151

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER #, 10 ORIGINAL

THE STATE OF GEORGIA,
Complainant,

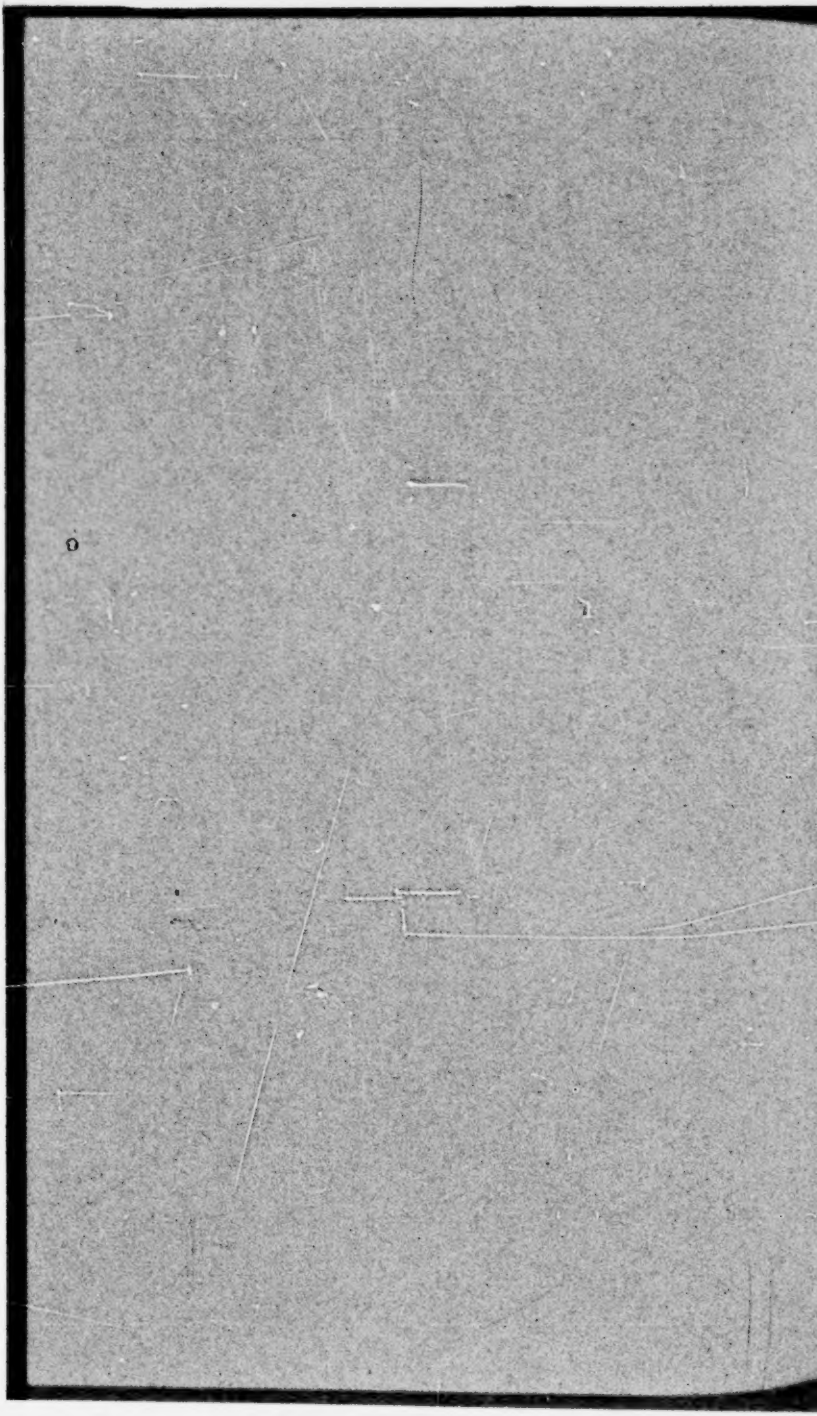
VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT

THE STATE OF GEORGIA,
BY:
ELLIS ARNALL,
Governor of Georgia,
T. GRADY HEAD,
Attorney General of Georgia,
MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia,
EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.

FOOTE & DAVIES, ATLANTA



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THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Comes now the State of Georgia, by Ellis Arnall, Governor of Georgia; T. Grady Head, Attorney General of Georgia; Marshall L. Allison, Claude Shaw, Assistant Attorneys General of Georgia; and Edgar Watkins, Deputy Assistant Attorney General of Georgia, and moves the Court for leave to file an original complaint against the Pennsylvania Railroad Company and others. Attached to this motion are a brief thereon and the original complaint.

Defendants have been notified of this motion by mailing to the president of each defendant carrier a full copy of this motion, the notice, the brief, and the complaint.

Respectfully submitted,

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,
MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia,
EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for the State of Georgia.

Supreme Court of the United States

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Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

NOTICE OF HEARING

Please take notice that on the second day of October, 1944, or as soon thereafter as counsel can be heard, the motion of complainant for leave to file its bill of complaint in the above entitled cause will be submitted to the Supreme Court of the United States.

THE STATE OF GEORGIA,

BY:

ELLIS ARNALL,
Governor of Georgia.

T. GRADY HEAD,
Attorney General of Georgia,
MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia,
EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for Complainant.

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER..... ORIGINAL

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

BRIEF ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

As cause for this motion, complainant respectfully shows:

(1) This cause involves a controversy between the State of Georgia and citizens of other states.

(2) The State of Georgia, as complainant, is the real party in interest.

(3) This cause is of a justiciable character, of a civil nature, is within the judicial power of the United States, is instituted to redress a wrong and save the State of Georgia from irreparable injury as a sovereign state in its property rights, and to protect the rights of its citizens from irreparable injury from certain continuing and threatened acts on the part of defendants, which are in conflict with the rights of the State of Georgia, and its citizens, under the Constitution of the United States.

(4) This is an action arising from extraordinary and exceptional circumstances in which the State of Georgia and its property rights, and rights of its citizens would be without adequate protection, and full relief cannot be obtained except by invoking the original jurisdiction of this Court in equity.

(5) Equity jurisdiction rests upon the claim that the defendants have by contracts, combinations and conspiracies in restraint of trade and commerce among the several states, monopolized part of such trade and commerce, and thus are prescribing and collecting unlawful charges for hauling commodities within what is known as Official and Southern territories, and between such territories, and have so fixed the charges on transportation to and from the State of Georgia as to prefer the ports of other states over the ports of Georgia, and have exacted from the State of Georgia as owner of state institutions, and from shippers who are under the sovereign protection of Georgia, charges for transporting commodities which are unreasonable, unjustly discriminatory, and preferential to localities, ports and shippers, to the damage, disadvantage and prejudice of the State of Georgia and shippers therein who ship commodities in commerce among the states; that such defendants threaten, and will continue unless enjoined by the Court, such practices and charges, and the complainant and its citizens will be irreparably damaged and injured in its property rights and in the exercise of its governmental and sovereign powers as a state. (See *Article 3, Section 2, Clauses 1 and 2, of the Constitution of the United States; Pennsylvania vs. Wheeling Bridge Company, 13 How. 518; Virginia vs. West Virginia, citing Cohen vs. Virginia, 206 U. S. 290, at page 318; Georgia vs. Evans, 316 U. S. 159.*)

WHEREFORE, complainant prays that this Honorable

Court may exercise its original jurisdiction in this controversy, as provided in Article III, Section 2, Clause 2, of the Constitution of the United States.

THE STATE OF GEORGIA,

BY:

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for the State of Georgia.

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER..... ORIGINAL

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

BILL OF COMPLAINT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The bill of complaint of the State of Georgia respectfully shows this Honorable Court that:

(1) The State of Georgia is one of the states of the United States of America and this action is brought on its behalf pursuant to the written order to the Attorney General of Georgia by the Governor of Georgia, who by statute is so authorized. This order, dated May 27, 1944, is as follows:

"WHEREAS: Equality of economic opportunity for all peoples, all sections and all states of the Union is a basic and fundamental principle of Americanism; and

"WHEREAS: Our nation is engaged in a titanic war against discriminations and injustices to small peoples and to small nations everywhere; and

"WHEREAS: The Supreme Court of the United States has stricken down and uprooted discriminations wherever they have been made to appear; and

"WHEREAS: Georgia and the South have been shackled to the nation as colonial dependencies subject to economic exploitation, domination and control; and

"WHEREAS: The prevailing discriminatory freight rate system impeding the development of the South should be ended and the trade barriers erected against the South should be abrogated; and

"WHEREAS: Georgia and the South should be readmitted to the Union on a basis of full fellowship and equality; and

"WHEREAS: Interstate Rail Carriers prescribing and collecting charges for hauling commodities within 'Official' and 'Southern' territories, and between such territories, have by contracts, combinations and conspiracies in restraint of trade and commerce among the several states, with the condonation of the Interstate Commerce Commission, illegally, unconstitutionally, and unjustly monopolized part of such trade and commerce, and have so fraudulently fixed the charges on transportation to and from the State of Georgia as to prefer the ports of other states over the ports of Georgia and have thus, by their discriminatory rates and illegal practices, unlawfully exacted from the State of Georgia as owner of State institutions, and from shippers in Georgia who are under the sovereign protection thereof, charges for transporting commodities which said charges are unreasonable, unjustly discriminatory, excessive and preferential to localities, ports and shippers, to the disadvantage and prejudice of the State of Georgia and shippers therein who ship commodities in commerce among the states; and

"WHEREAS: The State of Georgia owns the Western & Atlantic Railroad extending from Atlanta, Georgia, to Chattanooga, Tennessee, which said railroad has been irreparably damaged because of the illegal, unconstitutional and preferential rate system which has lessened and will continue to lessen the establishment of industry on said line, lessened the amount of freight handled and decreased the rental value of said railroad; and

"WHEREAS: The discriminatory and detrimental freight rate structure now imposed upon Georgia and the South is the creature of pernicious sectional politics; and

"WHEREAS: The Interstate Commerce Commission has been and is derelict in its duty, is a party to the illegal practices herein recited and does condone, aid and abet them; and

"WHEREAS: The Supreme Court of the United States stands as the highest citadel of justice in our nation in which the people and the states may have their rights determined and injustices against them stricken down:

IT IS THEREFORE ORDERED

That Hon. T. Grady Head, Attorney General of Georgia, be and he is hereby directed to file an original suit in the Supreme Court of the United States in the name of the sovereign State of Georgia against such rail carriers and citizens of other states as may be determined necessary and proper, together with such appropriate allegations as the Attorney General may deem sufficient to correct wrongs and injustices to the State of Georgia, and to the people thereof arising by virtue of the prevailing unconstitutional, discriminatory and illegal freight rate system."

(2) This is an action brought under the authority of Article 3, Section 2, Clauses 1 and 2 of the Constitution of the United States.

(3) Complainant further shows that it makes defendants The Pennsylvania Railroad Company, a resident of the State of Pennsylvania; The Baltimore and Ohio Railroad Company, a resident of the State of Maryland; Chicago and Eastern Illinois Railroad Company, a resident of the State of Indiana; Chicago, Indianapolis and Louisville Railway Company, L. F. De Ra aus and Holman D. Pettibone, Trustees, a resident of the State of Indiana; The Chesapeake and Ohio Railway Company, a resident of the States of Virginia and West Virginia; Erie Railroad Company, a resident of the State of New York; The New York Central Railroad Company, a resident of the States of New York, Ohio, Illinois, Indiana, Pennsylvania, and Michigan; The New York, Chicago and St. Louis Railroad Company, a resident of the States of New York, Ohio, Illinois, Pennsylvania and Indiana; Norfolk and Western Railway Company, a resident of the State of Virginia; Richmond, Fredericksburg and Potomac Railroad Company, a resident of the State of Virginia; Wabash Railroad Company, a resident of the State of Ohio; and Western Maryland Railway Company, a resident of the States of Maryland and Pennsylvania. The greater part of the transportation service of the above named defendants is within Official classification territory. For convenience, these are hereinafter called "northern defendants." Complainant further makes defendants Atlantic Coast Line Railroad Company, a resident of the State of Virginia; Carolina, Clinchfield and Ohio Railway, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, lessees, a resident of the State of Virginia; Illinois Central Railroad Company, a resident of the State of Illinois; Gulf, Mobile and Ohio Railroad Company, a resident of the States of Alabama, Mississippi and Tennessee; Louisville and Nashville Railroad Company, a resident of the State

of Kentucky; the Nashville, Chattanooga and St. Louis Railway, a resident of the State of Tennessee; Seaboard Air Line Railway Company, L. R. Powell, Jr., and Henry W. Anderson, Receivers, a resident of the State of Virginia; and Southern Railway Company, a resident of the State of Virginia. These last named defendants operate principally in Southern territory, although the Illinois Central Railroad Company, the Louisville and Nashville Railroad Company, and the Southern Railway Company, have lines extending into Official territory. These are hereinafter called "southern defendants."

(4) "Official territory" as used herein, originally and broadly meant that part of the United States north of the Ohio and Potomac Rivers, and east of the Mississippi River, and the west boundary of the State of Illinois, and for convenience is hereinafter called "North." Defendants have enlarged this territory by including therein points on the Ohio River, from Cairo, Illinois, to Kenova, West Virginia, thence easterly via the main line of the Norfolk & Western Railway Company through Bluefield, West Virginia and Walton, Virginia, to Roanoke, Virginia; thence via the main line of the Virginian Railway to Norfolk, Virginia. "Southern territory," hereinafter called "South," is that part of the United States east of the Mississippi River and south of Official territory.

(5) All of the defendants have, using therefor some sixty rate bureaus, committees, and other rate making agencies (See Exhibit 1 attached hereto and made a part hereof, and reference thereto prayed), by contracts, combinations, agreements and conspiracies in restraint of trade and commerce among the several states, monopolized part of such trade and commerce, and have so fixed the charges on transportation to and from the State of Georgia as to prefer the ports of other states over the ports of Georgia, and have thus, and by their rates and practices, exacted from the State of Georgia as owner of State institutions,

and from shippers in Georgia who are under the sovereign protection of said State, charges for transporting, as common carriers, commodities, which charges are unreasonable, unjustly discriminatory, and preferential to localities, ports and shippers outside of Georgia, to the disadvantage and prejudice of the State of Georgia, its ports, and shippers therein who ship commodities in commerce among the states.

(6) All defendants, conspiring, combining, confederating and agreeing jointly, using therefor the agencies named in Exhibit 1, here again referred to and made part hereof, adopt rates and charges for transportation of commodities among the states that are accepted as binding on each rail carrier engaged in such commerce. Any proposal to change the charges for transportation in such commerce must be considered and acted on by some of such agencies, with power in the highest thereof finally to decide what such charges may be. While a single line has the nominal right, which some of the southern defendants have, as herein later shown, exercised in some cases, to make rates themselves, no line can change joint through rates without the approval of the agencies created by defendants to direct what these rates shall be. The effect of this conspiracy is unjustly and oppressively to increase and augment the said rates and prices, and to counteract the effect of free competition on the facilities and prices of transportation, and to establish and maintain arbitrary rates, and to prevent any one of said defendants from reducing such arbitrary rates, and thereby exact and procure great sums of money from the State of Georgia and the people of Georgia in commerce among the states.

Defendants by such conspiracy have put into effect and kept in force upon the several lines of railroad the rules and regulations and rates and prices for moving, carrying, and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroads rates and prices for

the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road, and the people of Georgia and the State of Georgia have been compelled to and are still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association, and have, for more than ten years, and still are deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and are deprived of cheaper rates that might be reasonably expected to flow from free competition among the defendants and that the trade, traffic, and commerce in such region of country, and the freight traffic in connection therewith, have been and are monopolized and restrained, hindered, injured and retarded by the defendants by means and through the instrumentality of such conspiracy, and the agencies named in said Exhibit 1.

(7) The southern defendants, with lines wholly, or principally in the South, generally are dominated and coerced by the northern defendants, and therefore, even when the southern defendants desire, they cannot publish joint-through rates between Georgia and the North when the northern carriers refuse to join in such rates. The southern carrier defendants, to the extent that they serve directly or over a dominated line, as to rates on some commodities, make joint-through rates between points in Georgia, and that part of the territory in the North to which they have the power, and to the limited territory controlled by them, have, as to some commodities, made their rates and charges the same for like mileages as the northern defendants make rates in the North. As to other rates, even when the southern carriers could act independently, they refuse so to do, and join their co-conspirators in the illegal combination heretofore described.

(8) Illustrative of instances where southern defendants have established rates from points in the State of Georgia to destinations in Illinois Freight Association Territory, by virtue of their control of delivering carriers in that territory, which are lower relatively, than rates on the same commodities to destinations in Official territory served by strictly Official territory lines, are rates on Textiles, Carload; Drugs and Medicines, Carload; Chemicals, Carload; Wine, Carload; Harness and Saddlery, Carload; and Scrap Paper, Carload.

(9) All the defendants, by reason of the joint actions and agreements aforesaid, have the power to, and do, prescribe, on some commodities, rates and charges for transportation in commerce among the states, between points in the North and points in Georgia, which, as to the Georgia shipments, are, on commodities rated first class, approximately 39 per cent higher than charges for like distances on the same commodities between points in the North. As to some commodities, defendants have jointly conceded rates free from discrimination, or less unjustly discriminatory, than those on the first class, and on some commodities not competitive with commodities owned by shippers in the North, lower rates per mile. On some special commodities the Interstate Commerce Commission has prescribed rates on a parity. There remains, on many classes and commodities, rates much lower for like distances, between points in the North than is exacted on shipments between such points and points, ports and localities in the State of Georgia.

(10) The defendants, by virtue of their illegal combination, make rates on the principle that charges for transportation should be determined by considering only the factor of what the traffic will bear.

(11) There is located in the State of Georgia the ports of Savannah and Brunswick, which are of such size and character as to permit boats to enter and transport com-

modities in interstate and foreign commerce thereto and therefrom. Defendants, by their rates and practices, give preference and advantage in rates on domestic traffic to and from the North Atlantic ports of Baltimore, Philadelphia, New York, Boston, and other related ports over the ports of Savannah and Brunswick, to the injury and prejudice of the sovereign State of Georgia and to the citizens therein. Illustrative of this, on shipments from Alton, Illinois, in Official territory, to Baltimore, Maryland, the first class rate is $1.68 per 100 pounds, while to Savannah, six miles less in distance, the rate is $2.39.

(12) The State of Georgia has built, and owns and operates state hospitals, experimental farms, penal and educational institutions, and constructs roads and bridges, and for these it buys and sells commodities shipped from or to Georgia, to or from the North. As to those state-owned institutions and operations, the State of Georgia pays and bears the extortionate and illegal freight charges, to the State's irreparable damage. Such damage is both direct and consequential and no remedy at law is adequate to protect the State against the total of such damages. Among such commodities are: Asphalt, Cement, Hardware, Machinery, Road and Heavy Duty Machinery, Motor Oils and Greases, Tires, Truck Parts, Drugs, Textiles, Dry Goods, and Groceries.

(13) The State of Georgia owns the Western and Atlantic Railroad, with a line extending between Atlanta, Georgia, and Chattanooga, Tennessee. This road is now under lease which terminates December 27, 1969, to the Nashville, Chattanooga and St. Louis Railroad. The rate system, complaint against which is here made, has lessened, and will continue to lessen, the establishment of industries on said line, lessened the amount of freight handled, and decreased the rental and the sales value of said railroad, to the irreparable injury and damage of complainant.

(14) Illustrations of the unlawfulness of the practices and rates of defendants appear from an exhibit attached hereto and made part hereof, in the form of a table, marked Exhibit 2. This Exhibit shows rates between Georgia points and points in the North and in Official territory, for substantially the same distances, and is illustrative of the general situation, and reference thereto is prayed.

(15) The cost of transportation in the South is probably less, and certainly no more, than in the North, a fact recognized by some of the defendants and adjudged by the Interstate Commerce Commission in fixing or prescribing rates on the same commodities on a parity in both territories. Defendants have voluntarily, and also under orders from the Interstate Commerce Commission, extended to points in the South in the States of Kentucky, Tennessee, Virginia and North Carolina, the rates and practices used in the North. Some illustrations of this are shown in Exhibit 3 attached hereto and made a part hereof, and reference thereto is prayed.

(16) The unlawful rates and practices hereinbefore described in Exhibit 2, result in extortionate charges which have been exacted of the State of Georgia on its shipments during the ten years next preceding the filing of this complaint, thus charging the State of Georgia a large sum, to-wit, the sum of $250,000.00 to three times which, or $750,000.00, the State is entitled under the anti-trust laws, to judgment against the defendants.

(17) A much larger sum, to-wit, not less than $2,000,000.00, annually, has been exacted of shippers in Georgia, for the use of whom complainant asks damages in treble thereof.

(18) All such actions, doings, and pretenses of the said confederates, defendants herein, are contrary to equity and good conscience, and tend to the manifest injury and oppression of complainant, both as a shipper and as a sovereign State. In consideration whereof, and forasmuch as

complainant is remediless in the premises according to strict rules of the Common Law, and can only have adequate relief in this Court as a Court of Equity, where matters of this nature are properly cognizable and relievable, complainant respectfully prays:

(1) That defendants, their agents and employees, be enjoined from demanding or collecting rates or charges for shipments to or from Georgia, higher than are, for like distances, on the same commodities, contemporaneously maintained and applied between points in Official territory.

(2) That it be decreed that rates and charges between points in Georgia and her ports and the North are, and for the future will be, unjust, unreasonable and prejudicial to complainant and shippers and ports therein, and unduly preferential of points and ports in the North and of shippers and traffic therefrom and thereto, to the extent that the rates from and to points and ports in the State of Georgia and points and ports in the North exceed, or may exceed for like distances, those contemporaneously maintained and applied to and from points and ports in the North.

(3) That complainant have judgment for its damages and also one for the use of shippers shipping commodities to and from Georgia under the unlawful rates exacted of them, and to that end an accounting be had under the direction of this Court, of the amounts of such damages.

(4) That a permanent injunction be issued against the defendants and each of them, and any and all of their agents, rate bureaus, assistants and employees, restraining and forbidding the defendants and each of them, and any and all of their said agents, bureaus, assistants and employees, from conspiring and confederating in the establishment of rates and charges exacted of the State of Georgia and of the citizens thereof.

(5) The complainant further prays that such other and further relief be granted as equity and justice require and which to the Court shall be deemed proper.

THE STATE OF GEORGIA,

BY:

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for Complainant.

VERIFICATION

UNITED STATES OF AMERICA
STATE OF GEORGIA } ss.
COUNTY OF FULTON

T. GRADY HEAD, being first duly sworn, according to law, deposes and says that he is Attorney General for the State of Georgia; that he has read the foregoing bill of complaint; that the facts contained in said bill of complaint, which are within his own knowledge, are true and correct and that the facts averred upon information received from others are based upon information received from reliable sources and which facts he believes are true, and that as such Attorney General of the State of Georgia, he is duly authorized to pray leave to file, and file, the said bill of complaint.

T. GRADY HEAD
Attorney General
of the State of Georgia.

Subscribed and sworn to before me by T. Grady Head, this 12th day of June, 1944.

MAUD SAUNDERS
Notary Public, Georgia,
State at Large.

My commission expires the 31st day of October, 1945.

FOLD-OUT IS TOO LARGE TO BE FILMED

PRESENT RATES IN CENTS PER 100 POUNDS

WINE, CARLOAD,
Minimum Weight 40,000 Lbs.

	FROM Atlanta, Ga.		FROM New York, N. Y.	
	Miles	Rates	Miles	Rates
To: Grand Rapids, Michigan	772	86	772	68

LEAD PIPE, CARLOAD

To: Grand Rapids, Michigan	772	86	776	54

WORK CLOTHING, CARLOAD,

	FROM Macon, Ga.		FROM Philadelphia, Pa.	
	Miles	Rates	Miles	Rates
To: Chicago, Illinois	817	156	814	112

WORK CLOTHING, LESS CARLOAD,

	FROM Chicago, Ill.		FROM Atlanta, Ga.		FROM Macon, Ga.	
	Miles	Rates	Miles	Rates	Miles	Rates
To: Hopkinsville, Kentucky	369	84	362	106	...	...
To: Jackson, Tennessee	478	104	...	...	464	118

SHOES, CARLOAD,

	FROM Atlanta, Ga.		FROM Endicott, N. Y.		FROM Boston, Mass.	
	Miles	Rates	Miles	Rates	Miles	Rates
To: Chicago, Illinois	728	116	696	99	977	117

CANNED VEGETABLES, CARLOAD,

	FROM Griffin, Ga.		FROM Baltimore, Md.	
	Miles	Rates	Miles	Rates
To: Chicago, Illinois	772	62	767	47

	FROM Milledgeville, Ga.		FROM Baltimore, Md.	
	Miles	Rates	Miles	Rates
To: Winston-Salem, N. C.	359	49	360	42

DRUGS, CARLOAD,

	FROM Atlanta, Ga.		FROM Philadelphia, Pa.	
	Miles	Rates	Miles	Rates
To: Lima, Ohio	601	87	618	54

PRESENT RATES IN CENTS PER 100 POUNDS

COMPARISON OF FIRST CLASS RATES FROM A SOUTHERN AND AN OFFICIAL TERRITORY ORIGIN TO A DESTINATION IN THE LATTER TERRITORY EQUI-DISTANT FROM THE TWO ORIGINS, AND THE DIFFERENCES IN SUCH FIRST CLASS RATES

FROM	TO	MILES	FIRST CLASS RATES
Atlanta, Georgia	Chicago, Illinois	731	210
Newark, New Jersey	Fort Wayne, Indiana	727	152
	Difference		58
Atlanta, Georgia	Chicago, Illinois	731	210
Danville, Illinois	Washington, D. C.	733	151
	Difference		59
Atlanta, Georgia	Chicago, Illinois	731	210
New York, N. Y.	Fort Wayne, Indiana	734	152
	Difference		58
Atlanta, Georgia	Youngstown, Ohio	769	213
Manchester, Mass.	Columbus, Ohio	769	152
	Difference		61
Macon, Georgia	Chicago, Illinois	819	223
Trenton, New Jersey	Danville, Illinois	819	163
	Difference		60
Atlanta, Georgia	Madison, Wisconsin	854	227
Milwaukee, Wisconsin	Jersey City, New Jersey	844	167
	Difference		60
Augusta, Georgia	Rockford, Illinois	961	243
Watertown, Wisconsin	Petersburg, Virginia	964	173
	Difference		70

COMMODITIES ON WHICH DEFENDANT SOUTHERN CARRIERS HAVE VOLUNTARILY OR UNDER ORDER OF THE INTERSTATE COMMERCE COMMISSION, EXTENDED TO DESTINATIONS IN THE BORDER SOUTHERN STATES OF KENTUCKY, TENNESSEE, VIRGINIA AND NORTH CAROLINA, RATES AND PRACTICES USED IN THE NORTH.

Commodities on which Southern rail defendants have established rates from points in the State of Georgia to the Ohio River cities and Virginia cities (border points between Official and Southern territories) to be the same, mile for mile, as the rates applied to these border points from origins in the North:

Manufactured Iron and Steel, CL and LCL.

Lead Articles, viz: Pipe, Sheet Lead, etc., CL.

Wine, CL.

Paper and Paper Article, viz:

KD Boxes, CL.

Bags, CL.

Wrappings, CL.

Tablets, School Blank Forms, LCL.

EXHIBIT 3

FILE COPY

Office - Supreme Court, U.S.
FILED
DEC 7 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 10 Orig.

THE STATE OF GEORGIA, *Complainant,*

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

RETURN TO RULE TO SHOW CAUSE BY SEVEN OF THE EIGHT "SOUTHERN DEFENDANTS."

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

RETURN TO RULE TO SHOW CAUSE.

Come now Atlantic Coast Line Railroad Company; Carolina, Clinchfield and Ohio Railway, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees; Louisville and Nashville Railroad Company; Illinois Central Railroad Company; Gulf, Mobile and Ohio Railroad Company; The Nashville, Chattanooga and St. Louis Railway; and Southern Railway Company (seven of the eight so-called "southern defendants" described in the amended bill) and make this, the

separate return of each of them, to the rule to show cause why leave to file the amended bill of complaint should not be granted, which rule issued pursuant to this Court's order of November 6, 1944.

QUESTIONS PRESENTED.

1. Whether the amended bill of complaint presents a case or controversy within the original jurisdiction of this Court under Article III, Section 2, clauses 1 and 2, of the Constitution.

2. Whether the amended bill of complaint presents a justiciable case or controversy within the jurisdiction of any court or subject to the judicial power.

CONSTITUTIONAL PROVISIONS.

Article III, Section 2, clauses 1 and 2, of the Constitution are as follows:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

STATUTES INVOLVED.

Judicial Code, section 233, 28 U. S. C. 341, provides:

> *Original jurisdiction.* The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

The pertinent provisions of Sections 1, 4, and 8 of the Act of July 2, 1890, 26 Stat. 209, 210, as amended, 15 U. S. C., secs. 1, 4, and 7, commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *.
>
> Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *.
>
> Sec. 7. The word "person", or "persons", wherever used in sections 1-7 and 15 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

The pertinent provisions of Sections 4 and 16 of the Act of October 15, 1914, 38 Stat. 730, 731, 737, 15 U. S. C., secs.

15 and 26, commonly known as the Clayton Act, are as follows:

> Sec. 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> Sec. 26. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

The Interstate Commerce Act, the Act of February 4, 1887, 24 Stat. 379, as amended many times (Part I applicable to interstate carriers by railroad), 49 U. S. C., secs. 1 to 27, is involved. It completely covers rate-making by these carriers and gives the Interstate Commerce Commission complete and primary jurisdiction and control over all questions as to the legality or illegality of the rates referred to in the amended bill, both as to the past and as

to the future. It furnishes the remedy for all matters sought to be complained of in the amended bill, to the exclusion of remedy by injunction and damages under the antitrust laws.

The Interstate Commerce Act is too voluminous to admit of quotation here of all its pertinent provisions. Copies of the official pamphlet of the Act, supplementary Acts and related Sections of other Acts, as compiled by the Interstate Commerce Commission and revised to August 7, 1942, will be furnished the Court for its convenient reference. Particularly applicable provisions of the Act are referred to and quoted from hereinafter.

Specially pertinent is the history of the progressive development and expansion of the regulation of common carriers by railroad by the various amendments to the Interstate Commerce Act, the most important of which were: the Act of June 29, 1906, 34 Stat. 584, known as the Hepburn Act, giving the Commission the power to fix maximum rates; the Act of June 18, 1910, 36 Stat. 539, known as the Mann-Elkins Act, which first gave the Commission power to suspend rates; Transportation Act of 1920, the Act of February 28, 1920, 41 Stat. 456, which first gave the Commission power to fix minimum rates and which enacted a "new national transportation policy"; and Transportation Act of 1940, the Act of September 18, 1940, 54 Stat. 952, which expanded and specifically defined that policy.

A pertinent provision of the Act of June 11, 1942, entitled an Act "To mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes" (56 Stat. 351, 357), is quoted hereinafter at page 41.

SUMMARY OF ARGUMENT.

I.

There is no original jurisdiction to entertain the amended bill of complaint, because two of the named defendants are citizens of the plaintiff State and hence original jurisdiction, under Article III, Section 2, of the Constitution, is ousted. *Louisiana* v. *Cummins, et al.*, 314 U. S. 577, and cases cited.

II.

The original bill of complaint lodged in June obviously presented no justiciable case or controversy within the original jurisdiction of this Court, for the following reasons:

1. It was a direct attack on the interterritorial class freight rate structure embodied in tariffs on file with and approved by, or subject to suspension or approval by, the Interstate Commerce Commission under the Interstate Commerce Act, and expressly prayed injunction fixing a new structure of rates for the future and reparation or rate damage for the past, without prior resort to the Commission.

2. It sought to have this Court perform legislative and administrative functions committed to the Interstate Commerce Commission by the Interstate Commerce Act, and, hence, it presented no justiciable controversy.

3. To allow Georgia, without resort in the first instance to the regulatory Commission, to sue for an injunction under the antitrust laws and, in the guise of enjoining violations of those laws, to secure decrees fixing rates, would break down beyond repair the unity of the system of regulation built up by interstate commerce legislation beginning in 1906 and the interpretation thereof by this Court beginning with its decision in 1907 in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. See *Terminal Ware-*

house Co. v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 513.

4. In so far as it sought damages for alleged illegal rates exacted in the past, prior resort to the Commission was essential before a justiciable question could be raised, because the inquiry in such case is essentially one of fact and of discretion in technical matters and because uniformity of regulation can be secured only if its determination is left to the Commission composed of administrative experts. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291.

5. The Interstate Commerce Act, not the Anti-Trust Act, provides the remedy for alleged unreasonable, discriminatory, and illegal rail freight rates and for rate damage resulting therefrom, and that remedy is primary and exclusive. A charge of violation of the Anti-trust Act does not confer jurisdiction on the Court in such case. *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500. The Sherman Act, in the case of common carriers by railroad, is qualified by the Interstate Commerce Act. *Tigner* v. *Texas*, 310 U. S. 141, 148, and cases cited; *McLean Trucking Co.* v. *United States*, 321 U. S. (adv.) 67, 83.

6. Section 16 of the Clayton Act, which first authorized suits for injunction against violations of the Sherman Act by plaintiffs other than the United States, expressly denies the right of any person other than the United States to sue for such injunctive relief against any common carrier subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission." Georgia's original bill was in the teeth of this provision of the Clayton Act. *Central Transfer Co.* v. *Terminal Railroad*,

288 U. S. 469, 474-476; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 513.

7. Georgia had no standing in an original suit in this Court to vindicate the rights of its individual citizens as shippers. *Jones, Governor, ex rel. Louisiana* v. *Bowles, Price Administrator*, 321 U. S. (adv.), Number 2, III, May 1, 1944, 88 L. ed. (adv.) 896; *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277; *Oklahoma* v. *Cook*, 304 U. S. 387.

III.

The amended bill, as to which the rule to show cause issued, has the same object and purpose and undertakes to assert the same causes of action as the original bill. Only the color is sought to be changed by elaboration of verbiage and modification of prayers. It presents no justiciable case or controversy within the original jurisdiction of this Court, and it must fail for all of the same reasons which applied to the original bill.

IV.

Upon the allegations of the amended bill it is only by the payment of alleged illegal freight rates that Georgia or its citizens could have been damaged. If the rates be not unlawful, there is no *damnum* and no *injuria*, even if the rates did result from an illegal conspiracy denounced by the Sherman Act. Whether the rates were and are lawful or unlawful is a question within the exclusive, primary jurisdiction of the Interstate Commerce Commission. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500; *Merchants' Warehouse Co.* v. *United States*, 283 U. S. 501.

V.

Since 1898 a wholly new public policy has substituted public, administrative regulation of rail carriers in the

support of a national transportation system for the old Sherman Act rule of unrestricted competition between individual carriers. The Commission has primary jurisdiction of the matters here involved, not the courts.

VI.

The wisdom of the law in denying court jurisdiction of such a suit as this is strikingly illustrated by a consideration of the impossible results which would attend any attempt by this Court to grant the relief prayed in the amended bill. Under express mandate of the Transportation Act of 1940, the Commission now has under general investigation, in a proceeding to which Georgia is a party, the lawfuiness of the very interterritorial rates sought to be attacked here by the amended bill. A decree here by this Court would not bind the United States or the Commission. It would not bind or benefit any other southern state save Georgia or the citizens of and shippers in any other states than Georgia. It would bind no railroad except the twenty here named defendants. Such a decree would instantly produce impossible discriminations and prejudice as between shippers in the other southern states, who would have to continue to pay tariff rates, and shippers in Georgia over these twenty railroads, who would pay a different set of rates fixed pursuant to this Court's decree. Like discrimination and prejudice would be set up as between shippers in Georgia, depending on whether they would ship over these twenty railroads or over the several railroads domiciled in Georgia, which are not here named defendants, and which would not be bound by a decree here. The amended bill seeks to submit to this Court, in advance of decision by the Commission, administrative questions now pending before the Commission but still undecided, and thus violates the public policy of the provisions of the Judicial Code requiring that all suits to review orders of the Commission must be brought in the district courts against the United States as party defendant and giving

this Court direct appellate jurisdiction to review decisions of the district courts in such suits. Such a suit has never been entertained by this Court in its original jurisdiction. Twice this Court has refused original jurisdiction to review orders of the Commission. *North Dakota* v. *C. & N. W. Ry. Co.*, 257 U. S. 485, 490; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 164. A litigant before the Commission, asserting a remedy under the Interstate Commerce Act, cannot *pari passu* pursue another remedy, in the courts under the Sherman Act, for the same grievance. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 50 Fed. (2d) 83, 90, affirmed, 284 U. S. 474.

VII.

The allegations regarding the State-owned Western and Atlantic add no support to the amended bill.

Conclusion.

Leave to file the amended bill should be denied and the rule to show cause should be dismissed because its allegations are not sufficient to call for a decree in favor of the plaintiff State, *Alabama* v. *Arizona*, 291 U. S. 286, 291-292, and because, if filed, it could only be dismissed as presenting no justiciable controversy within the original jurisdiction of this Court, *Arizona* v. *California*, 298 U. S. 558, 572; *Massachusetts* v. *Mellon*, 262 U. S. 447; *Florida* v. *Mellon*, 273 U. S. 12, 17.

ARGUMENT.

I.

There Is No Original Jurisdiction to Entertain the Amended Bill, Because Two of the Named Parties Defendant are Citizens of the Plaintiff State.

The amended bill incorrectly alleges (Paragraph 7, p. 14) that Seaboard Air Line Railway Company, L. R. Powell, Jr., and Henry W. Anderson, Receivers, is a resident (presumably meaning "citizen," since Article III, Section 2, of the Constitution does not use the word "resident") of the State of Virginia.

Seaboard Air Line Railway Company is a consolidated corporation, created and existing under and by virtue of the laws respectively of the States of Virginia, North Carolina, South Carolina, Georgia and Florida. Accordingly, as between it and the State of Georgia, Seaboard Air Line Railway Company is for jurisdictional purposes a citizen of the State of Georgia. See separate return of Seaboard Air Line Railway Company.

The original jurisdiction of this Court does not extend to a suit by a State against one of its own citizens, and the naming as defendant of a citizen of the plaintiff State ousts this Court's original jurisdiction. *Cohens* v. *Virginia*, 6 Wheat. 264, 398; *United States* v. *Texas*, 143 U. S. 621, 643; *California* v. *Southern Pacific Co.*, 157 U. S. 229, 262; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 246-247; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Louisiana* v. *Cummins, et al.*, 314 U. S. 577. Judicial Code, section 233.

In *Louisiana* v. *Cummins, et al., supra*, this Court said:

> "Leave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 256-262; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 238; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 163. The rule to show cause is discharged."

Furthermore, as is shown hereinafter in Point VII of this return, another named defendant is, for all purposes of this suit, a citizen of the State of Georgia. The Nashville, Chattanooga and St. Louis Railway, in its capacity as lessee of the State-owned Western and Atlantic Railroad, is held by the courts of Georgia, under the statute of Georgia authorizing the lease to it, to be a Georgia corporation and hence a citizen of Georgia.

It results that two of the named defendants are citizens of Georgia and hence original jurisdiction is ousted under the above-cited authorities.

II.

The Original Bill of Complaint Lodged in June Obviously Presented No Justiciable Case or Controversy Within the Original Jurisdiction of this Court.

The original bill of complaint lodged by Georgia in June, and upon which no action had been taken by this Court prior to the lodging of its motion for leave to file its amended bill of complaint, mailed to the Clerk on September 18, 1944, was very obviously on its face an effort to by-pass the Interstate Commerce Commission and its jurisdiction over rate-making under the Interstate Commerce Act, to avoid the statutory provisions for review of orders of the Interstate Commerce Commission, and to ask this Court, under the guise of an exercise of its original jurisdiction over "cases in which a State shall be a party," to sit as an administrative tribunal to perform the purely legislative and administrative function of fixing rates for carriers by railroad and to pass upon the legality of a freight rate structure in a case brought without prior resort to the Commission.

While that bill purported to be a bill under the Anti-Trust Act to enjoin violations of that Act, the real object and indeed the sole purpose of that bill (Paragraphs 1, 2 and 3 of Prayer), was to obtain a reduction in the freight

rates between Georgia and points in the North and damages in favor of Georgia (Paragraph 16) and for the use of individual shippers in Georgia (Paragraph 17) for the exaction of alleged unlawful rates collected in the past. This Court was asked to enter decree enjoining and fixing rates (Prayers 1 and 2) and awarding rate damages (Prayer 3).

The allegations of that bill (Paragraphs 5, 6, 7) that the defendants, their agents and rate bureaus had, by contracts and conspiracies in restraint of trade, fixed and maintained arbitrary and unreasonable rates to and from Georgia and the prayer (Prayer 4) that the defendants be generally enjoined from such alleged conspiracy were inserted in that bill merely to give color to the alleged rights of Georgia to bring suit within the original jurisdiction of this Court. The charges of conspiracy and violation of the Anti-Trust Act were so interrelated with charges of illegal rates and with the essential purpose of the bill to secure rate reductions as not to be susceptible of consideration separate therefrom.

That the allegations and prayers of that bill as to violations of the Anti-Trust Act were purely colorable in aid of jurisdiction and that the real purpose of the bill was to have this Court reduce rates between points in Georgia and the North and remove an alleged discrimination against Georgia in the existing rate structure—a legislative function—was further clearly shown by Paragraph 1 of said bill, wherein was quoted a written order to the Attorney General of Georgia by the Governor of Georgia, dated May 27, 1944, directing him to bring "an original suit in the Supreme Court of the United States in the name of the sovereign State of Georgia * * * to correct wrongs and injustices to the State of Georgia, and to the people thereof arising by virtue of the prevailing unconstitutional, discriminatory and illegal freight rate system."

In that order, the Governor of Georgia, in "whereas" clauses, made the following recitals, *inter alia*:

"Georgia and the South have been shackled to the nation as colonial dependencies subject to economic exploitation, domination and control; and

"The prevailing discriminatory freight rate system impeding the development of the South should be ended and the trade barriers erected against the South should be abrogated; and

"Georgia and the South should be readmitted to the Union on a basis of full fellowship and equality; and

* * * * * * * * *

"The discriminatory and detrimental freight rate structure now imposed upon Georgia and the South is the creature of pernicious sectional politics; and

"The Interstate Commerce Commission has been and is derelict in its duty, is a party to the illegal practices herein recited and does condone, aid and abet them; and * * *"

Obviously, whether Georgia and the South have been shackled to the nation as colonial dependencies or should be readmitted to the Union on a basis of full equality are political questions, not judicial questions for this Court. Whether the prevailing freight rate structure is discriminatory and should be ended as a trade barrier is the typical legislative question committed to the administrative jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Act, not a justiciable question for this Court in such an original suit.

Whether the Interstate Commerce Commission has been derelict in its duty and has been a party to and condoned, aided and abetted illegal practices of carriers might be a political question to present to Congress or a question to submit to the Senate as a Court of Impeachment. It is certainly not a justiciable question for this Court in an original suit.

Obviously, the original bill filed in June could not be maintained, and, in accord with its settled practice, the Court should not have allowed it to be filed because clearly

its allegations were not sufficient to call for a decree in favor of the plaintiff State, *Alabama* v. *Arizona*, 291 U. S. 286, 291-292; and because, if filed, it could only have been dismissed, *Arizona v. California*, 298 U. S. 558, 572. This is true for the following reasons:

1. The mere fact that a State is a plaintiff is not enough to maintain an original suit. Georgia presented no right susceptible of judicial enforcement, no justiciable controversy. *Massachusetts* v. *Mellon*, 262 U. S. 447; *Florida* v. *Mellon*, 273 U. S. 12, 17.

2. If Georgia, without resort in the first instance to the regulatory Commission, can sue for an injunction under the Anti-Trust Act and, in the guise of enjoining violations of that Act, secure decrees fixing rates, the unity of the system of regulation built up by the legislation and the interpretation thereof by this Court since its decision in 1907 in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, breaks down beyond repair. *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 513.

3. The function of rate-making for the future is purely legislative in character, whether it is exercised directly by the legislature or by some administrative body to which the power of fixing rates in detail has been delegated. *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, 226; *Honolulu R. T. Co.* v. *Hawaii*, 211 U. S. 282, 290; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8; *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 305; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; *Chicago Junction Case*, 264 U. S. 258, 263; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 317.

4. Although it is a judicial function to determine whether a shipper has in the past been wronged by the exaction

of an unreasonable or discriminatory rate, while to determine what rates shall be deemed reasonable for the future is a legislative and administrative function, yet preliminary resort to the Commission is required alike in both cases, because the inquiry is essentially one of fact and of discretion in technical matters and because uniformity can be secured only if its determination is left to the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. Georgia's original bill would not lie because there was no preliminary resort to the Commission and the questions raised could not be brought originally and initially to the Court.

5. The Interstate Commerce Act, not the Anti-Trust Act, provides the remedy for alleged unreasonable and discriminatory rates and for rate damages. That remedy is primary and exclusive. A charge of violation of the Anti-Trust Act does not confer jurisdiction on the Court in such a case. *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500. The Sherman Act, in the case of common carriers by railroad, is qualified by the Interstate Commerce Act, and, in the case of shipping combinations, by the Merchant Marine Act. *Tigner* v. *Texas*, 310 U. S. 141, 148, and cases cited.

6. Under the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, 26 Stat. 209), the Government alone was authorized to maintain a suit to restrain violations of its provisions. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 70; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. Persons other than the United States were first and only authorized to bring suit for that purpose by Section 16 of the Clayton Act (Act of October 15, 1914, c. 323, sec. 16, 38 Stat. 737; 15 U. S. C., sec. 26). But that same section of the Clayton Act expressly denies the right of any person other than the United States to bring suit in equity

for injunctive relief against any common carrier subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." Georgia's original bill was in the teeth of this provision of the Clayton Act. *Central Transfer Co.* v. *Terminal Railroad*, 288 U. S. 469, 474-476; *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 513.

7. In so far as Georgia sought to sue to vindicate its own rights as a shipper, its original bill would not lie for the above six reasons. But in so far as it sought to sue as *parens patriae* to vindicate the rights of its individual citizens as shippers, the bill would not lie for all of the above reasons and for the further reason that Georgia clearly had no standing to bring an original suit in this Court to vindicate the grievances of such particular individuals. *Jones, Governor, ex rel. Louisiana* v. *Bowles, Price Administrator*, 321 U. S. (adv.), Number 2, III, May 1, 1944, 88 L. ed. (adv.) 896; *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277; *Oklahoma* v. *Cook*, 304 U. S. 387.

III.

The Amended Bill Has the Same Object and Purpose as the Original Bill. Only the Color is Sought to be Changed by Elaboration of Verbiage and by Modification of the Prayers. It Must Fail for All of the Same Reasons Which Applied to the Original Bill.

It is clear that the object and purpose of the amended bill are exactly the same as those of the original. The grievances of the State of Georgia and of its shipper citizens whom it seeks to represent are the same. The asserted rights which it seeks to vindicate are the same. The gist and essence of the supposed causes of action asserted by the amended bill are identical with those of the original bill.

The amended bill is a more finished literary product than the original bill. It evidences expertness in the art of

camouflage. But camouflage, however artistic, cannot confer jurisdiction on this Court.

The amended bill omits the quotation of the written order of the Governor of Georgia to his Attorney General directing him to bring this suit, evidently because the draftsman of the amended bill realized that that order, on its face, too clearly silhouetted the purpose and object of the suit, "to correct wrongs and injustices to the State of Georgia, and to the people thereof arising by virtue of the prevailing unconstitutional, discriminatory and illegal freight rate system," to by-pass the Interstate Commerce Commission, and to have this Court sit as an administrative tribunal to perform the legislative and administrative function of rate-fixing.

However, paragraph 2 of the amended bill discloses that it also is presented pursuant to that written order to the Attorney General by the Governor of Georgia.

The amended bill contains a more thoughtful elaboration of legal theories than did the original bill, but these in no wise change the nature of the causes of action sought to be stated.

In the bill originally lodged, Georgia sought to sue in two capacities:

(1) in its proprietary capacity as owner of state hospitals, experimental farms, penal and educational institutions, roads and bridges, in connection with which it alleged it paid and bore extortionate and illegal freight charges, as the result of the alleged discriminatory freight rate system which that bill attacked, to its irreparable damage (Paragraphs 12 and 16), and as owner of Western and Atlantic Railroad, leased to defendant, The Nashville, Chattanooga and St. Louis Railway, until December 27, 1969, as to which it alleged that the attacked freight rate system had lessened and would continue to lessen the establishment of industries on its line and the amount of freight handled by it and had decreased the rental and sales value

of its railroad, to the irreparable injury and damage of Georgia (Paragraph 13);

(2) as the representative and for the benefit of the ports of Georgia said to be discriminated against by the attacked freight rate system (Paragraphs 5 and 11) and of citizens of Georgia who, as shippers, were said to be subjected to unreasonable and discriminatory freight rates (Paragraphs 5, 6, 17).

The amended complaint, by mere elaboration of verbiage, undertakes to assert four separate and distinct capacities in which the State seeks to sue in each of four counts, as follows (Paragraph 2):

> "*First Count:* The State of Georgia sues in its capacity as a sovereign to safeguard the performance of the obligations of government with which as a State of the Union it is charged.[1]
>
> "*Second Count*: The State of Georgia sues in its capacity as a quasi-sovereign or as agent and protector of its people against a continuing wrong done to the people of Georgia as an organized community in their lives, liberties, and estates.
>
> "*Third Count*: The State of Georgia sues in its capacity as a proprietor, against wrongs suffered by, and damage done to, the State as the owner of a railroad, as the owner and operator of various institutions maintained by the State, all of which makes necessary the purchase by the State of Georgia of certain merchandise and materials which are transported by defendants into this State to be used by the State of Georgia itself.
>
> "*Fourth Count*: The State of Georgia sues in its capacity as protector, and in behalf of, a large general class of its citizens, who by necessity are required to ship over the defendant railroads and have been damaged by the acts of which complaint is made herein."

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[1] Apparently Georgia has now been readmitted to the Union.

There immediately follows this joint and several generalization, confusing and intermingling the supposed four separate and distinct capacities in which Georgia asserts it sues:

> "All of the above counts are brought jointly and severally for the purpose of protecting the sovereignty of the State, the interests of its people, and the rights of its citizens from irreparable injury from certain continuing and threatened acts on the part of defendants, all of which are in conflict with the rights of the sovereign State of Georgia, the people of Georgia as an organized community, the proprietary interests of the State, and a large general class of its citizens who are directly affected thereby, all of which rights enjoy the protection of the Constitution of the United States."

Upon analysis, all this verbiage resolves itself into two, and still the same two, capacities in which the State seeks to sue: (1) its proprietary capacity as a shipper and receiver of freight, paying alleged discriminatory freight charges, and as owner of the Western and Atlantic; and (2) its capacity as "*parens patriae*, trustee, guardian, or representative" (Paragraph 6, Amended Bill) of its citizens said to have been damaged by being required to pay such discriminatory charges. The language about sovereignty, safeguarding the obligations of State government, protecting its people as an organized community in their lives, liberties and estates, conflict with the rights of a sovereign state, while it sounds solemn and impressive, evokes nothing to raise a justiciable question and no new capacity in which the State seeks to sue. It merely imports political oratory into the bill.

The amended bill unsuccessfully attempts to avoid the specific references to a discriminatory freight rate system or structure which were sprinkled throughout the original bill. Thereby it seeks to conceal the real object and purpose of the bill, to attack the freight rate structure, to bypass the Interstate Commerce Commission, to avoid the

statutory provisions for review of the Commission's decisions, and to have this Court, without prior resort to the Commission, perform the function of rate-making in the guise of an exercise of its original jurisdiction.

Indeed, as if in confession of the fatal defects of the original bill, the amended bill expressly asserts (Paragraph 18), "Nor is it a schedule of rates, or a series thereof, which is the basic objective of the causes of action set forth above"; and (Paragraph 19) "It is not a specific rate structure which the State of Georgia attacks but a continuing situation, created and maintained by a conspiracy of carriers" and "The causes of action herein set forth are of a justiciable, not an administrative, character." These, however, are not allegations of fact but are mere characterizations of the legal effect of the bill. This Court can determine the legal effect of the amended bill at the present stage, on motion for leave to file and on rule to show cause why it should not be filed, just as competently as after filing.

The same effort at camouflage of the essential nature of the cause of action sought to be presented by the amended bill is seen in the extensive elaboration of the allegations as to conspiracy and as to the mechanics and instrumentalities through which the conspiracy is said to have been carried out, contained in paragraphs 9 to 11, inclusive, and in the constant emphasis given to the Anti-Trust Act and the effort to deny existing administrative remedies under the Interstate Commerce Act.

The allegations of paragraphs 18 and 19 of the amended complaint are most remarkable in this respect. It is there asserted that no administrative remedy is open to Georgia; that the alleged acts of the defendants "constitute a common law tort, are contrary to the common law against conspiracy, and violate the antitrust laws"; that "The tort is committed and the conspiracy operates in a domain which lies beyond the authority of any administrative agency"; that "The Interstate Commerce Commission, to which specified duties in respect to the regulation of railroads

have been delegated, has been entrusted with no jurisdiction over a conspiracy to restrain trade and commerce among the several states. The Interstate Commerce Act confers upon the Commission no power to afford relief from a conspiracy among common carriers; nor does it exempt such a rate fixing conspiracy as is recited here from the operation of the antitrust laws of the United States, which prohibits every contract, combination, and conspiracy in restraint of trade."

There are several complete answers to those allegations:

First, the Interstate Commerce Act, among the "specified duties" which it delegates to the Commission, does give it primary, exclusive and complete authority, subject to judicial review under controlling statutory provisions (Judicial Code, section 208, 36 Stat. 1149, 28 U. S. C. 46; Act of October 22, 1913, c. 32, 38 Stat. 220, 28 U. S. C. 47) in a suit in the district court to which the United States must be a party, over the fixing of railroad freight rates and over all questions as to whether rates are unjust, unreasonable, discriminatory and illegal, whether as the result of a conspiracy violative of the antitrust laws or without such conspiracy.

Second, it is no part of the sovereign prerogative of the State of Georgia to vindicate and enforce the federal antitrust laws as such; that is the function of the federal government.

Third, Section 16 of the Clayton Act expressly denies the right of any person except the United States to sue to enjoin any violation of the antitrust laws with respect to the fixing of rates subject to the jurisdiction of the Interstate Commerce Commission.

Fourth, Georgia has no standing to complain of such a conspiracy as is described in the amended bill or of violations of the antitrust laws there charged unless and except to the extent that such conspiracy results in unjust, dis-

criminatory or illegal freight rates which Georgia, as a private shipper, has been required to pay under controlling tariffs having the force and effect of public statutes, to its damage, and in such case its right is the same as that of any other shipper so damaged.

Fifth, no such shipper, including a state, can sue for such damages without prior resort to the Commission and then its remedy is under the Interstate Commerce Act, not under the Sherman Act.

Sixth, no such suit for damages lies within the original jurisdiction of this Court, certainly where there has been no prior resort to the Commission, even where a state is a party or where it is suing citizens of other states.

Seventh, a suit either to restrain such an alleged conspiracy or to recover rate damages as a result thereof presents no justiciable case within the original jurisdiction of this Court.

Eighth, Georgia ports and shippers who are citizens of Georgia cannot maintain such a suit to vindicate their individual rights for all of the above reasons and for the additional reason that such suits on their behalf are not within the original jurisdiction of this Court under Article III, Section 2, of the Constitution.

Ninth, the State of Georgia cannot bring such a suit as *parens patriae* and representative of its ports and citizens for all of the above-stated reasons and for the additional reason that it has no legal standing to vindicate such individual rights, even if the individuals had a right to bring such a suit, which right they do not have.

The rest of paragraph 18 and all of paragraph 19 of the amended bill, too long to quote here, constitute merely a further elaboration of the ideas sought to be stated in the above-quoted allegations of paragraph 18, in brief: that the bill is not an attack on specific rates or a specific rate structure, but is solely an attack on a conspiracy in viola-

tion of the antitrust laws; that the rates which have damaged Georgia, its citizens and ports, "are mere manifestations of a conspiracy in restraint of trade"; that it is the conspiracy, not the rates resulting therefrom, which has damaged Georgia, its ports and citizens; that Georgia is seeking to enjoin the conspiracy and to recover damages therefor, not to enjoin rates and recover rate damages; that therefore (a complete *non sequitur*, even if the foregoing were sound) the causes of action alleged in the amended bill present justiciable, not legislative and administrative, questions.

These elaborate allegations are confession and futile effort at avoidance of the fatal defects of the amended bill, and it must fail for the nine reasons just above stated.

In so far as the amended bill undertakes to assert rights under the common law and to charge common law torts and conspiracies contrary to the common law, it stands in no better light than it does as to its charges of violations of the Sherman Act. What this Court said in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446-447, applies:

> "But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz.: ' . . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

IV.

Upon the Allegations of the Amended Bill it is Only by the Payment of Alleged Illegal Freight Rates that Georgia or Its Citizens Could Have Been Injured.

The amended bill makes it perfectly plain that the only way in which Georgia, its ports or its citizens, claim to have been damaged by the alleged conspiracy is by having to pay unjust, discriminatory, and hence illegal rates resulting from such a conspiracy. In such case it is the rates, not the conspiracy producing them, which cause the *damnum*. If the rates in effect are not unjust, unreasonable, discriminatory and illegal, then there is no *damnum*, and no *injuria*, even if they be the result of a violation of antitrust laws. If the rates be not illegal and if Georgia is not attacking illegal rates, then it has no case at all; it is seeking to attack a mere abstraction *in vacuo*. Whether the rates are illegal is a question within the primary jurisdiction of the Interstate Commerce Commission.

We invite attention to the comprehensive scope of the power to regulate carriers by railroad entrusted to the Interstate Commerce Commission by the Interstate Commerce Act; and particularly to the direction that the provisions of the Act shall be administered and enforced with a view of carrying out the National Policy "to encourage the establishment and maintenance of reasonable charges for transportation services, without * * * unfair or destructive competitive practices" (54 Stat. 898, 899); to the provision of section 15(3) that, upon complaint or upon its own initiative, the Commission may establish through rates "or the maxima or minima, or maxima and minima, to be charged" etc.; to the provision of section 3 making it unlawful for a carrier unreasonably or unduly to prefer or prejudice any "locality, port, * * * point, region, district, territory," etc.; and to the direction of section 5(b) of the Transportation Act of 1940 (54 Stat. 898, 902; 49 U. S. C. sec. 3, note) that the Commission shall investigate *inter alia* interterritorial rates in their relation to each other,

and "enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: * * *"

Indeed, this Court will take judicial notice of the fact that the whole question of the comparative rate levels in Southern Territory and in Official Classification Territory, which it is the whole object both of the original bill and of the amended bill to attack, is now pending before the Interstate Commerce Commission in general investigations which have not been concluded, *Class Rate Investigation, 1939*, Docket 28300, and *Consolidated Classification*, Docket 28310. The record in those proceedings shows that the State of Georgia has been represented both by its Governor as a member of the Southern Governors' Conference and by the Chairman of its Public Service Commission, Walter R. McDonald, Esq. Yet, apparently impatient with the Commission, obviously undertaking to by-pass it, the State of Georgia is seeking to vindicate in an original suit in this Court the very position it has taken in those proceedings and to have this Court do the Commission's work, which the Commission is perfectly competent to do, has exclusive statutory authority to do and doubtless will do, in those proceedings.

It is interesting to observe that the amended bill no longer makes the charge contained in the original bill, that the Commission has been derelict in its duty, is a party to the illegal practices charged against the carriers, and aids and abets them.

Despite the elaborate effort of the amended bill to avoid its essential character as an attack on the existing freight rate structure and to assume the guise of a mere attack on a conspiracy in violation of the antitrust laws (an effort which if successful would be fatal to the bill, leaving it a mere attack on an abstraction), the amended bill still leaves visible the unmistakable evidences of its true nature as an attack on the existing freight rate structure.

Thus, in First Count, paragraph 3(c), p. 8, it is alleged, "The defendants, a group of common carriers, have con-

spired to establish and to maintain freight rates which are unjust, unfair, and harmful to the State and the people of Georgia."

In Second Count, paragraph 4, p. 10, it is alleged, "Defendants, by their rates and practices, give preference and advantage in rates on domestic traffic to and from the North Atlantic ports of Baltimore, Philadelphia, New York, Boston, and other related ports over the ports of Savannah and Brunswick, to the injury and prejudice of the sovereign State of Georgia and to the citizens therein." Illustrations of the alleged rate preference are then given.

In Third Count, paragraph 5, p. 11, it is alleged, "As to those state-owned institutions and operations, the State of Georgia has paid and now pays the extortionate and illegal freight rates, fixed by the defendants for the transportation of said commodities to the State's irreparable damage." Reference is then made to Exhibit 1, said to show the "higher rates actually paid by the State of Georgia on these comodities which are necessary to, and used or sold by, said State institutions."

The allegations of the amended bill and the exhibits together present the basic theory of Georgia that rates in Southern Territory ought not to be, mile for mile, higher than rates in Official Territory. The exhibits offer no other measure or basis for the comparison between rates in the two territories than the straight mileage basis, although the allegations of the amended bill recognize that other criteria for rate-making and for rate comparisons are pertinent, to wit: "the cost of constructing and maintaining their several lines of railroad and the cost of carrying freight over the same, and such other elements as should be considered by each particular railroad in establishing its tariff rates * * *." (Paragraph 10, p. 16.) All these and other elements, in addition to the mileage measure, are considered by the Interstate Commerce Commission in exercising its jurisdiction over rate-making. Georgia's exhibits seek to present to this Court, however, only the one element of mileage.

In Third Count, paragraph 5(b), p. 12, it is alleged, "*The rate system*, which is a result of the conspiracy on the part of the defendants * * * has lessened, and will continue to lessen, the establishment of industries on said line [the state-owned Western and Atlantic], lessened the amount of freight handled, and decreased the rental and the sales value of said railroad, to the irreparable injury and damage of complainant." We pass over, merely pointing to it, the fantastic nature of the charge that the defendant, The Nashville, Chattanooga and St. Louis Railway, has joined in a conspiracy to fix rates to injure the business and value of a line of railroad which it holds and operates under lease running twenty-five more years. (Italics ours.)

In Fourth Count, paragraph 6, p. 12, is described "a general class of its citizens made up largely of farmers, manufacturers, merchants, and shippers, who, in the payment of extortionate charges for freight carriage, have suffered the impact of the conspiracy * * *." *Thus, in express allegation, the impact of the alleged conspiracy lies in the payment of extortionate freight charges.*

Paragraph 9, p. 15, speaks of "charges for transporting commodities, which charges are unjust, unreasonable, arbitrary, noncompetitive and favorable to localities, ports, and shippers outside of Georgia, and to the disadvantage, harm, hurt, prejudice, and injury of the State of Georgia, its ports, and shippers therein who ship commodities in commerce among the several States."

These allegations pick up the technical terms used by the Interstate Commerce Act in conferring and defining the jurisdiction of the Interstate Commerce Commission, and they unmistakably disclose the true nature of the bill and its objects and purposes.

The gist of the amended bill and of the grievance sought to be presented by Georgia to this Court is succinctly stated in paragraph 14, pp. 2-21, "The defendants, by reason of the joint actions and agreements aforesaid, have the power to, and do, fix rates and charges for transportation of some

commodities in commerce among the several States, between points in the North and points in Georgia, which are approximately 39 per cent higher than the rates and charges for transportation of like commodities for like distances between points in the North." That is what the bill seeks to have this Court enjoin for the future and grant rate damages upon for the past.

The nature of the suit is not concealed by the changed form of the prayers for relief of the amended bill as compared with the prayers of the original bill.

The prayers for injunctive relief of the original bill in terms prayed injunction fixing and reducing rates and equalizing them as between territories on a mileage basis, as follows:

> "(1) That defendants, their agents and employees, be enjoined from demanding or collecting rates or charges for shipments to or from Georgia, higher than are, for like distances, on the same commodities, contemporaneously maintained and applied between points in Official territory.
>
> "(2) That it be decreed that rates and charges between points in Georgia and her ports and the North are, and for the future will be, unjust, unreasonable and prejudicial to complainant and shippers and ports therein, and unduly preferential of points and ports in the North and of shippers and traffic therefrom and thereto, to the extent that the rates from and to points and ports in the State of Georgia and points and ports in the North exceed, or may exceed for like distances, those contemporaneously maintained and applied to and from points and ports in the North."

The prayers for injunctive relief of the amended bill, paragraph 22(c), (d) and (e), seek to avoid the sharpness with which those of the original bill prayed exercise of the rate-making function, by the use of generalized language praying injunction to restrain violations of the antitrust laws, but even so, paragraph 22(c) cannot avoid showing the characterization of the alleged conspiracy prayed to be en-

joined as "conspiring and confederating in the establishment of rates and charges to be exacted from the State of Georgia and the citizens thereof for transportation in commerce among the several States." The changed form of the amended prayers cannot conceal the identity of the causes of action sought to be presented with those sought to be presented by the original bill.

The amended bill must fail for all of the reasons hereinbefore set forth and for all of the reasons which were applicable to the original bill.

The situation presented by this amended bill is squarely analogous to that presented in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, except for the fact that the suit here presented is addressed to the original jurisdiction of this Court and hence, *a fortiori,* must fail.

In the *Cunard Case,* the Navigation Company sued Cunard and others for injunction against an alleged conspiracy in the fixing of rates injurious to the plaintiff conceded by this Court to have been a violation of the Sherman Act, "unless the Shipping Act stands in the way." (284 U. S. 480.) After pointing out that the Shipping Act was a comprehensive measure bearing substantially the same relation to common carriers by water as that of the Interstate Commerce Act to carriers by railroad, and after reaffirming previous cases applying the same principles under the Interstate Commerce Act, this Court said (485-486):

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh* v. *Chicago & N. W. Ry. Co.* [260 U. S. 156], *supra,* at page 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose

of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the Commission were made in the face of a clause in § 22 of the Interstate Commerce Act that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

To the same effect are *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, and *Merchants' Warehouse Co.* v. *United States*, 283 U. S. 501.

V.

Since 1898 a Wholly New Public Policy Has Substituted Public Regulation of Carriers to Support a National Transportation System for the Old Sherman Act Rule of Unrestricted Competition Between Individual Carriers. The Commission Has Primary Jurisdiction of the Matters Here Involved, Not the Courts.

When this Court decided *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, in 1897, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, in 1898, the Interstate Commerce Commission had been given no rate-making power, and the modern rule of public, administrative regulation of carrier rate-making had not been adopted. The law at that time in our history left carrier rate-making to the rule of the claw and the fang, to unrestricted and unregulated free competition under the doctrine of the Sherman Act. The concept of the development and preservation of a national transportation system under public regulation was still to be born.

The Government expressly recognized, in the second of those cases, the extent to which the prevailing doctrine of

unrestricted and unregulated competition enabled the larger and more powerful railroad to destroy the weaker. "That they should take, who have the power, and they should keep who can," was the prevailing doctrine of that day and was the expressed philosophy of the Government in the *Joint Traffic Association Case.*

The Solicitor General, in his concluding argument in that case, said:

> "It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it." (171 U. S. 546.)

And at pages 547-548 he further said:

> "Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results * * *.
>
> "The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest."

At page 550 he said, of the Interstate Commerce Act as it then existed:

> "The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition."

And at page 557 he pointed out the complete lack of rate-making power by the Commission, saying:

> "The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no

> adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it."

And the Court, in the *Joint Traffic Association Case*, squarely recognized the reach and thrust of that prevailing claw and fang philosophy. Mr. Justice Peckham said (171 U. S. at 577):

> "* * * An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them."

Since 1898 wholly new concepts of carrier regulation have progressively developed. More and more detailed regulation by the Commission has been substituted for the free and unregulated competition to which carriers were left by the philosophy of 1898. The "better way" has been found.

By the Act of June 29, 1906 (34 Stat. 584), the Hepburn Act, the Commission was first given the very power to fix maximum rates which it did not have when the *Joint Traffic Association Case* was decided. That Act amended Section 15 of the Interstate Commerce Act so as to give the Commission express power to determine just and reasonable maximum rates and to establish through routes and maximum joint rates, to prescribe divisions of joint rates and the terms and conditions under which such through routes shall be operated. And Section 5 of the Act of 1906 further amended the Act so as to give the Commission the power to award rate damages or reparations, in the first instance, with provision for enforcement of such award by court action by any person for whose benefit such award was made.

Since the Act of 1906, every legislative step has been in the direction of more complete and exclusive authority of the Commission over railroads.

The Act of June 18, 1910 (36 Stat. 539), known as the Mann-Elkins Act, first gave the Commission power to suspend rates. Transportation Act of 1920 (41 Stat. 456) first gave the Commission power to fix minimum rates. And the latter Act wrote into the law a wholly new national transportation policy.

That new national transportation policy was first analyzed and described by Chief Justice Taft in *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, sustaining a state-wide order of the Commission requiring the raising of intrastate rates above the level fixed by the state commission, to prevent discrimination against interstate and foreign commerce.

That new policy sought to develop and preserve a national transportation system and to that end sought to protect weak railroads against the very unrestricted competition which, in 1898, the Government and this Court recognized might enable the strong railroads to destroy the weak ones. And in *New England Divisions Case*, 261 U. S. 184, this Court gave effect to that new policy by sustaining exercise by the Commission of its power over divisions of rates to take from the strong and give to the weak.

After referring to those two cases, the Court in *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, sustaining an order of the Commission requiring surrender of excess profits under the recapture clause, said, through the Chief Justice:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an

opportunity to earn enough to maintain their properties and equipment in such state of efficiency that they can carry well this burden. To achieve that great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged." (478.)

That new transportation policy was recognized in *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, in connection with the power and duty of the Commission to control new investments, construction and extensions, as applied to the building of a new union station.

It was recognized in connection with the Commission's power over extensions and abandonment of lines in *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277, 278, and in *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311.

Since that initial effort at reshaping regulation of railroads to "ensure * * * adequate transportation service" (*The New England Divisions Case*, 261 U. S. 184, 189), Congress has extended federal regulation in connection with other forms of transportation and has elaborated more fully the objectives to be achieved by its legislation. Air Commerce Act of 1926, 44 Stat. 568, as amended by 48 Stat. 1113; Air Mail Act of 1934, 48 Stat. 933; Air Mail Act of 1935, 49 Stat. 614; Civil Aeronautics Act of 1938, 52 Stat. 973; Motor Carrier Act of 1935, 49 Stat. 563; and compare Title II of the Transportation Act of 1940, 54 Stat. 898, 929. See *McLean Trucking Co.* v. *United States*, 321 U. S. (adv.) 67, 81-82, and footnotes.

The Transportation Act of 1940 (Act of September 18, 1940, 54 Stat. 898, 899, 919, 929) carried farther this new

policy, gave it a new, express definition as the "National Transportation Policy," and extended it to water carriers as well as to highway motor carriers and railroads.

That Act starts with the declaration of that policy which states as elements of it, *inter alia:* "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *."

No longer is the harsh law of free and unregulated competition left applicable.

That declaration of the "National Transportation Policy" ends: "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

That Act, in its Section 5(a), amended Section 3 of the Interstate Commerce Act, so as to read:

> "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

hus Transportation Act of 1940 covered the precise mat-
T of which the State of Georgia would complain in this
ters. But Congress did not leave those matters to be regu-
suitd by the courts under the antitrust laws. It committed
laten more completely to the jurisdiction of the Interstate
thenmerce Commission, and to its "fostering guardianship
Con control," for regulation under the Interstate Com-
andce Act.
mer he very question of the comparative levels of rates as
T een territories was brought to the attention of Con-
betws in the legislative history of the Act of 1940, and Sec-
gres 5(b) of that Act committed that whole question to the
tion mission by this provision:
Con

> "The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect[2] in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: *Provided*, That the Commission in its discretion may confine its investigation to such manufactured products, agricultural commodities, and raw materials, and the rates thereon as shippers thereof may specifically request be included in such investigation."

B; this provision Congress committed to the Commission
the whole question of unlawfulness *in any respect* of the
rate; referred to in Georgia's amended bill, not only au-
thorzed but *directed* the Commission to make a general

[2] T— his would clearly include a determination of unlawfulness in
respect of violation of the antitrust laws, if they be applicable at all.

investigation covering all such rates, and invited those complaining of those rates to present their complaints to the Commission.

The Commission has entered upon that investigation pursuant to that congressional direction. Georgia has made its complaint to the Commission pursuant to that congressional invitation. Before the Commission has acted, Georgia, without withdrawing its complaint from the Commission, which has statutory jurisdiction, seeks to present the same complaint concurrently to this Court under the guise of an original suit.

Quite apt to this situation is the comment of Mr. Justice Black, joined in by Mr. Justice Douglas and Mr. Justice Murphy, in their concurring opinion in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 608, that "* * * the problem of rate-making is for the administrative experts, not the courts * * *."

This review of the new concepts of statutory regulation of carriers under the Interstate Commerce Act and of the new national transportation policy makes it clear that the free and unregulated competition theory of the Sherman Act does not fit the pattern of Interstate Commerce Act regulation of carriers which Congress has built up since 1906, largely expanded in Transportation Act of 1920, and still further expanded and fortified in Transportation Act of 1940. It is not surprising, in the light of this development, that this Court should have said, through Mr. Justice Cardozo, in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 514, "Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water."

In view of this history, it was inevitable that he should have said, at page 513 of the opinion in that case, "If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair."

This history made it inevitable that this Court should hold in *Tigner* v. *Texas,* 310 U. S. 141, 148, and in the cases there cited, that the Sherman Act, in the case of common carriers by railroad, is qualified by the Interstate Commerce Act, and, in the case of shipping combinations, by the Merchant Marine Act.

In *McLean Trucking Co.* v. *United States,* 321 U. S. (adv.) 67, this Court affirmed a judgment of a statutory district court of three judges refusing to set aside orders of the Commission authorizing consolidation of seven large motor carriers. The United States had confessed error. The Department of Justice argued that the Commission had failed to give due weight to the prohibitions and policies of the antitrust laws. The argument in its full sweep was rejected as being an attack upon the policy which Congress had declared. "But," said the Court, "taken for less than that, it poses a problem of accommodation of the Transportation Act and the anti-trust legislation, to which we now turn. In doing so we note that the former is the later in time and constitutes not only a more recent but a more specific expression of policy." (p. 79).

The Court pointed out (p. 80) that "The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887." It reviewed the most recent part of that history, beginning with the Transportation Act of 1920, which "marked a sharp change in the policies and objectives embodied in those efforts," and traced the development and extension of the new policy in subsequent Acts and ending in the Transportation Act of 1940.

And upon that history the Court said (p. 83):

> "The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of § 5 (11), that the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way. And

the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, has its counterpart in motor carrier policy. The premises of motor carrier regulation posit some curtailment of free and unrestrained competition. The origins and legislative history of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when 'competition between carriers may result in harm to the public as well as in benefit; and that when a carrier inflicts injury upon its rival, it may be the public which ultimately bears the loss.' Cf. *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277."

The declaration of the National Transportation Policy in Transportation Act of 1940 makes specific reference to the adequacy of the transportation system to meet the needs of national defense. All branches of the Government have paid tribute to the unprecedented efficiency with which the railroads have contributed to the national defense and to the prosecution of the war.

The Interstate Commerce Act itself requires consultation, conference and joint action of carriers to enable them to carry out the requirements of the Interstate Commerce Act, to fix joint through routes and rates, to establish and maintain territorial rates and interterritorial rates "without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;" to establish fair divisions of rates, to comply with the "long and short haul" provisions, and to do many other things required by that Act.

Congress has specially recognized the necessity for such joint action, at least for the period of the war, by the provisions of Section 12 of the Act of June 11, 1942, entitled an Act "To mobilize the productive facilities of small busi-

ness in the interests of successful prosecution of the war, and for other purposes" (56 Stat. 351, 357), which provides:

> "Whenever the Chairman of the War Production Board shall, after consultation with the Attorney General, find, and so certify to the Attorney General in writing, that the doing of any act or thing, or the omission to do any act or thing, by one or more persons during the period that this section is in effect, in compliance with any request or approval made by the Chairman in writing, is requisite to the prosecution of the war, such act, thing or omission shall be deemed in the public interest and no prosecution or civil action shall be commenced with reference thereto under the antitrust laws of the United States or the Federal Trade Commission Act. Such finding and certificate may in his discretion be withdrawn at any time by the Chairman by giving notice of such withdrawal to the Attorney General, whereupon the provisions of this section shall not apply to any subsequent act or omission by reason of such finding or certificate. * * *."

Recognizing the necessity for such joint action, especially in the making of joint rates, the Commission has promulgated a code of rules to govern joint action by carriers and freight forwarders, for the purpose of considering or agreeing upon rates and for publication of tariffs through publishing agents, rate conferences, etc.

And on March 20, 1943, Donald M. Nelson, Chairman of the War Production Board, made his Certificate No. 44, addressed to the Attorney General, pursuant to that statutory provision (Federal Register, Vol. 8, No. 61, March 27, 1943, pp. 3804-3805), in which he approved joint action by carriers in the making of rates through rate bureaus, rate conferences, and other similar organizations, under the Commission's rules, and certified that such joint action was "requisite to the prosecution of the war."

His certificate is as follows:

> "The Attorney General: Pursuant to the provisions of section 12 of Public Law No. 603, 77th Congress (56 Stat. 357), I hereby approve joint action by common

carriers or freight forwarders, or their respective representatives, through rate bureaus, rate conferences, or other similar carrier or forwarder organizations, in the initiation and establishment of common carrier and freight forwarder rates, fares, and charges, and carrier and forwarder regulations and practices pertaining thereto: *Provided,* That such action is taken subject to and in compliance with certain regulations for rate conferences formulated by the Interstate Commerce Commission a copy of which is hereunto annexed and made a part hereof; and after consultation with you, I hereby find and so certify to you that the doing of any act or thing, or the omission to do any act or thing, by any person in compliance with my approval herein expressed, is requisite to the prosecution of the war."

Upon the making of that certificate, the provision of Section 12 above quoted came into play, declared such joint action in rate-making to be "in the public interest," and provided that "no prosecution or civil action shall be commenced with reference thereto under the antitrust laws of the United States * * *."

This is another demonstration of the public policy against court interference in antitrust suits with matters committed to the regulation of the Interstate Commerce Commission under the Interstate Commerce Act, analogous to the prohibition of Section 16 of the Clayton Act.

But the prohibition of the Act of 1942 goes further than the Clayton Act prohibition. The Clayton Act merely forbids suit for injunction by any person except the United States. The Act of 1942 forbids any civil action with reference to matters covered by the certificate of the Chairman of the War Production Board, whether for injunction or for damages.

Under the acts of Congress and under the decisions of this Court, it is clear that the courts have no jurisdiction of such matters in an original proceeding under the antitrust laws and only have jurisdiction of review of orders of the Commission with regard to such matters in statutory suits in the federal district courts, to which the United

States must be a party, and that this Court's jurisdiction over such matters is confined to appellate review of decisions of such specially constituted three-judge district courts.

VI.

The Wisdom of the Law in Denying Court Jurisdiction of Such a Suit as this is Strikingly Illustrated by a Consideration of the Impossible Results Which Would Attend Any Attempt by this Court to Grant the Relief Prayed.

The rates attacked by the amended bill and its exhibits are the class rates between Georgia and the North. These have been approved by the Interstate Commerce Commission in a long line of cases in which the Commission had before it the comparison between intraterritorial class rates within the South and interterritorial class rates between the South and the North.[3] The opinion of the late Commissioner Eastman in the first of those cases[4] shows not only the difficult and technical problems presented but also the time, care, patience and expert knowledge the Commission gave those problems. The reasons for the differences between class rates between points in Southern Territory and points in Official Territory and class rates for comparable mileage between points in Official Territory have been considered by the Commission in many cases.[5]

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[3] *Southern Class Rate Investigation*, 100 I. C. C. 513; 109 I. C. C. 300; 113 I. C. C. 200; 128 I C. C. 567; *Commonwealth of Kentucky* v. *A. & W. Ry. Co.*, 213 I. C. C. 297; 218 I. C. C. 521; 229 I. C. C. 20; 231 I. C. C. 453; *North Carolina Corporation Com.* v. *A. C. & Y. Ry. Co.*, 213 I. C. C. 259; 218 I. C. C. 521; 229 I. C. C. 20; 231 I. C. C. 453; *Class Rates Within the State of North Carolina*, 238 I. C. C. 225. The class rates approved or prescribed in these cases were increased on March 28, 1938, pursuant to the Commission's authority in the *Fifteen Per Cent Case*, 1937-38, 226 I. C. C. 41.

[4] *Southern Class Rate Investigation*, 100 I. C. C. 513.

[5] *Southern Class Rate Investigation*, 100 I. C. C. 513, 644; *Eastern Class-Rate Investigation*, 164 I. C. C. 314, 393; *State of Alabama* v. *N. Y. C. R. R. Co.*, 235 I. C. C. 255, 265, 266, 321, 340; *Commonwealth of Kentucky* v. *A. & W. Ry. Co.*, 213 I. C. C. 297, 314, 317.

Eight Southern States, including Georgia, alleged in a complaint filed with the Interstate Commerce Commission on May 26, 1937, that the rail rates on certain manufactured commodities from points in those states to destinations in the North were unlawful. The Commission, following extensive hearings, found[6] that the rates assailed on certain commodities were unreasonable and discriminatory to the extent that they were upon levels higher than would result from the application of approximately the same levels of rates as apply on similar traffic within Official Territory. The rates on certain other commodities were found not unlawful.

The Georgia Public Service Commission, and the State regulatory commissions of nine other States, filed a complaint with the Interstate Commerce Commission on March 29, 1940, attacking the rates on live stock within the South and from the South to the North. The Commission in its decision in this and related cases[7] entered an order requiring among other things reductions in the rates on live stock from the South to the North, and fixing rates which were very slightly above the rates in the North.

Georgia obtained in the orders of the Commission in these two cases substantially the relief it sought: rates from Georgia to the North the same, or substantially the same, as the rates in the North.

No review was ever sought by Georgia of the findings and orders of the Commission in these cases. The bill now sought to be filed by Georgia may be said to constitute a collateral attack upon them. The statutes require that all suits to set aside orders of the Commission must be brought in District Courts and that the United States must be made a defendant (Judicial Code, secs. 207, 208, 211; 28 U. S. C., secs. 41(28), 46, 47 and 48). This Court has twice refused to entertain original suits brought by States in this

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[6] *State of Alabama* v. *N. Y. C. R. R. Co.*, 235 I. C. C. 255; 237 I. C. C. 515.

[7] *Live Stock to and from the South*, 253 I. C. C. 241.

Court to set aside orders of the Commission, this Court holding that the public policy, which these provisions of the Judicial Code reflect, requires that a State aggrieved by the Commission's order should be remitted to the remedy which they afford—a suit in the District Court to which the United States is a party.[8]

As we have already pointed out, the very class rates which Georgia here seeks to attack are now the subject of a further general investigation by the Commission in proceedings not yet concluded and in which the State of Georgia has taken a very active part.

By its order entered on July 29, 1939, in Docket No. 28300, *Class Rate Investigation, 1939,* of which this Court will take judicial notice, the Commission instituted an investigation on its own motion into the lawfulness of the interstate class rates between points in the United States lying on and generally east of the Rocky Mountains, with a view of making such findings as might be proper in the premises. The class rates covered by this investigation include, among others, the interterritorial class rates in effect between Georgia and points in the North.

Hearings in this investigation were held before the Commission (Division 2). The record is an elaborate one, embracing a total of 5,490 pages of testimony, with 233 documentary exhibits. The proceeding was argued before the entire Commission in Washington from June 14 to June 24, 1944.

Counsel representing the Southern Governors' Conference, made up of the eight Southern States of Alabama, Georgia, Florida, Mississippi, Louisiana, North Carolina, South Carolina, and Tennessee, filed a brief in this proceeding and participated in oral argument. Mr. Walter R. McDonald, the Chairman of the Public Service Commission of Georgia, also participated in the oral argument on behalf of the State Commissioners of the states embraced in the Southern Governor's Conference.

[8] *North Dakota* v. *C. & N. W. Ry. Co.*, 257 U. S. 485, 490; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 164.

The Southern Governors' Conference and Mr. McDonald for the State Commissioners took the position in this pending proceeding that the intraterritorial class rates within the South, and the interterritorial class rates between the South and North, should be exactly the same, distance considered, as the class rates in the North. This is precisely the position taken by Georgia in the amended bill and its exhibits.

Georgia, by its active participation in the class rate case now pending before the Commission, recognized the principle that the Commission alone has primary and exclusive jurisdiction to pass upon the lawfulness of existing class rates between Georgia and the North, and if it finds that they are unlawful in any respect, to prescribe what would be lawful rates. In this amended bill it seeks relief in court under a different law and contrary to the decisions of this Court and the statutes of the United States.

As was said by Circuit Judge Augustus Hand, in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 50 Fed. (2d) 83, 90, affirmed, 284 U. S. 474:

> "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued *pari passu*."

That Congress recognized that the problems arising out of the difference in levels in the class rates in the different territories are wholly administrative in character, and as such are to be determined by the Interstate Commerce Commission, is shown by the fact that Congress in the 1940 Transportation Act[9] amended Section 3(1) of the Interstate Commerce Act (49 U. S. C., sec. 3(1), which prohibits undue or unreasonable preference or advantage, so as to prohibit any undue or unreasonable preference or advantage to any particular "locality, port, port district, gateway, transit point, region, district, territory * * *"

[9] Act of September 18, 1940, c. 722, sec. 5 (54 Stat. 898, 902).

This amendment, as shown by the committee reports, was made by Congress after the attention of Congress had been directed to the subject of interterritorial freight rates.[10]

The Interstate Commerce Commission is, therefore, called upon in the pending proceedings to construe this amendment to Section 3(1) in the light of the facts developed by the record and in the light of the other provisions of the Act.

Georgia has no right to be heard in any court respecting the class rates, or any other published tariff rates, between Georgia and the North until the Interstate Commerce Commission has issued an order dealing with those rates. Then its court right is only to judicial review of that order in a suit in the district court to which the United States is a party. Otherwise the unity of the whole system of regulation breaks down.

We are filing, as an Appendix to this Return, a memorandum prepared August 18, 1943, and based on the testimony and exhibits in Docket No. 28300, *Class Rate Investigation, 1939,* which demonstrates the extent to which the interterritorial class rates attacked in Georgia's amended bill are Commission-made rates, not carrier-made rates. It shows, therefore, the extent to which the amended bill is an attempted collateral attack on orders of the Commission fixing rates. It is a factual study and gives references to the cases in which the Commission fixed the rates.

The wisdom of the law in denying court jurisdiction of such a bill as this is well illustrated by a consideration of the impossible results that would follow if this Court should entertain this amended bill and grant the relief sought.

If this Court should enjoin the published class rates between Georgia and the North upon this amended bill, only

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[10] *Senate Report 433*, 76th Congress, 1st Sess., Committee on Interstate Commerce, accompanying Senate 2009, which became the Transportation Act of 1940. Conference Report (Report 2832, 76th Cong., 3rd Sess., dated August 7, 1940) states that the words "region," "district," "territory," have been added to the proposed amendment to Section 3(1) of the Act.

Georgia and the twenty railroads here made parties would be bound by its decree. The Interstate Commerce Commission would not be bound. The United States would not be bound. No other railroad would be bound.

Only Georgia would get the relief sought by the bill. Instant prejudice and discrimination would be created as to every other sister state of Georgia in the South and as to the shippers in those other states who would still be governed by the published tariff rates against which only Georgia and its citizens would have secured relief. There would be two sets of rates between the South and the North: one set fixed by this Court's decree or pursuant to such decree, applicable to shippers in Georgia and these twenty railroads; and another set governed by published tariffs approved by the Commission, applicable to all other shippers in the South and to all railroads.

It is to be noted that a number of important railroads domiciled in Georgia are not named defendants here. No such railroad would be bound by a decree here and thus another set of discriminations between railroads and shippers in Georgia would inevitably result from a decree here.

Moreover, since illegality in existing rates is averred only because of disparity in the level of rates in the two rate-making areas, with no averment that Southern carriers receive more than a fair charge for the service they render, the Court would be required to determine whether, if discrimination is found, the discrimination should not be removed by increasing rates in Official Territory, or by establishing an intermediate level of new rates. *Interstate Commerce Commission* v. *United States*, 289 U. S. 385, 389. And even if the Court could assume that legislative function, its decree would be productive of more discrimination than is charged in the bill, because it could not bind those Southern and Eastern carriers not made parties defendant.

The amended bill arbitrarily brushes aside all of the considerations weighed by the Interstate Commerce Commission in fixing the level of class rates, with the single ob-

servation that "The cost of transportation in the South is possibly less, and certainly no more, than in the North; * * *" (Paragraph 15.) No other fact is averred to sustain the oft-repeated conclusion of the pleader—that existing rates are unreasonable, preferential, arbitrary and extortionate, and therefore unlawful. All rate-making policies evolved by the Commission pursuant to legislative direction are thrust aside and ignored.

Thus it is obvious that this Court cannot entertain the amended bill and grant its prayers for relief without breaking down beyond repair the whole system of rate regulation and the unity thereof. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500, 513.

If for no other reason, the Court should deny leave to file the amended complaint in "the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Massachusetts* v. *Missouri*, 308 U. S. 1, 19. The amended bill here is clearly an abuse of such opportunity.

VII.

The Allegations Regarding the State-Owned Western and Atlantic Add No Support to the Amended Bill.

Third Count, paragraph 5(b), alleges ownership by Georgia of Western and Atlantic Railroad, its lease to defendant The Nashville, Chattanooga and St. Louis Railway for a term extending to December 27, 1969, and that the "rate system" described "has lessened, and will continue to lessen, the establishment of industries on said line, lessened the amount of freight handled, and decreased the rental and the sales value of said railroad, to the irreparable injury and damage of complainant." (Amended bill, Paragraph 5-b)

There is no allegation to indicate that Georgia could suffer in the amount of its rentals or could sell its line and

suffer any decrease in sales value until the end of the lease.

The averments regarding the Western and Atlantic obviously are made in support of the prayers for injunctive relief, since no award of damages is prayed on account of the alleged diminution in the volume of freight handled on the Western and Atlantic Railroad or on account of the alleged decrease in its rental and sales value. (Amended bill, Paragraphs 21 and 22)

Since the only relief sought on account of this averment is an injunction in respect of matters subject to the regulation and jurisdiction of the Interstate Commerce Commission, the several arguments and citations herein made in opposition to the jurisdiction of the Court in this case are applicable to this paragraph of the proposed bill, and the power of the Court to award the injunctive relief sought is expressly denied by Section 16 of the Clayton Act. (38 Stat. 737; 15 U. S. C., sec. 26)

The lease referred to in paragraph 13 of the proposed bill was made under the authority of a statute of the State of Georgia of November 30, 1915, published at page 119 of the Georgia Acts 1915 (extra session). Section 11 of said statute contains the following provision:

> "The persons, association or corporation accepted as lessees under this Act, if not already a corporation created under the laws of Georgia, shall from the time of such lease being entered on the Executive Minutes, and until after the final adjustment of all matters springing out of said lease contract, become a body politic and corporate under the laws of this State, under the name and style of the Western & Atlantic Railroad, which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued on all contracts made or to be performed, and all torts committed, by said company, in like manner and time and place as other railroad companies operating railroads in this State may sue and be sued, after the execution of said lease or for any cause of action which may accrue to said company or to which it may become liable."

giving effect to the provision of the Act of 1915, the Georgia courts have held that "the lessee railroad, by the terms of section 11 of that Act, became 'a body politic and corporate under the laws of this State [Georgia], under the name and style of the Western & Atlantic Railroad,' " etc. *Bonnett* v. *Western and Atlantic Railroad*, 42 Ga. App. 821, 157 S. E. 365; *The Nashville, Chattanooga and Saint Louis Railway Company* v. *Edwards*, 91 Ga. 24, 16 S. E. 347. By virtue of the Act of 1915, The Nashville, Chattanooga and Saint Louis Railway, in relation to the State of Georgia and its rights under said lease contract, has become the Western and Atlantic Railroad, and the latter is a Georgia corporation over which the Georgia courts have jurisdiction. Therefore, the State of Georgia is neither required nor entitled to maintain this proposed action in order to protect and preserve any rights accruing to it by virtue of its said lease. *Massachusetts* v. *Missouri*, 308 U. S. 1.

CONCLUSION.

For all the reasons and upon all the authorities hereinbefore set forth, the undersigned respectfully submit that leave to file the amended bill should be denied, because it states no cause of action within the jurisdiction of this Court and because, if filed, the bill could only be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, Orig.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

APPENDIX TO THE RETURN BY SEVEN OF THE EIGHT "SOUTHERN DEFENDANTS."

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

THE RATE STRUCTURE IN THE SOUTH.

A study based on the record in Docket No. 28300, Class Rate Investigation, 1939, showing the extent to which the rates have been fixed by the Interstate Commerce Commission, with citation of the cases.

JOSEPH P. COOK,
Commerce Counsel,
Southern Railway Company.

Washington, D. C.,
August 18, 1943.

THE RATE STRUCTURE IN THE SOUTH.

The Southern carriers in *Docket 28300, Class Rate Investigation, 1939,* showed that the present rate structure in the South has to a very large extent been prescribed by the Interstate Commerce Commission. Mr. B. F. Morris, Assistant to Vice President, Louisville & Nashville Railroad, in his testimony in that proceeding gave a complete description of the current rate structure in Southern territory and between that territory and other territories in the country. This description is contained in Exhibit 15 filed by Mr. Morris. The following outline of the rate structure in Southern territory is based upon that study.

The Class-Rate Structure Within Southern Territory And Between Southern and Official Territories.

The present interstate class-rate structure within Southern territory and between Southern and Official territories was established pursuant to the findings and orders of the Interstate Commerce Commission in:

No. 13494, *Southern Class Rate Investigation,* 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, 128 I. C. C. 567; (during period July 1925-July 1927).

No. 21373, *Commonwealth of Kentucky* v. *Ahnapee & W. Ry. Co.,* 213 I. C. C. 297, 218 I. C. C. 521, 229 I. C. C. 20, 231 I. C. C. 453; (during period Dec. 1935-Jan. 1939).

No. 21665, *North Carolina Corp. Comm.* v. *Akron, C. & Y. Ry. Co.,* 213 I. C. C. 259, 218 I. C. C. 521, 229 I. C. C. 20, 231 I. C. C. 453; (during period Dec. 1935-Jan. 1939).

No. 26699, *Class Rates Within the State of Georgia,* 209 I. C. C. 586, decided July 5, 1935.

No. 27900, *Class Rates Within the State of North Carolina,* 238 I. C. C. 225, decided April 8, 1940.

The *Southern Class Rate Investigation,* 100 I. C. C. 513, was an investigation by the Commission of the interstate class rates within Southern territory and between that ter-

ritory and Official territory in the North. It covered all rates, both all-rail and rail-and-water, with certain exceptions, and it also covered less-than-carload ratings provided in exceptions to the Southern Classification and less-than-carload commodity rates. Its purpose was to determine whether the rates and ratings under investigation were unreasonable or unduly prejudicial to or unduly preferential of particular localities, persons, or descriptions of traffic.

In the original and supplementary decisions the Commission prescribed for application within Southern territory a system of class rates based on mileage scales. The rates were published to become effective January 15, 1928.

The current intraterritorial class rates reflect the mileage scale set forth in Appendix K-2 to the Second Supplemental Report on Reconsideration in *Southern Class Rate Investigation,* 113 I. C. C. 200, modified to conform to the mileage scale set forth in the appendix to the report of April 8, 1940, in *Class Rates Within the State of North Carolina,* 238 I. C. C. 225,[1] for distances of 190 miles and less.

[1] This was an investigation by the Commission to determine whether the scale of class rates set forth in the order of the North Carolina Utilities Commission of June 16, 1937, caused any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. The investigation was the result of a petition, filed by the carriers operating within the State of North Carolina in which it was pointed out that the scale prescribed by the North Carolina Commission in its order of June 16, 1937, discriminated against interstate commerce. The scale prescribed by the North Carolina Commission was 8 per cent lower than the K-2 scale fixed by this Commission for general application in Southern territory, in *Southern Class Rate Investigation,* 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, and 128 I. C. C. 567. In its order dated April 8, 1940, respondent rail lines were required to publish and maintain class rates within the State of North Carolina on basis of a distance scale made up of the D scale prescribed in the *North Carolina Case,* 213 I. C. C. 259, up to 200 miles, and of the K-2 scale prescribed in the *Southern Class Rate Investigation, supra,* beyond 200 miles. The scale on this basis became effective October 31, 1940, and superseded the rates prescribed by the North Carolina Commission in its order of July 16, 1937.

All of these class rates are governed by the Southern Classification and reflect the following percentage relationships:

Classes	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*
Percentage	100	85	70	55	45	40	35	30	25	22½	20	17½

The distances used in constructing the class-rate tariffs are the shortest distances via routes over which carload traffic may be handled without transfer of lading.

With the exception of the State of Kentucky, the system of class rates described in the foregoing is also applicable to intrastate traffic throughout Southern territory.[2] The intrastate rates in Kentucky are those prescribed by the Railroad Commission of Kentucky in its Docket No. 344, which was before the Interstate Commerce Commission in No. 27325, *Intrastate Class and Commodity Rates in Kentucky*, 223 I. C. C. 109, 129.

The Interterritorial Class Rates Between Southern and Official Territories.

With the exception of Trunk Line and New England territories, the interterritorial class rates between Official and Southern territories are made upon the formula which the Commission prescribed in Appendix Q-1 to the third supplement report on reconsideration in the *Southern Class Rate case*, 128 I. C. C. 567, as modified by the subsequent decisions in the *Commonwealth of Kentucky* v. *A. & W. Ry.*

[2] The class rates became effective intrastate throughout the South on January 15, 1928, except in North Carolina where they later became effective June 10, 1930. The rates in North Carolina were published in compliance with the thirteenth section order of the Commission in *Virginia Corporation Commission* v. *A. & R. R. Co., et al.*, 136 I. C. C. 173, 161 I. C. C. 273 (February 1930).

Co., et al., 213 I. C. C. 297,[3] and *North Carolina Corporation Commission* v. *A. C. & Y. Ry. Co.*, 213 I. C. C. 259.[4]

The decision of the Commission in *East Tennessee Border Traffic Association* v. *A. C. & Y. Ry. Co.*, et al, 214 I. C. C. 316, resulted in a limited modification of the Southern Class-Rate Structure.[5]

The Appendix Q-1 formula provided a system of differential rates for the distances in Official territory to or from

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[3] In *Commonwealth of Kentucky* v. *A. & W. Ry. Co., et al.*, 213 I. C. C. 297, the issue before the Commission was the lawfulness of the interterritorial class rates between points in Kentucky, on the one hand, and points in Official territory and Western Trunk Line territory, on the other hand, together with the classification ratings upon which the class rates are based. With certain exceptions, the complaint alleged that the general structure of commodity rates was unlawful.

[4] In *North Carolina Corporation Commission* v. *A. C. & Y. Ry. Co., et al*, 213 I. C. C. 259, the Commission investigated the class rates between points in Official territory, on the one hand, and points in Southern Virginia and North Carolina, on the other hand.

[5] In that case an attack was made on the rates, including the class rates, between Johnson City, Kingsport, Elizabethton, Bluff City, Watauga, Piney Flats, and Bemberg, Tenn., and points in Official territory, including Mississippi River crossings in Missouri and Iowa and points in the northern peninsula of Michigan embraced in Western Trunk Line territory. The Commission did not consider the rates to Western Trunk Line territory, as they were pending in the *Western-Southern Class Rates, supra.*

In deciding that the assailed rates were unlawful, the Commission prescribed a formula for making the rates, which resulted in a reduction in the assailed rates. The prescribed class rates were published generally effective November 2, 1936, but subject only to the Southern Classification. The former class rates were continued in effect for application in connection with the classification exceptions and certain commodity column rates. On November 5, 1936, the new class rates were made subject to a limited number of the exceptions and, to permit a further study of the application of the exceptions, the effective date of the order was extended to February 3, 1937. Subsequently, the defendants made the new rates applicable in connection with classification exceptions providing ratings which are the same as, or higher, in relation to first class, than ratings on the same articles in Official territory. The new rates are presently in effect generally between the Tennessee points and Official Classification territory.

the Ohio River and Virginia gateways, which vary with the lengths of the hauls south of these gateways, to which are added rates resulting from the application of the Appendix K-2 scale to the short-line distances between the gateways and points in Southern territory. These differentials were modified in 1935 by the Commission's decision in the *Kentucky and North Carolina cases, supra.*

In the *North Carolina case* a class-rate scale was prescribed by the Commission for application between points in North Carolina, on the one hand, and southern Virginia points on the other hand, and this scale for distances 190 miles and less was lower than the scale previously prescribed in *Southern Class Rate case, supra.* This scale was later prescribed for application on North Carolina intrastate traffic in *Class Rates Within the State of North Carolina*, 238 I. C. C. 225, and the rates became effective October 31, 1940. As heretofore stated, this modified scale for distances 190 miles and less was adopted for general application within Southern territory effective July 7, 1941.

In fixing the class rates between Southern territory, except points in Virginia and North Carolina, on the one hand, and Trunk Line territory (not including the Buffalo-Pittsburgh zone) and New England territory, on the other hand, and between Southern territory and the Buffalo-Pittsburgh zone, the Commission used "key rates." The underlying reasons for this system of key rates were fully stated by the Commission in its report in the *Southern Class Rate case, supra.*

These key rates, on the whole, were lower than they would have been if they had been made on the general basis. The reason for this was the influence of the water-rail routes. The Commission decided that these rates should be determined with regard to the reasonably direct routes partly by water. Following the original decision of the Commission, the carriers suggested the advisability of making the all-rail rates between the East and the South without regard to the water-rail routes and then fix the

water-rail rates by deducting differentials from the all-rail rates. The Commission was unwilling to follow this plan and prescribed a level of rates having regard for both the all-rail and water-rail routes, and, as the Commission said, the rates so prescribed were, in some instances, not as high and, in others, not as low as they would have been if the routes had been independently considered. In other words, the all-rail rates between the East and the South were made somewhat lower than they would have been if they had been constructed independently of the rates via the water-rail routes. The Commission also prescribed rate groups in connection with these rates.[6]

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[6] At page 700 of its decision in *Southern Class Rate Investigation*, 100 I. C. C. 513, the Commission said, at page 700:

> "Under the special and peculiar conditions surrounding the movement of traffic between southern territory and eastern points from and to which routes partly by water furnish an economical and efficient means of transportation, we are of the opinion that the interterritorial class rates applicable to such traffic should be determined with regard both to the reasonably direct routes wholly by rail and to the reasonable direct routes partly by water. Inasmuch as the all-rail routes and the water-rail routes through Norfolk approach southern territory destinations from the north while the water-rail routes through south Atlantic ports approach the same destinations from the east, it is impracticable to work out such an adjustment without resort to fairly extensive groups. For this purpose we have divided southern territory into 30 groups which are shown by the map in Appendix N. Much of Kentucky and part of Tennessee have not been included in this grouping, for the reason that it is intended to cover only such points in southern territory as can reasonably be reached from some eastern point by a water-rail route. The excluded portions of Kentucky and Tennessee can not, we think, be so reached, and it follows that the through rates to and from these portions should in all cases be made by the use of the southern territory scale as a maximum subject to the alternative application of the differentials south of the gateway points for which provision is hereinafter made. We have not divided eastern territory into groups, but have instead selected certain representative cities as key points in the fixing of the rates. With the help of these key points the carriers will no doubt be able to divide the territory into reasonable groups. In view of the many practical

The interterritorial class rates reflect the same class relationships as are observed in the intraterritorial adjustment and are likewise governed by the Southern classification.

The class rates prescribed or approved in the *Southern Class Rate case, supra,* were made effective January 15, 1928. The modifications required by the reports in the so-called border cases became effective October 27, 1936, and the modification of the basic class rates within the South for distances of 190 miles and less, which the carriers made voluntarily to harmonize the intraterritorial class rates with those prescribed in the *North Carolina case,* became effective July 7, 1941. These rates with the increases authorized by the Commission in the general increase cases are in effect today.[7]

The Class-Rate Structure Between Southern and Southwestern Territories.

Joint through class rates between Southern and Southwestern territories were first prescribed by the Commission in *Consolidated Southwestern Cases,* 123 I. C. C. 203,[8] decided April 5, 1927, and made effective July 14, 1928. The class rates now in effect between Southern and South-

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considerations which properly influence the determination of group boundaries, it has seemed best not to attempt this task in eastern territory for the present, although it may be found desirable to do so if it becomes necessary to issue an order. It may also prove desirable to make minor modifications in the southern group boundaries shown in Appendix N."

[7] In its decision of April 6, 1943, in *Ex Parte No. 148,* 255 I. C. C. 357, on further hearing, the Commission suspended from and after May 15, 1943, until January 1, 1944, the increases in rates and charges which it had authorized in its original decision, 248 I. C. C. 545.

[8] The *Consolidated Southwestern Cases* involved the class rates between points in the Southwest and also between points in that territory, on the one hand, and points in Southern and Official territories, on the other hand. Rates on numerous commodities were also under investigation.

western territories were fixed by the Commission. The current rates were established pursuant to the twenty-first and twenty-second suplemental reports of the Commission, decided November 22, 1934, and December 2, 1935, respectively.[9] They were made effective on April 9, 1937, and, with the general increases authorized by the Commission, are in effect today.

In fixing these rates the Commission used a system of key rates. They are governed by the Western Classification and exceptions thereto.

The Class-Rate Structure Between Southern Territory and Western Trunk Line Territory and Southern Missouri.

The class rates now in effect between Southern territory, on the one hand, and Western Trunk Line territory, including extended Zone C in Wisconsin, and southern Missouri, on the other hand, were established pursuant to the report and order of the Interstate Commerce Commission in *Western-Southern Class Rates,* 226 I. C. C. 497, decided April 5, 1938.

These class rates reflect the "key" rates set forth in Appendix E to the said report, and are governed by the classifications and exceptions shown in the following table:

From and To:	*Classification and Exceptions*
From Western Trunk Line territory, including extended Zone C in Wisconsin and from southern Missouri, to a southern territory: From southern territory to Zone C in Wisconsin and to west-bank Lake Michigan ports north thereof over car-ferry routes:	Southern Classification and exceptions thereto applicable in the same direction between most points in Illinois territory and the south.

[9] 205 I. C. C. 601, and 211 I. C. C. 575.

From southern territory to western trunk line territory, excluding Zone C in Wisconsin and the lake ports described above, and to southern Missouri:	Western Classification and exceptions thereto applicable from most points in Illinois territory to western trunk line territory.

The relations between the classes under the system of rates prescribed in the *Western-Southern case* are:

Western Classes	*1*	*2*	*3*	*4*	*A*	*5*	*B*	*C*	*D*	*E*
Percentages	100	85	70	55	45	37.5	32.5	30	22.5	17.5

Southern Classes	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*
Percentages	100	85	70	55	45	40	35	30	25	22.5	20	17.5

The class rates prescribed in this case became effective June 7, 1939, and with the general increases authorized by the Commission in the *Fifteen Percent case, 1937-38*, and *Increased Railway Rates, Fares and Charges, 1942*, are in effect today.

In summarizing the above sketch of the class-rate structure, it will be observed that with the single exception of Trans-Continental rates which were established by the Director General of Railroads during the period of Federal control, the entire system of class rates within Southern territory and between that territory and the balance of the United States has been specifically prescribed or approved by the Interstate Commerce Commission, after exhaustive investigations within the last fifteen years.

The Commodity-Rate Structure Within, From, and To Southern Territory.

By far the greater part of the commodity-rate structure within, from, and to Southern territory has been completely revised during the past fifteen years.

A complete general revision of practically the entire commodity-rate structure within Southern territory and between that territory and Official territory was undertaken by the carriers immediately following the establishment of the class rates prescribed in the *Southern Class Rate case, supra.*

The purpose of that general provision of the commodity-rate structure was four-fold: (1) to bring these rates into conformity with the requirements of the long-and-short-haul provisions of Section 4(1) of the Interstate Commerce Act; (2) to harmonize, as nearly as possible, the commodity-rate structure with the principles underlying the prescribed or approved class rates; (3) to meet changed economic and competitive conditions; and (4) to provide modifications of the rates resulting from the class-rate prescriptions where, in the judgment of the railroads and the shipping public, such modifications were and are essential to the free movement of particular commodities.

Actually, the task of revising these commodity rates between Southern and Official territories has been practically completed, and there now remains for treatment only a relatively small number of miscellaneous commodity rates.

The *Consolidated Southwestern case, supra,* involved both class and commodity rates. The decision of the Commission in that case prescribed rates, or bases of rates, for application to the principal commodities moving between the Southwest and the South which bore definite and fixed percentage relationships to the prescribed first-class rates.

As has been explained, the class rates orginally prescribed in the *Consolidated Southwestern cases,* were completely revised effective April 9, 1937, pursuant to the twenty-first and twenty-second supplemental reports on reconsideration therein. Although the twenty-second supplemental report relieved the carriers of the necessity of immediately conforming the then existing commodity rates to the newly prescribed class rates, this task was subsequently undertaken with the result that there are now only

forty-two commodity groups on which rates related to the former first-class rates are applicable between the South and the Southwest.

Following the establishment of the class rates prescribed in the *Western-Southern case* and the classification exceptions or "column rates" required therein, between the South and Western Trunk Line territory, effective June 7, 1939, the carriers' committees undertook a general revision of commodity rates between those territories with a view to bringing them into conformity with the requirements of Section 4 of the Act, as now administered, and readjusting them where necessary to meet the needs of commerce.

The revision of these commodity rates has progressed to a point where only twenty-seven commodity groups from the South to Western Trunk Line territory and fifty-six commodity groups from that territory to the South remain to be treated.

Appendix E to Exhibit 15 shows the extent to which exceptions to the classification or "column rates," having general application and bearing a fixed and definite relationship to the concurrent first-class rates, are now in effect within Southern territory and between that territory and Official (including Illinois) territory, Southwestern territory, and Western Trunk Line territory, respectively. These rates are published in the form of "exceptions to the classification" or "column rates," but whatever the names they are designated in the tariffs, they bear a fixed, definite relationship to the first-class rates, and, therefore, reflect the underlying principles of the class-rate structures which the Commission prescribed or approved in the *Southern, Southwestern, and Western-Southern Class Rate cases.*

It will be seen from Appendix E of Exhibit 15 that these rates, which bear a fixed percentage relationship to the class rates, apply upon a vast multitude of commodities. The table below shows the number of commodities subject to these rates within Southern territory and between that territory and each of the other rate territories:

Application		*Number of Commodities*
Within Southern territory		644
Between Southern territory and Central territory		582
Between Southern territory and Illinois territory		606
Trunk Line and New England		581
Southwestern territory		379
Western Trunk-Line	N.	222
	S.	255

N.—Northbound
S.—Southbound

All of these rates which have been made effective since the class rates to which they are related were prescribed or approved by the Commission. A great many of them have been specifically considered by the Commission in formal proceedings in which the existing percentage relationships of the commodity rates to the concurrent class rates, or relationships producing higher rates, have been prescribed or approved.

The study made by Mr. Morris reveals that since 1927 a large part of the commodity-rate structure within the South and between the South and the greater part of the United States has been revised to reflect the underlying principles of the class-rate structures which this Commission has prescribed, and has been the subject of intensive consideration by the railroads, the Commission, and the shipping public.

A tremendous tonnage of commodities moves within Southern territory on commodity rates published in the form of mileage scales or specific point-to-point commodity rates based upon mileage scales. Prominent among these commodities are brick,[10] case iron pipe and fittings,[11] ce-

[10] *Brick and Clay Products From, To, and Between Points in Southern Territory*, 88 I. C. C. 543, 155 I. C. C. 730.

[11] *Krupp Foundry Company* v. *Southern Ry. Co., et al*, 148 I. C. C. 743, 156 I. C. C. 415.
Wrought Pipe and Fittings, 234 I. C. C. 347.
Alabama Iron & Steel Shippers Conference, et al. v. *A. T. & S. F. Ry. Co., et al*, 213 I. C. C. 381.

ment,[12] lime,[13] road aggregates,[14] live stock,[15] furnace raw materials,[16] fertilizer and fertilizer materials,[17] cotton,[18] petroleum and petroleum products,[19] lumber,[20] scrap iron, iron and steel articles,[21] and pulpwood.[22] The rates on those commodities have either been prescribed or approved by this Commission, or are at lower levels than this Commission has prescribed or approved for general application in Southern territory.

The importance of these mileage-scale rates is shown by the volume of the movement of the commodities on which they apply. During the year 1941, for example, the originated tonnage of these commodities, (exclusive of furnace raw materials for which statistics are not available), amounted to 65,084,448 tons or 38 per cent of the total originated tonnage of the Class I railroads of the Southern region, divided as follows:

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[12] *Southern Cement Rates*, 132 I. C. C. 427.

[13] *Lime between Southern Points*, 129 I. C. C. 635.

[14] *Rates on Chert, Clay, Sand and Gravel Within the State of Georgia*, 122 I. C. C. 133.

[15] *Live Stock To, From and Between Points in the Southeast*, 74 I. C. C. 419.

Live Stock To and From the South, 253 I. C. C. 241.

[16] *Alabama Company et al* v. *D. G. et al*, 78 I. C. C. 561.

[17] *Fertilizers and Fertilizer Materials between Southern Points*, 113 I. C. C. 389.

[18] *Rate Structure Investigation, Part 3, Cotton*, 165 I. C. C. 595.

[19] *Rate Structure Investigation, Part 4, Petroleum and Petroleum Products*, 171 I. C. C. 286.

[20] *Lumber and Forest Products Between Southern Points and Destinations in Virginia*, 157 I. C. C. 280.

Pensacola Creosoting Co. v. *C. of Ga., et al*, 179 I. C. C. 540.

[21] *Iron and Steel in the South*, 195 I. C. C. 255.

Scrap Iron and Scrap Steel in Southern Territory, 182 I. C. C. 175.

[22] *Pulpwood in Florida*, 232 I. C. C. 567.

West Virginia Pulp & Paper Co. v. *Sou. Ry. Co., et al*, 96 I. C. C. 244.

Cordwood and Pulpwood between Points in Alabama, 178 I. C. C. 509.

	Tons	Percent of Total
Brick	1,186,536	.70
Cast Iron Pipe	835,835	.49
Cement	3,761,959	2.20
Lime	312,963	.18
Road Aggregates	21,253,109	12.45
Live Stock	512,087	.30
Fertilizer	4,862,849	2.85
Sulphuric acid	703,397	.41
Cotton	1,195,793	.70
Petroleum	7,120,616	4.17
Iron and steel articles	1,244,126	.72
Scrap iron	1,177,195	.69
Lumber	13,823,062	8.10
Pulpwood	7,094,921	4.16
Total	65,084,448	38.13
Total all traffic originated	170,704,052	100.00

There are a number of commodity rates which are published as specific point-to-point rates and which are unrelated to the class rates. These rates are maintained between the South and other territories. The rates on coal from Kentucky, Tennessee, Alabama, and southwest Virginia to the North and Northwest are examples of such rates. Other examples are the rates on lumber, phosphate rock, and pig iron from the South to the North and the East. These commodity rates were published for this purpose of meeting competition or commercial conditions.

The foregoing sketch of the class and commodity rate structures within Southern territory and between that territory and Official, Southwestern, and Western Trunk Line territories shows that the great majority of them have been

prescribed or approved by this Commission.[23] They are the result of intensive study by this Commission, the railroads, and the shipping public.

[23] An analysis made by Mr. B. F. Morris to determine the extent to which the tonnage handled by Class I railroads of the Southern region moves under rates not in excess of maximum rates or bases prescribed or approved by the Interstate Commerce Commission or rates involved in proceedings now pending before the Commission shows that, excluding coal, 81.4 percent so moves, and including coal, 88.6 percent (Exhibit 15).

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER ..10.. ORIGINAL

THE STATE OF GEORGIA,

Complainant,

v.

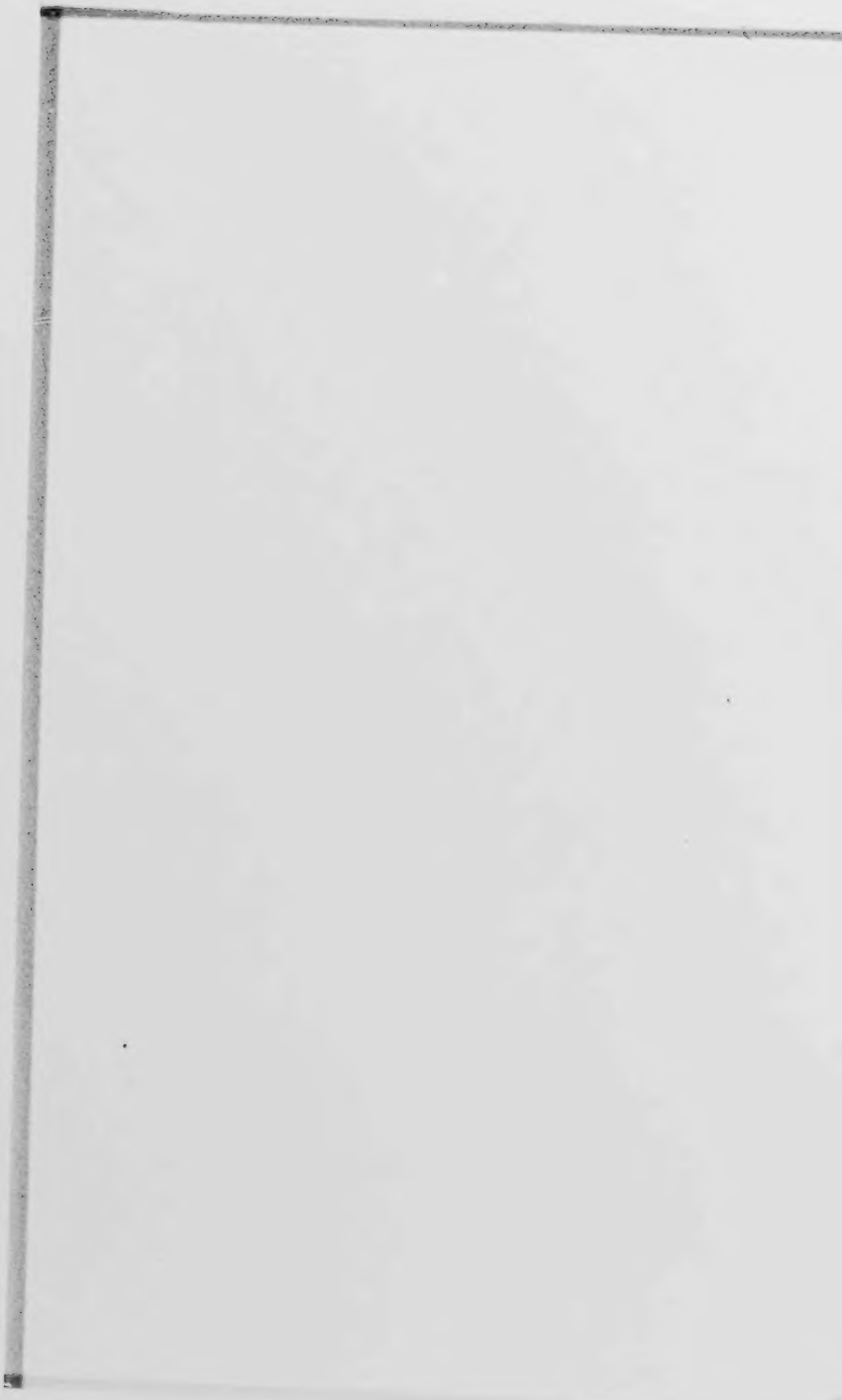
THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

RETURN TO RULE TO SHOW CAUSE AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term, 1944

NUMBER ..... ORIGINAL

THE STATE OF GEORGIA,

Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

RETURN TO RULE TO SHOW CAUSE

And now come The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company, defendants above named and being two of the defendants referred to in the proposed bill of complaint herein as the "northern defendants" and make this the separate return of each of them to the rule to show cause entered herein on the sixth day of November, 1944 why the complainant State of Georgia should not be granted leave to file its proposed bill of complaint in the above-entitled matter, in accordance with its motion for leave to file said bill of complaint submitted to this Court on or about the 17th day of June, 1944, and its motion for leave to file an amended bill of complaint submitted to this Court on or about the 19th day of September, 1944.

These defendants, by way of return to said show cause order, respectfully submit that complainant's motion for leave to file its proposed bill of complaint should be denied because if said motion were granted and said bill of complaint filed, said bill would have to be dismissed as failing to state a cause of action for the following reasons:

I.

Insofar as the proposed complaint* purports to state a claim for injunctive relief against the establishment and collection of certain rates and charges, it fails to state a cause of action because it lacks the necessary and essential allegation that the rates and charges complained of have been challenged before, and passed upon and found improper by, the Interstate Commerce Commission in the exercise of its primary jurisdiction; and because, if such rates and charges may in fact have been passed upon by the Commission, the proposed bill of complaint constitutes an unwarranted attempt to obtain a judicial review of an order or orders of the Commission otherwise than in the manner and through the procedural channels duly provided by law.

II.

Insofar as said proposed complaint presents a claim for injunctive relief under the antitrust laws against the defendant and other carriers and seeks to restrain them, their agents, assistants and employees from establishing

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* "Complaint" or "proposed complaint", as hereinafter used, refers to the amended complaint attached to the State of Georgia's motion praying leave to file said amended complaint, which was submitted to this Court on or about September 19, 1944.

rates through the established method of rate committees, associations and bureaus, it fails to state a cause of action because the right of a complainant other than the United States to injunctive relief under the antitrust laws derives solely from Section 16 of the Clayton Act, and said action specifically exempts common carriers by railroad from suits in equity seeking injunctive relief with respect to any matter subject to the jurisdiction of the Interstate Commerce Commission, where such suit is not instituted by the United States (15 U. S. C., Sec. 26).

III.

Insofar as said proposed complaint requests that certain rates, and certain practices alleged to be followed in the establishment of such rates, be decreed unlawful, and insofar as said proposed complaint presents a claim for damages alleged to have resulted to complainant itself, to its citizens, and to private shippers within its borders from such allegedly unlawful rates and practices, it fails to state a cause of action because such request and such claim, insofar as they may be grounded on the Interstate Commerce Act, ignore and disregard the primary jurisdiction of the Interstate Commerce Commission to determine the unreasonableness or other unlawfulness of rates; and insofar as said request and said claim may be grounded on the antitrust laws, they ignore and violate the rule of law laid down by this Court that a shipper is not entitled to bring suit for damages or other relief under the antitrust laws against a carrier because of alleged combination, conspiracy or agreement with respect to any matter subject to the jurisdiction of the Interstate Commerce Commission; and to such request and claim for damages further fail to state a cause

of action insofar as relief is sought for the use of citizens of the State of Georgia or private shippers within the said State, because a State has no standing in this Court to enforce the private rights of its citizens and residents.

IV.

Insofar as said proposed complaint presents a claim of the State of Georgia in its alleged capacity as sovereign, quasi-sovereign, or representative of a general class or classes of its citizens, as set forth in the first, second and fourth counts of said proposed complaint, it fails to state a cause of action, because it does not present a "case" or "controversy" within the meaning of Section 2 of Article III of the Constitution, the second clause of which confers original jurisdiction upon this Court of all "Cases • • • in which a State shall be Party," and under the decisions of this Court a suit brought by a State in the capacity of guardian or representative of its citizens, for the purpose of redressing alleged wrongs committed against its citizens, is not such a "case" and therefore does not come within the judicial power granted by Article III of the Constitution to the courts of the United States, including this Court.

Wherefore, these defendants above named pray that the complainant's motion for leave to file said proposed bill of complaint be denied.

RALSTONE R. IRVINE,
Attorney for The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company.

BRIEF IN SUPPORT OF RETURN TO RULE TO SHOW CAUSE

This brief is submitted on behalf of The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company in support of their separate returns to the rule to show cause why complainant State of Georgia should not be granted leave to file in this Court its proposed bill of complaint in the above entitled matter.

Jurisdiction

The State of Georgia seeks to invoke the jurisdiction of this Court under Article III, Section 2 of the Constitution of the United States.

Question Presented

Whether the amended and substituted complaint of the State of Georgia, relying upon an alleged conspiracy of common carriers to fix and maintain freight rates subject to the jurisdiction of the Interstate Commerce Commission, states a cause of action for damages or for an injunction either under the antitrust laws or at common law.

Constitutional Provisions Involved

Article III, Section 2, clauses 1 and 2, of the Constitution are as follows:

> "SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Statutes Involved

Judicial Code, section 233, 28 U. S. C. 341, provides:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."

The pertinent provisions of Sections 1, 4 and 8 of the Act of July 2, 1890, 26 Stat. 209, 210, as amended, 15 U. S. C., secs. 1, 4, and 7, commonly known as the Sherman Act, are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: • • •
>
> Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. • • •
>
> Sec. 7. The word 'person' or 'persons', wherever used in sections 1-7 and 15 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State or the laws of any foreign country."

The pertinent provisions of Sections 4 and 16 of the Act of October 15, 1914, 38 Stat. 730, 731, 737, 15 U. S. C., secs. 15 and 26, commonly known as the Clayton Act, are as follows:

> "Sec. 15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy,

and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 26. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Statement of the Case

On November 6th, 1944, this Court issued its rule requiring the defendants to show cause why leave should not be granted to the State of Georgia to file its amended complaint in an original action in this Court against, among others, The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company, upon whose behalf this brief is filed.

The State of Georgia alleges (Complaint, paragraphs 9-16): The defendant carriers have entered into a combination and conspiracy by which they have fixed and maintained at arbitrary and non-competitive levels interstate freight rates, particularly rates to and from Georgia. These rates discriminate against localities, ports and shippers in Georgia in favor of localities, ports and shippers in other states. As a result of the conspiracy the defendants have exacted from Georgia as a shipper and from shippers within that State unjust, unreasonable, arbitrary, non-competitive and preferential charges for transporting commodities.

The State of Georgia seeks an injunction against the future fixing of rates pursuant to the alleged conspiracy and damages for the injury allegedly caused to it and to its citizens by the fixing of rates pursuant to the alleged conspiracy (Complaint, paragraph 22). It seeks this relief as (1) a sovereign, (2) a quasi-sovereign, (3) a proprietor, and (4) a protector of the people of Georgia[1] (Complaint, paragraph 2).

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[1] In so far as the proposed suit is brought in behalf of individuals to assert their individual rights of action, it would seem that it fails to present a case to which the State of Georgia is a party, within the meaning of Article III, Section 2, clause 2 of the Constitution.

Oklahoma v. *Cook*, 304 U. S. 387 (1938) and cases cited;

In so far as the proposed suit is brought by the State of Georgia in a sovereign or quasi-sovereign capacity to redress alleged injuries to its general economic welfare, it would seem that it fails to present a justiciable controversy within the meaning of Article III, Section 2, clause 1.

The determination of this motion will turn upon the effect of the Interstate Commerce Act upon the right of Georgia, under the antitrust laws or at common law, to recover damages or to secure an injunction because of the exaction by carriers of unreasonable freight rates. It must be assumed, there being no allegation to the contrary, that the rates complained of are rates stated in schedules filed with the Interstate Commerce Commission and published according to the requirements of the Interstate Commerce Act. It is the duty of the carriers under the Act to enforce such rates against shippers. (49 U. S. C., Sec. 6 (7)).

ARGUMENT

I.

The State of Georgia cannot maintain an action under the antitrust laws either for damages or for an injunction based upon a conspiracy among carriers to fix or maintain rates.

The State of Georgia apparently recognizes the long settled rule that the Interstate Commerce Commission has exclusive and plenary jurisdiction to determine whether the

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Massachusetts v. *Mellon*, 262 U. S. 447 (1923);
Minnesota v. *Northern Securities Company*, 194 U. S. 48 (1904);
Wisconsin v. *Pelican Insurance Company*, 127 U. S. 265 (1888).

It is not deemed necessary to urge these contentions, however. In so far as the proposed suit is brought by the State of Georgia in its proprietary capacity, it purports to present both a case to which the State of Georgia is a party and a claim of the State of Georgia against the defendants.

rates of carriers subject to the Interstate Commerce Act (49 U. S. C., Secs. 1-27) are just, reasonable and non-discriminatory. This rule establishes that no action will lie for damages or an injunction in the absence of a prior finding by the Commission that the rate or practice complained of is unjust, unreasonable, discriminatory or otherwise unlawful.[2]

The State seeks to distinguish between a cause of action based upon the imposition of rates alleged to be unlawful and one based upon a conspiracy pursuant to which such rates are established. This is evident from the description of its claim in paragraph 19 of the proposed amended bill of complaint:

> "The action is against a conspiracy among private parties, operating without legal warrant, imposing wrongs on the State and the citizens of Georgia, and existing in violation of the common law against tort, the common law against conspiracy, and the Anti-trust Laws of the United States. The conspiracy organized years ago and in continuous operation is manifest, among other things, in freight rates which are prejudicial to the interests of the State and the citizens of Georgia. There is in the federal statutes no legal recognition of collective or collusive action for the fixing of railroad rates. It is not a specific rate structure which the State of Georgia attacks but a continuing situation, created and maintained by a conspiracy of carriers."

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[2] *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426 (1907); *Robinson* v. *Baltimore and Ohio Railroad Company*, 222 U. S. 506 (1911); *Northern Pacific Railway Company* v. *Solum*, 247 U. S. 477 (1918); *Midland Valley Railroad Company* v. *Barkley*, 276 U. S. 482 (1928); *Director General of Railroads* v. *The Viscose Company*, 254 U. S. 498 (1921).

This Court has explicitly held that no such distinction exists.

> *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U. S. 156 (1922);
> *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469 (1933);
> *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500 (1936).

In *Keogh* v. *Chicago & Northwestern Railway Company, supra*, this Court held that a carrier is not liable under the Sherman Act to a shipper for damages allegedly resulting from the operation of a rate-fixing combination, it appearing that the rate allegedly established by the conspiracy had been approved by the Commission. This Court observed: "A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce" (p. 162).

In *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469 (1933), the plaintiff sought under Section 16 of the Clayton Act[3] (15 U. S. C., Sec. 26), to restrain the performance by a carrier of a contract relating to practices subject to the jurisdiction of the Interstate Commerce Commission on the ground that the contract itself as distinguished from the prac-

---

[3] This section extended to persons other than the United States the right to obtain an injunction "against threatened loss or damage by a violation of the anti-trust laws". It also provided that no such injunction could be obtained, except by the United States, against a common carrier subject to the jurisdiction of the Interstate Commerce Commission "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

tices required thereby was not "subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission". Similarly Georgia seeks to enjoin, not the rates charged by the defendants, which are subject to the jurisdiction of the Interstate Commerce Commission, but an alleged conspiracy or agreement by means of which those rates are established. In the *Central Transfer* case this Court held that even if it were assumed that the Interstate Commerce Commission had no jurisdiction over the contract alleged to violate the Antitrust Law, it had jurisdiction over any acts which the carrier might do pursuant thereto and for that reason no injunction should issue. This Court said:

> "True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way in which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission." (p. 476)

In *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500 (1936), the plaintiff warehouse company sought to recover treble damages under the antitrust laws from a carrier and a competing warehouse company. The plaintiff alleged that the defendant carrier had agreed to make discriminatory payments and allowances to the de-

fendant warehouse company to the injury of the plaintiff. Holding that the arrangement related solely to matters of which the Interstate Commerce Commission had regulatory jurisdiction and, therefore, it could not be regarded as violative of the Sherman Act, even though it actually restrained competition, this Court said:

> "Discriminatory privileges and payments given by a carrier to a consignor or consignee are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-Trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends. In the absence of such a showing a sufferer from discriminatory charges and allowances has his remedy under the Commerce Act for any damage to his business, and that remedy is exclusive against all the parties to the wrong." (p. 511)

The decisions of this Court in the *Keogh, Central Transfer* and *Terminal Warehouse* cases were not based upon a restrictive interpretation of the antitrust laws. Those cases recognized that the Congress in enacting the antitrust laws intended to forbid every unreasonable restraint of interstate commerce in every field of human activity. *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1 (1911). But the Interstate Commerce Act also embodies a fundamental congressional policy, that of relying upon administrative regulation of the rates and practices of carriers to prevent the evils and redress the injuries caused by improper rates and practices. Where these two congressional policies conflict, these cases decide, the policy of the Interstate Commerce Act controls.

The State of Georgia in its proposed amended complaint alleges a conspiracy to establish unlawful freight rates. The conspiracy has no purpose other than the establishment of such rates. The only injury which could be suffered by Georgia or its citizens would flow from the imposition of such rates. For the redress of that injury the Interstate Commerce Commission has plenary and exclusive jurisdiction. It follows that the alleged conspiracy is indistinguishable from the agreements involved in the *Keogh, Central Transfer* and *Terminal Warehouse* cases. Every consideration of law and policy which led to the denial of recovery in those cases calls for a similar result here.

II.

The State of Georgia cannot maintain an action on common law principles based upon a conspiracy among carriers to fix or maintain rates.

The public policy which led this Court consistently to deny to a shipper either legal or equitable relief under the antitrust laws applies with equal force to defeat the effort of the State of Georgia to obtain similar relief on common law principles. To assert that relief granted upon an antitrust theory would run contrary to an established national policy, but that the identical relief granted upon a common law theory would be consistent with that policy, is a manifest contradiction.

This public policy has found further expression in a long line of cases beginning with *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426 (1907) which have held that whatever right may have

existed at common law to recover damages resulting from, or to obtain an injunction restraining the collection of, excessive rates has been modified or superseded by the rights and remedies granted by the Interstate Commerce Act. In these cases the courts have grounded their conclusion on the pre-emption of the field by the exclusive jurisdiction granted to the Interstate Commerce Commission to determine what rates are legal. The force of the *Abilene* and later cases is in no way avoided by the fact that, in form, Georgia purports to seek injunctive relief from an alleged conspiracy to fix rates as distinguished from the enforcement of such rates. There would be no way by which the conspiracy itself could be effectively assailed by injunction except by restraining the acts done in performance of it, *i. e.*, the maintenance of rates established in accordance with the Interstate Commerce Act. *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469, 476 (1933); *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500 (1936); and *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U. S. 474 (1932).

Legal injury is an indispensable element of a common law cause of action for damages or an injunction. If either The State of Georgia or any of its citizens have suffered any injury it must have been caused by the rates of the defendants rather than by the alleged combination to maintain those rates. The combination or agreement in and of itself could injure no one. It is not claimed that the allegedly discriminatory rates were other than the lawful rates established by the filing of tariffs with the Interstate Commerce Commission. Even if these rates were held by the Commission to be discriminatory, the only legal injury

to Georgia or its citizens would result from the discrimination itself for which they would enjoy a right of reparation under the Interstate Commerce Act. Thus relief is afforded for every legal injury, leaving no injury or wrong which flows from the conspiracy itself.

In any event this Court may recognize the alleged common law cause of action only if there be a body of law dealing with restraints of interstate commerce independent of the Sherman Act. When this Court exercises its original jurisdiction, it does not sit as a court of any state. In purely local matters it enforces the laws and policies of the particular state involved under established rules of comity, but in a case such as this the law applied and policies enforced are of necessity not State but Federal. *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931). The applicable Federal laws are the antitrust laws which reach every possible ramification of interstate commerce, except as their scope has been restricted by the Interstate Commerce Act. *Standard Oil Company of New Jersey* v. *United States,* 221 U. S. 1, 59 (1911).

Since the antitrust laws are all inclusive with respect to those restraints of interstate trade and commerce for which a remedy is sought in the Courts rather than before the Interstate Commerce Commission, there is no room for the development by this Court of an independent policy in that field. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943; *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (1942); *D'Oench Duhme & Co.* v. *F. D. I. C.,* 315 U. S. 447 (1942); *Deitrick* v. *Greaney,* 309 U. S. 190 (1940).

CONCLUSION

For the reasons herein stated and on the authorities herein cited leave to file the amended bill of complaint should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 10..... Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

RETURN TO RULE TO SHOW CAUSE and BRIEF IN SUPPORT OF RETURN TO RULE TO SHOW CAUSE.

JOHN DICKINSON,
Attorney for The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, L. F. De Ramus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1944.

No. ..... Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

RETURN TO RULE TO SHOW CAUSE

And now come The Pennsylvania Railroad Company; The Baltimore & Ohio Railroad Company; Chicago & Eastern Illinois Railroad Company; L. F. De Ramus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company; Erie Railroad Company; The New York Central Railroad Company; Norfolk & Western Railway Company; Richmond, Fredericksburg

& Potomac Railroad Company; Wabash Railroad Company and Western Maryland Railway Company, defendants above named and being the defendants referred to in the proposed complaint herein as the "northern defendants," and make this return to the rule to show cause entered herein on the tenth day of November, 1944, why the complainant State of Georgia should not be granted leave to file its proposed complaint in the above-entitled matter, in accordance with its motion for leave to file said complaint submitted to this Court on or about the 19th day of June, 1944, and its motion for leave to file an amended complaint submitted to this Court on or about the 20th day of September, 1944.

By way of return to said show-cause order, these defendants respectfully submit that complainant's motion for leave to file its proposed complaint* should be denied, because if said motion were granted and said complaint filed, said complaint would have to be dismissed as failing to state a cause of action for the following reasons:

I.

Insofar as the proposed complaint purports to state a claim for injunctive relief against the establishment and collection of certain rates and charges, it fails to state a cause of action because it lacks the necessary and essential allegation that the rates and charges complained of have been challenged before, and passed upon and found improper by, the Interstate Commerce Commission in the exercise of its primary jurisdiction; and because, if such rates and charges may in fact have been passed upon by the Commission, the proposed complaint constitutes an unwarranted attempt to obtain a judicial review of an

* "Complaint" or "proposed complaint", as hereinafter used, refers to the amended complaint attached to the State of Georgia's motion praying leave to file said amended complaint, which was submitted to this Court on or about September 20, 1944.

order or orders of the Commission otherwise than in the manner and through the procedural channels duly provided by law.

II.

Insofar as said proposed complaint presents a claim for injunctive relief under the Anti-Trust Laws against the defendant and other carriers and seeks to restrain them, their agents, assistants and employes from establishing rates through the established method of rate committees, associations and bureaus, it fails to state a cause of action because the right of a complainant other than the United States to injunctive relief under the anti-trust laws derives solely from Section 16 of the Clayton Act, and said section specifically exempts common carriers by railroad from suits in equity seeking injunctive relief with respect to any matter subject to the jurisdiction of the Interstate Commerce Commission, except where such suit is instituted by the United States (15 U. S. C. 26).

III.

Insofar as said proposed complaint requests that certain rates, and certain practices alleged to be followed in the establishment of such rates, be decreed unlawful, and insofar as said proposed complaint presents a claim for damages alleged to have resulted to complainant itself, to its citizens, and to private shippers within its borders from such allegedly unlawful rates and practices, it fails to state a cause of action because such request and such claim, insofar as they may be grounded on the Interstate Commerce Act, ignore and disregard the primary jurisdiction of the Interstate Commerce Commission to determine the unreasonableness or other unlawfulness of rates; and insofar as said request and said claim may be grounded on the Anti-Trust Laws, they ignore and violate the rule of law laid down by this Court that a shipper is not entitled to bring suit for damages under the Anti-Trust Laws

against a carrier because of alleged combination, conspiracy or agreement with respect to any matter subject to the jurisdiction of the Interstate Commerce Commission; and such request and claim for damages further fail to state a cause of action insofar as relief is sought for the use of citizens of the State of Georgia or private shippers within the said State, because a State has no standing in this Court to enforce the private rights of its citizens and residents.

IV.

Insofar as said proposed complaint presents a claim of the State of Georgia in its alleged capacity as sovereign, quasi-sovereign, or representative of a general class or classes of its citizens, as set forth in the first, second and fourth counts of said proposed complaint, it fails to state a cause of action, because it does not present a "case" or "controversy" within the meaning of Section 2 of Article III of the Constitution of the United States, the second clause of which confers original jurisdiction upon this Court of all "Cases * * * in which a State shall be Party," since under the decisions of this Court a suit brought by a State in the capacity of guardian or representative of its citizens, for the purpose of redressing alleged wrongs committed against its citizens, is not such a "case" and therefore does not come within the judicial power granted by Article III

of the Constitution to the courts of the United States, including this Court.

Wherefore, these defendants above named pray that the complainant's motion for leave to file said proposed complaint be denied.

JOHN DICKINSON,

Attorney for The Pennsylvania Railroad Company,
The Baltimore & Ohio Railroad Company,
Chicago & Eastern Illinois Railroad Company,
L. F. De Ramus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company,
Erie Railroad Company,
The New York Central Railroad Company,
Norfolk & Western Railway Company,
Richmond, Fredericksburg & Potomac Railroad Company,
Wabash Railroad Company, and
Western Maryland Railway Company.

December 11, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ..... Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

BRIEF IN SUPPORT OF RETURN TO RULE TO SHOW CAUSE.

The motion of the State of Georgia for leave to file this proposed suit should be denied for reasons which are apparent on the face of the proposed amended complaint now on file in this Court in connection with said motion. These defendants treat said amended complaint as having been substituted for, and taking the place of, the original complaint attached to the first motion for leave. All that is said herein with respect to the amended complaint is to be taken as applicable in all essentials to the original complaint, and defendants submit that the reasons herein urged for denying leave to file the amended complaint are equally conclusive against granting permission to file the original complaint, if that issue should be regarded as still before the Court.

Point 1.

Leave to File Should Be Denied With Respect to the First, Second and Fourth Counts of the Proposed Amended Complaint, Because Each of These Three Counts Fails to Present, Within the Meaning of the Second Clause of Section 2 of Article III of the Constitution, a "Case" or "Controversy" to Which the State is a Party and Which is Within the Judicial Power Granted by that Article to the Courts of the United States, Including This Court.

The proposed amended complaint consists (pages 6-7) of four counts. These defendants submit that the first, second and fourth counts do not come within the judicial power granted by Article III of the Constitution to the courts of the United States, including this Court, because they do not present a "case" or "controversy" within the meaning of Section 2 of Article III of the Constitution, for the following reasons:

In the first, second and fourth counts contained in the amended complaint, the State of Georgia seeks leave to bring this suit in some public or representative, sovereign or quasi-sovereign, capacity, rather than to assert a proprietary right or rights of its own. The third count is the only part of the proposed amended complaint where Georgia asks relief in its proprietary capacity.

It is not easy to differentiate or distinguish with clarity or nicety between all the different shadings of public character intended to be designated or defined in the first, second and fourth counts.

In the first the State is said to sue "as a sovereign, charged with the government of its citizens...and the promotion of the general welfare of its people." The gist of this count is that the State has been hampered and hindered in the discharge of its governmental powers and duties by the conduct of the defendants, which is said to have interfered with the effectiveness of governmental measures

taken by the State "to shape the pattern of its State-economy."

In the second count the State is said to sue in a "quasi-sovereign capacity, as agent of the people of Georgia," and on their behalf "as an organized community who have been harmed in their interests and impeded in their development" by the conduct charged against the defendants; and it is alleged in this count that as a result of that conduct the people of Georgia have been deprived of a right to "enjoy the conditions of prosperity, and to share equally with other States in the opportunities which the progress of the nation brings."

In the fourth count the State is said to sue as the representative, and on behalf, of "a general class of its citizens made up largely of farmers, manufacturers, merchants, and shippers . . . who have been injured in being denied the opportunity to expand their businesses." In this count the State invokes the original jurisdiction of this Court in the capacity of "*parens patriae*, trustee, guardian, or representative of all or a considerable portion of its citizens who have suffered damage," as a result of the alleged conduct of the defendants.

It is not believed that these different gradations or degrees of public governmental or political capacity have any significance in establishing the right of Georgia to sue, since a State, asking leave to file suit in any or all of these capacities in this Court, is barred at the threshold by *Oklahoma* v. *A. T. & Santa Fe Ry.*, 220 U. S. 277 (1911), and the reasoning on which that decision rests.

In that case the State of Oklahoma alleged that the defendant railway company was and had been continuously charging unlawful rates within the territorial limits of the State, in that said rates were higher than those charged for the same distances within the territorial limits of Kansas. The bill went on to recite that the State of Oklahoma was developing and building towns and that the articles on which the allegedly excessive rates were charged

were essential to the growth of the State and its development; that the conduct of the defendant was "a menace to the future of said State" and "an injury to the property rights of its inhabitants."

In denying the right of a State to sue on such grounds, this Court said (at pp. 286-287 of 220 U. S.):

> "If . . . those rates [i.e., the rates complained of] were in themselves unreasonable and purely arbitrary, a controversy, in the constitutional sense, would have arisen between each shipper and the company, which could have been determined by suit brought by the shipper in the proper state court, or even in the proper Federal court . . . But plainly, the State, in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court . . . The opposite view must necessarily rest upon the ground that the Constitution when conferring *original* jurisdiction on this court . . . intended to include any and every judicial proceeding of whatever nature which the State may choose to institute, in this court, for the purpose of enforcing its laws, although the State may have no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws. In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates [on certain commodities] . . . But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma, who may have occasion to ship such commodities over the railway."

The Court then referred to its prior decision in *Louisiana* v. *Texas*, 176 U. S. 1 (1899), and went on to say (at pp. 288-289 of 220 U. S.):

"These doctrines . . . require its dismissal as not being within the original jurisdiction of this Court as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting . . . to the injury of its people generally or in the aggregate; although an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured.

"We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers generally."

The language of the last part of the foregoing quotation aptly describes what the State of Georgia seeks to do in the suit which it now asks leave to file. In language already quoted from the fourth count of the complaint, Georgia here seeks "to vindicate the wrongs of some of its people." In the first count it seeks "to enforce its own laws and public policy," and in the second count it seeks to restrain "injury of its people generally or in the aggregate."

In *Louisiana* v. *Texas*, 176 U. S. 1 (1899), referred to in the foregoing opinion, a State sought leave to file a suit in this court against another State for alleged injuries claimed to result to the people of the former State generally or to many of them. In dismissing the bill, this Court said, through Mr. Chief Justice Fuller, speaking of the nature of the proposed cause of action (at p. 19 of 176 U. S.):

"Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens.

"She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained."

Mr. Justice Harlan, in his concurring opinion, said (at pp. 24-25 of 176 U. S.):

"But I am of the opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that State . . . When the Constitution gave this court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State, in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens . . . The word 'controversies' in the clauses extending the judicial powers of the United States to controversies, 'between two or more States', and to controversies, 'between a State and citizens of another State', . . . refer . . . not to controversies or cases that do not involve either the property or powers of the

> State which complains . . . The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State, but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this court."

The principle enunciated and applied in the two foregoing decisions was reaffirmed by this Court so recently as the 1939 Term in *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939) (see esp. p. 17).

Accordingly, the first, second, and fourth counts of the proposed amended complaint must be dismissed as not stating a case or controversy within the meaning of Section 2 of Article III of the Constitution. It follows that leave to file the complaint with respect to said counts must be denied.

Even if it should be held that a case or controversy within the meaning of Section 2 of Article III of the Constitution is stated in the first, second and fourth counts of the proposed complaint, nevertheless, said counts are subject to the same infirmities and objections as will be shown below to be applicable to Count 3; and therefore, if in view of those objections it is held that leave to file the complaint must be denied with respect to Count 3, leave to file must also be denied with respect to the remaining counts of the complaint as well.

shipped commodities to and from Georgia under the allegedly unlawful rates exacted of them. The third prayer (Amended Complaint, page 26) asks "that the defendants, and all officers, directors, agents, employes, representatives, and all persons, corporations, and associations, acting or claiming to act on behalf of any of the aforesaid defendants, be perpetually enjoined . . . from conspiring and confederating in the establishment of rates and charges to be exacted from the State of Georgia and the citizens thereof for transportation in commerce among the several States."

Matters of the kind referred to in the foregoing allegations, and in connection with which relief is sought in the foregoing prayers of the complaint, are precisely those which the Interstate Commerce Act commits to the determination of the Interstate Commerce Commission. There is no allegation anywhere in the proposed complaint that the complainant has resorted to the Commission for relief or that the rates complained of are other than those duly published in conformity with the Act and over which the Commission has undoubted jurisdiction. What the complaint in effect seeks to do is to have this Court exercise the rate-making authority appropriate to the Commission. In essence the complaint looks to the establishment by decree of this Court of rates within and to and from Georgia which will be uniform for like distances with those prevailing in northern, or so-called "Official", territory. The State of Georgia is asking this Court to undertake what is clearly a legislative or an administrative function. The allegation that the defendants have declined and refused to fix rates based on the cost of constructing and maintaining their railroads and the cost of carriage over their railroads amounts to an effort to have this Court, in the absence of action by the Commission, prescribe methods of rate-making with respect to the rates in which the State of Georgia is interested. This Court has consistently ruled that it cannot exercise functions which are essentially legis-

lative or administrative: *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428 (1923); *Radio Comm.* v. *General Electric Co.*, 281 U. S. 464 (1930).

It is a matter of public record, of which this Court may take judicial notice, that the Interstate Commerce Commission has at present before it and is considering in the so-called *Class Rate Investigation, 1939*, Docket 28300, and *Consolidated Classification*, Docket 28310, precisely the question of the comparative rate levels in so-called Southern territory and so-called Official Classification territory, which the State of Georgia now seeks to present to this Court in the suit which it asks leave to bring. The record in the proceedings before the Commission discloses that Georgia has been fully represented in those proceedings both by its Governor as a member of the Southern Governors' Conference and by the Chairman of its Public Service Commission, Walter R. MacDonald, Esq. In neither proceeding has the Commission yet made any report or order. It is also a matter of public record that five years ago the State of Georgia was one of the complainants before the Interstate Commerce Commission in a proceeding in which the question of the comparative rate levels in Southern and Official Classification territories was raised and in which the Commission, after extensive hearings and detailed consideration of the rates challenged, found some of those rates unlawful and others not unlawful: *State of Alabama* v. *New York Central R. Co.*, 235 I. C. C. 255 (1939). No attempt was made by either the State of Georgia or any other complainant to have the Commission's findings or orders reviewed by the courts under the statutory procedure provided for such review.

No point of law is better settled than that no suit may be brought either for damages or for an injunction by reason of any matter committed by the Act to the jurisdiction of the Commission, unless prior recourse is had to the Commission for relief, nor, after the Commission has acted, otherwise than through the statutory procedure for en-

forcement or review of the Commission's action. This applies to both suits for damages and suits for injunctive relief.

1. No Action for Damages Will Lie Where a Rate or Practice of a Carrier Under the Jurisdiction of the Interstate Commerce Commission is Alleged to be Unjust and Unreasonable or Unjustly Discriminatory or Unduly Preferential or Otherwise Unlawful, in the Absence of a Prior Finding by the Commission Sustaining the Allegation of Unreasonableness or Other Unlawfulness.

This principle was established in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), and has never subsequently been questioned by this Court, but has been repeatedly affirmed. The reason underlying the rule, as explained by this Court, is that one of the principal objectives of the Interstate Commerce Act is to prevent discrimination by providing for uniformity of rates as between shippers and that such uniformity would obviously be destroyed if the reasonableness of rates were left to the determination of a multitude of courts and juries in separate suits rather than passed upon by a single agency, namely, the Commission. Accordingly, the question of what is an unjust and unreasonable or discriminatory rate is a question which under the decisions cannot be raised in court except after an initial finding by the Commission.

The following quotations from two of the multitude of decisions applying this rule are conclusive. In *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506 (1912), this Court said, at p. 509:

> "When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards"

And again in *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285 (1922), this Court, speaking through Mr. Justice Brandeis, used the following language, at p. 291:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases."

It follows that a finding of unreasonableness or other unlawfulness by the Interstate Commerce Commission is a necessary prerequisite to any judgment for damages on account of allegedly unreasonable or unjustly discriminatory or otherwise unlawful rates, and therefore the proposed complaint of the State of Georgia is fatally defective, insofar as any claim for damages under the Interstate Commerce Act is concerned, in failing to allege such a finding of the Commission with respect to any of th rates complained of.

2. An Injunction Will not be Granted to Restrain Rates Alleged to be Unreasonable or Unjustly Discriminatory or Otherwise Unlawful Under the Interstate Commerce Act Where There has been no Prior Determination of the Unreasonableness or Other Unlawfulness of the Rates by the Commission.

The proposed complaint fails to state a cause of action for injunctive relief under the Interstate Commerce Act

for the same reason that it is defective in stating a claim for damages, namely, want of prior resort to the Commission.

The quotation presented above from the opinion of this Court in *Gt. No. Ry.* v. *Merchants Elev. Co., supra,* points out that, whether the question is as to what rate shall be deemed reasonable for the future or as to whether a shipper has been wronged in the past by the exaction of an unreasonable or discriminatory rate, preliminary resort to the Commission is required alike in the two classes of cases. This means, of course, that on a question of the reasonableness of rates the courts will refrain from granting injunctive relief for the future no less than damages for the past, in the absence of a determination by the Commission of what rate is reasonable. It is entirely clear that the Courts will not interfere with the future application of rates on the ground of their unreasonableness or discriminatory character in the absence of prior Commission action. *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.,* 215 U. S. 481 (1910).

Where the Interstate Commerce Commission has already acted with respect to a rate, the only way in which a State, or no less than any other complainant, desiring to obtain a judicial determination of the reasonableness of the rate, can approach the courts is through the normal prescribed statutory method for reviewing orders and determinations of the Commission. Thus, in *North Dakota* v. *Chicago & N. W. Ry. Co.,* 257 U. S. 485 (1922), the State of North Dakota brought an original bill in equity in this Court against certain railroads seeking a review of the reasonableness of certain rates which had been passed upon by the Commission. The bill was dismissed on the ground that the suit afforded no opportunity to bring the Commission before the Court so that it would be bound by the decree. Speaking through Mr. Justice Holmes the Court said, at pps. 490-91:

"Complete justice requires that the railroads should not be subjected to the risk of two irreconcilable commands,—that of the Interstate Commerce Commission enforced by a decree on the one side and that of this Court on the other. The decision in this case although an authority would not be *res judicata*, and the Commission would not be concluded from rearguing the whole matter . . . For the reasons that we have indicated it is equitable that a decree should not be entered except in such form as to bind the Interstate Commerce Commission and the United States and therefore this bill must be dismissed."

In *Texas* v. *Interstate Com. Comm.*, 258 U. S. 158 (1922), this Court held that a suit by a State to set aside an order of the Interstate Commerce Commission may not be brought as an original suit in this Court, but must be brought in accordance with the statutory review procedure in a district court, even though the State was seeking to institute the suit as a proprietor of a railroad allegedly affected by the order sought to be challenged.

It seems clear from the foregoing canvass of the cases and of the principles on which they rest, that the State of Georgia cannot have relief, either injunctive or by way of damages for the alleged violations of the Interstate Commerce Act set forth in its proposed complaint, save after an appropriate proceeding before the Interstate Commerce Commission, and that the proposed complaint is accordingly fatally defective under the Interstate Commerce Act in failing to allege prior recourse to the Commission.

B. The Allegations of the Proposed Complaint Fail to State a Cause of Action for Damages or Injunctive Relief Under the Anti-Trust Laws.

The State of Georgia in its proposed complaint seeks to intertwine a cause of action under the anti-trust laws with the cause of action sought to be founded on the Interstate Commerce Act and considered above.

The proposed complaint contains numerous allegations charging alleged unlawful concert, combination and restraint of trade among the defendants, contrary to the Anti-Trust Laws, in the making of the rates complained of. Of such character are the allegations that the defendants by the use of some sixty rate-bureaus, committees, conferences, associations and other private rate-fixing agencies have entered into and engaged in unlawful and wrongful contracts, combinations, agreements and conspiracies in restraint of trade and commerce among the several States and have monopolized a substantial part of such trade and commerce (Amended Complaint, paragraph 9, pages 14 and 15); that all the defendants, conspiring, combining, confederating and agreeing jointly in the use of said rate-bureaus and committees, have adopted rates and charges that are arbitrary and non-competitive, and that the effect of such conspiracy is unjustly and oppressively to increase and augment rates and to counteract the effect of competition on the facilities and rates of transportation (amended Complaint, paragraph 10, page 15); that these so-called "northern defendants", i.e., the defendant railroads whose lines are mainly located north of the Potomac and Ohio Rivers, including also the Chesapeake and Ohio Railway Company, the Norfolk & Western Railway Company and the Richmond, Fredericksburg & Potomac Railroad Company, dominate and coerce the other or southern railroad defendants in the making of rates (Amended Complaint, paragraph 13, page 20); and that the defendants by virtue of their alleged illegal combination make rates on the principle that charges for transportation should be determined by considering what the traffic will bear (Amended Complaint, paragraph 15, page 21). All these allegations obviously seek to charge violations of the Anti-Trust Laws.

The third prayer of the proposed Complaint (Amended Complaint, page 26) asks an injunction to restrain the defendants, and all officers, directors, agents, employes, representatives and all persons, corporations, and associations, acting or claiming to act on behalf of any

of the aforesaid defendants, from engaging in or participating in any agreements, practices, contracts, relationships, arrangements or understandings which would continue or renew any of the alleged violations of law charged in the Complaint, and from conspiring and confederating in the establishment of rates and charges to be exacted from the State of Georgia and its citizens. The fourth prayer (Amended Complaint, page 26) asks that the contracts, agreements, understandings, arrangements, combinations and conspiracies in restraint of trade and commerce, as described in the Complaint, and the monopolizing of a substantial part of such trade and commerce as so described, be decreed to be unlawful as a violation of the Anti-Trust Laws of the United States. The seventh prayer, which asks for damages, claims $250,000 as damages and requests judgment for three times that amount, "in accordance with Section 7 of the Sherman Antitrust Act." (Amended Complaint, page 27.)

In the various parts of the complaint just referred to, Georgia is obviously seeking to state a cause of action both for injunctive relief and for damages under the Anti-Trust Laws. These defendants submit that under the decisions of this Court and the appropriate statutes no cause of action either for damages or for injunctive relief properly lies under the Anti-Trust Laws for the matters and things complained of.

1. Damages Based on Alleged Violation of the Anti-Trust Laws May not be Recovered by a Shipper Against a Railroad Carrier or Carriers Where the Gist of the Charge is that the Illegal Concert and Combination Consists in the Fixing of Rates and Charges Which are Within the Jurisdiction of the Interstate Commerce Commission.

This point was squarely decided by this Court in Keogh v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), where the opinion was by Mr. Justice Brandeis, and was reiterated and reaffirmed in subsequent cases: *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932); *Terminal Warehouse* v. *Penn.*

R. Co., 297 U. S. 500 (1936); *Central Transf. Co.* v. *Term. R. R.*, 288 U. S. 469 (1933).

In the *Keogh* case a shipper sued eight railroads for treble damages under Section 7 of the Sherman Anti-Trust Act (26 Stat. 210), charging an illegal combination to fix rates. It was admitted that the rates were those contained in the lawfully published tariffs of the carriers, but it was charged that, since the said rates had allegedly resulted from concert and combination, there had been such a violation of the Sherman Act as to lay a proper basis for recovery of damages under Section 7 of that Act. This Court held that the action would not lie. The opinion points out that, while it is conceivable that a combination to fix rates which are subject to the jurisdiction of the Interstate Commerce Commission may be illegal under the Anti-Trust Laws, only the Government of the United States is entitled to raise this question, since the shipper must necessarily be held limited to relief under the provisions of the Interstate Commerce Act, viz., limited to recourse to the Commission. This is plainly stated and explained in the following excerpts from the opinion by Mr. Justice Brandeis, at p. 163:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff cannot be varied or enlarged by either contract *or tort* of the carrier . . . And they are not affected by the tort of a third party . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under Section 7. Uniform treatment would not result, even if all sued, unless the

highly improbable happened, and the several juries and courts gave to each the same measure of relief." (Emphasis supplied)

In other words, this Court applied to the facts and charges in the Keogh case precisely the same basic principle which governed its decision in the *Abilene Oil* case (*Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co., supra*), namely, that in order to insure uniformity of rates and charges as between shippers, no shipper must be permitted to have the benefit of a rate different from that available to other shippers, and that in order to insure this result it is necessary that no shipper shall be permitted by suit for damages or otherwise to obtain a rate lower than that contained in the published tariff which is available to all, save as a result of action by the Commission. Hence, in the language of Mr. Justice Brandeis, quoted above, "the legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper." And the Court goes on to say that these rights as between carrier and shipper, as defined by the tariff, cannot be varied *even by the tort* of the carrier, viz., by a violation of the Anti-Trust Laws.

Elsewhere in the opinion (p. 162) it is stated that under the Anti-Trust Laws a combination of carriers to fix rates, even though the rates are reasonable and non-discriminatory, may be illegal and, if so, the Government of the United States may have redress by criminal proceedings or by injunction, but that it does not follow from this that "a private shipper, may recover damages under Section 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed." The opinion states further that, "a rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade, in violation of the Anti-Trust Act. *What rates are legal is determined*

by the Act to Regulate Commerce." (Emphasis supplied.)

Accordingly, if there is to be a recovery of damages for the exaction of illegal rates resulting from a conspiracy, it must be because "the conspiracy complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory," and therefore the right to damages to be recovered must first be established in a proceeding before the Commission: *L. & N. R. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288 (1916).

Then follows in the opinion (p. 289) a statement that Section 7 of the Sherman Act gives a right of action only to one who has been injured; that injury implies a violation of a legal right; and that a shipper has no legal right as against a carrier to any other rate than that contained in the published tariff, for the reasons above reviewed.

These considerations, as developed by this Court and fully explained and applied in its decision in the *Keogh* case, plainly govern the question now presented by Georgia's attempt to found a right of action for damages upon alleged violations of the Anti-Trust Laws as charged in the proposed complaint. They clearly mean that a shipper may not set up a right to damages under the Anti-Trust Laws except for a legal injury, and that whether he has been legally injured or not depends solely upon whether the rate he has been required to pay is or is not lawful under the Interstate Commerce Act, a question which can only be determined in the first instance by the Commission, under the decision in the *Abilene Oil case.*

The same principles were applied and the same decision reached by this Court in *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500 (1936), in an opinion by Mr. Justice Cardozo. There the plaintiff sought treble damages under the Sherman Act because of the railroad's allegedly illegal practice in designating the Merchants Warehouse Co. as its agent for the receipt of freight in a manner prejudicial to competing warehouse companies and

to shippers who did not avail themselves of the alleged illegal arrangement. In a proceeding before the Interstate Commerce Commission, the Commission had determined that the relationship between the warehouse and the railroad was improper, but in the exercise of its undoubted jurisdiction had refused a reparation order to this plaintiff, holding that no damages had in fact been proved. Thereupon the plaintiff brought suit under the Sherman and Clayton Acts. The suit was dismissed on the principles of the *Keogh* case and on grounds which would have been equally applicable had the controversy never been submitted to the Commission. The following language from the opinion of Mr. Justice Cardozo seems conclusive against Georgia's claim for damages under the Anti-Trust Laws in the instant case (pp. 513-14 of 297 U. S.):

> "If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 * * *. On the other hand, if the regulatory commission has issued a 'cease and desist' order, an injunction under the Clayton Act is inappropriate and needless . . . The same considerations are applicable, and with undiminished force, where the suit under the Clayton Act is not for an injunction but for damages. There, too, a finding of undue discrimination by the regulatory board is a necessary preliminary to a suit against the carrier. See cases *supra*. Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Ship-

ping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive."

In Mr. Justice Cardozo's opinion in the *Terminal Warehouse* case, from which the foregoing quotation has been taken, there is a reference to *U. S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U. S. 474 (1932). That case was an application for an injunction under the Sherman and Clayton Acts, but the language used by this Court in its opinion is equally applicable to a suit for damages. This Court chose to regard the relationship between the Anti-Trust Laws and the Shipping Act there involved as being the same as that between the Anti-Trust Laws and the Interstate Commerce Act, and reached its decision on the basis of cases dealing with the Interstate Commerce Act. The following excerpts from the opinion are in point (pp. 480-82 of 284 U. S.):

"It may be conceded that looking alone to the Sherman Anti-Trust Act, the bill states a cause of action under . . . that act, and consequently, furnishes ground for an injunction under section 16 of the Clayton Act, unless the Shipping Act stands in the way . . .

"The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force . . . for more than a generation . . . It follows that the settled construction in respect of the earlier act must be applied to the later one . . ."

After referring to the *Abilene Oil* case, the opinion continues (at pp. 483-485):

> "That the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Anti-Trust Act is clear . . . A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, . . . that the allegations either constitute direct and basic charges of violations of these provisions, or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, *which to that extent supersedes the anti-trust laws* . . . The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion." (Emphasis supplied.)

2. Injunctive Relief To Restrain Alleged Violations of the Anti-Trust Laws Will Not Be Granted, Except to the United States, Against Railroad Carriers with Respect to Matters Subject to the Regulation and Jurisdiction of the Interstate Commerce Commission.

The third prayer of the proposed complaint asks an injunction against the defendants and each of them, and any and all of their agents, employes, representatives, and all persons, corporations and associations acting on their behalf, to restrain and enjoin them from conspiring and confederating in the establishment of rates and charges exacted of the State of Georgia and of the citizens thereof (Amended Complaint, page 26). This is obviously a prayer to restrain and enjoin supposed violations of the Anti-Trust Laws.

It follows from the decisions and language of this Court in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.* and *United States Navigation Co.* v. *Cunard Steampship Co.*, quoted above, that an injunction under the anti-trust laws will not be granted a shipper with respect to rates and prac-

tices within the jurisdiction of the Interstate Commerce Commission, for the reasons and on the principles laid down in the *Abilene* and *Keogh* cases, as recited and explained in the decisions just referred to. As stated by Mr. Justice Cardozo in the language already quoted from this Court's opinion in *Terminal Warehouse Co.* v. *Pennsylvaria R. Co.*, "If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair."

An even clearer, and indeed an absolutely conclusive, answer is given by the express language of Section 16 of the Clayton Act, upon which the prayer of the proposed complaint for injunctive relief must necessarily be predicated. Prior to the enactment of that section injunctive relief against violations of the anti-trust laws was restricted by Section 4 of the Sherman Act to suits brought on behalf of the United States by the several district attorneys under the direction of the Attorney General. Injunctive relief was not available to other plaintiffs. It was first extended to these by Section 16 of the Clayton Act, which broadly provides that, "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws." This section, however, goes on to restrict the scope of the relief which it makes available by an important proviso which applies directly to the present proceeding, and reads as follows:

> "Provided, That nothing contained [herein] . . . shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

The sole right of a plaintiff in the position of the State of Georgia to have injunctive relief based on the anti-trust laws derives from this section of the Clayton Act, and from the fact that a State has been held to be a "person" within the meaning of that word as used in the Anti-Trust Laws (*Georgia* v. *Evans*, 316 U. S. 159 (1942). However, it is clear from the proviso of Section 16, just quoted, that no "person" (which of course under *Georgia* v. *Evans*, includes a State), is entitled to injunctive relief against carriers subject to the Interstate Commerce Act with respect to matters subject to the regulation and jurisdiction of the Interstate Commerce Commission. Obviously, the rates challenged and attacked in the proposed bill of complaint are such matters.

The point is squarely ruled by the decision of this Court in *Central Transf. Co.* v. *Term. R. R.*, 288 U. S. 469 (1933). In that case petitioner, a corporation engaged in the transportation of interstate freight in St. Louis, brought suit in the appropriate district court against certain interstate rail carriers to restrain an alleged violation of the Anti-Trust Laws. The district court's dismissal of the suit was affirmed by the Circuit Court of Appeals, and this Court upheld the dismissal, saying in an opinion by Mr. Justice Stone (at pp. 473-75 of 288 U. S.):

> "By the Sherman Anti-Trust Act, the Government alone was authorized to maintain a suit to restrain violations of its provisions, *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. Private persons were first authorized to bring suits for that purpose by section 16 of the Clayton Act, (15 U. S. C. A. Section 26), but with the proviso 'that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions' of the Interstate Commerce Act 'in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.'

"It is not denied that the respondents are common carriers subject to the provisions of the Interstate Commerce Act. . . . Nor is it denied that by the applicable provisions of the Act the maintenance by the carriers of the 'off track' stations, the transportation service rendered in connection with them and between the 'on track' stations, through the exclusive agency of a single transfer company, . . . are all within the jurisdiction of the Commission.

"The petitioner, conceding that the Commission has jurisdiction of the service of the transfer companies in interchanging freight between the stations, insists that the Commission has no jurisdiction or control over the carrier's discretion in selecting their agents to perform that service, and consequently no jurisdiction over a contract by which that discretion is exercised or of a cause of action arising out of its unlawful exercise; that jurisdiction is therefore in the federal court to grant the relief prayed.

"This argument misconceives both the effect and the purpose of section 16 of the Clayton Act. Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the Sherman Anti-Trust Act . . . It affects only the capacity of a private party to maintain a suit to restrain violations . . . *Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the government itself.*" (Emphasis supplied.)

In the present proceeding there can be no doubt that the rates and charges attacked as unreasonable and discriminatory, which are the sole matters covered by the proposed complaint, are the very matters committed to the jurisdiction of the Commission by the Interstate Commerce Act. In the language used by Mr. Justice Stone, in the immediately foregoing quotation, they are obviously matters "or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of

the Commission," and therefore lie within the prohibition of the proviso of Section 16 of the Clayton Act, of which Mr. Justice Stone states that the "obvious purpose is to preclude any interference by injunction" with such matters "except when the suit is brought by the Government itself."

It is accordingly plain that, no matter what proof might be made if the present suit should be permitted by this Court to be brought, Georgia would have no right to the injunction asked in the third prayer of the proposed bill of complaint, insofar as such prayer is based on alleged violations of the Anti-Trust Laws.

Point 3.

Since the Proposed Complaint Fails to State a Cause of Action, Leave to File It Should Be Denied.

It is the settled practice of this Court, on application of a State for leave to file suit under the original jurisdiction of this Court, to deny such leave, unless "the complaint offered for filing [alleges] facts that are clearly sufficient to call for a decree in its favor," *Alabama* v. *Arizona*, 291 U. S. 286, at p. 291 (1934). "A bill of complaint will not be entertained which, if filed, could only be dismissed", *Arizona* v. *California*, 298 U. S. 558, 572 (1936).

Accordingly, since, for the reasons above set forth, the proposed complaint of the State of Georgia fails to state a cause of action and if filed could only be dismissed, the motion of Georgia for leave to file said complaint should be denied.

Respectfully submitted,

JOHN DICKINSON,

Attorney for The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, Chicago & Eastern Illi-

nois Railroad Company, L. F. De Ramus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company.

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THOMAS P. HEALY,
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D. LYNCH YOUNGER,
NORFOLK & WESTERN RAILWAY
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E. Randolph Williams,
Richmond, Fredericksburg &
Potomac Railroad Company.

Carleton S. Hadley,
Wabash Railroad Company.

Paul S. Parsons,
Western Maryland Railway
Company.

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DEC 13 194
CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 10 Orig.

THE STATE OF GEORGIA,

Complainant,

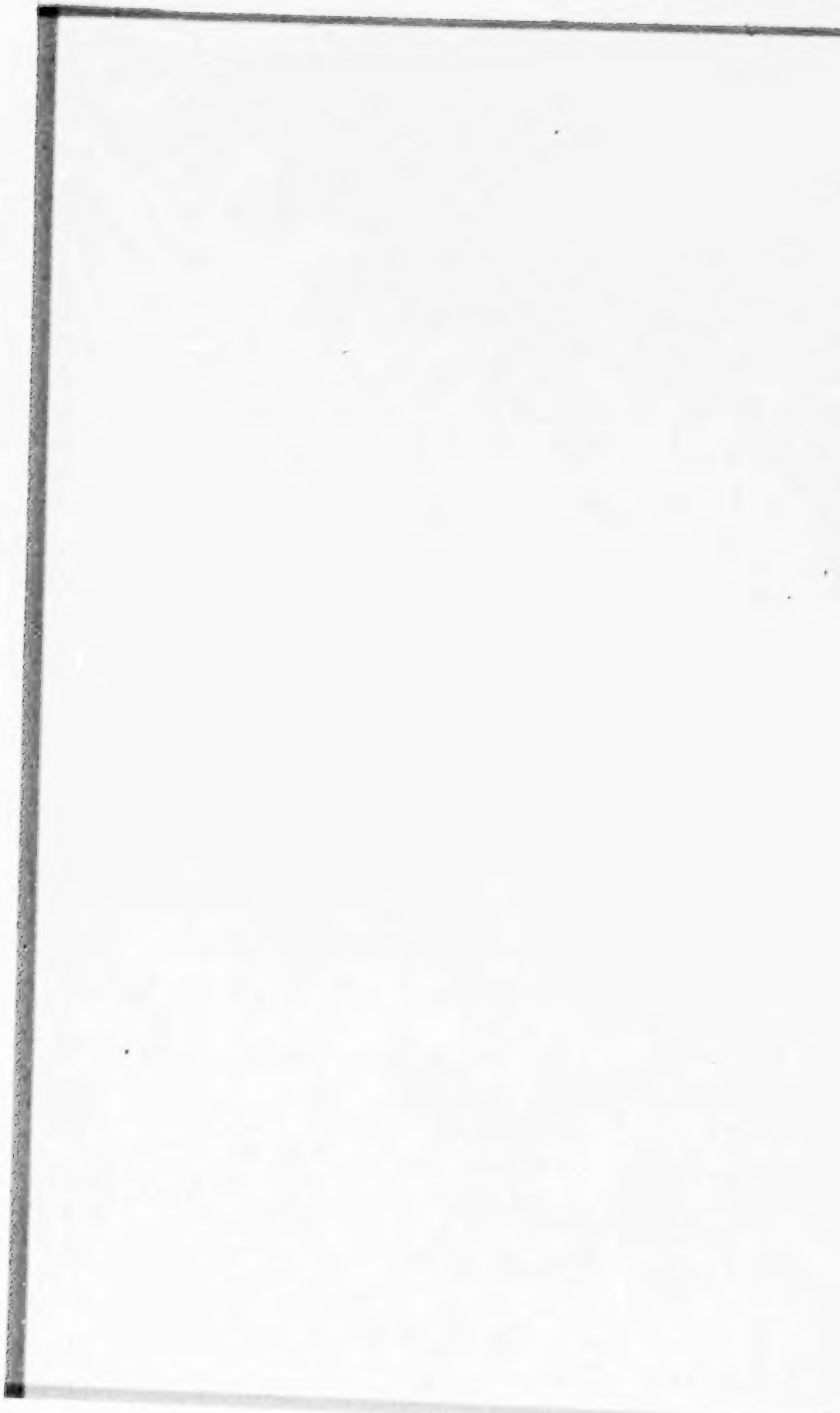
vs.

THE PENNSYLVANIA RAILROAD COMPANY,
et al.,

Defendants.

RETURN OF SEABOARD AIR LINE RAILWAY COMPANY TO RULE TO SHOW CAUSE.

W. R. C. COCKE,
Attorney for Seaboard Air
Line Railway Company.



IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No.....

THE STATE OF GEORGIA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, et al.,

Defendants.

RETURN OF SEABOARD AIR LINE RAILWAY COMPANY TO RULE TO SHOW CAUSE.

Seaboard Air Line Railway Company, one of the defendants named in the Amended Bill of Complaint of the State of Georgia in the above entitled proceeding, appearing specially herein for the purpose of making response to the Rule to Show Cause issued by this Court on the 10th day of November, 1944, requiring the defendants to show cause why leave to file the Amended Bill of Complaint should not be granted, in opposition to the granting of such leave shows as follows:

1. (a) The Amended Bill of Complaint in Section 7 names as one of the defendants "Seaboard Air Line Railway Company, L. R. Powell, Jr., and Henry W. Anderson, Receivers, a resident of the State of Virginia." The Rule to Show Cause is addressed to "Seaboard Air Line Railway Company, L. R. Powell, Jr., and Henry W. Anderson, Receivers."

(b) Seaboard Air Line Railway Company is now, and for many years past has been, a consolidated corporation created and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Florida, and under the laws of each of said states the said company is a corporation of said state and a citizen thereof within the meaning of the constitutions and laws of the said several states, the constitution of the United States and the laws made pursuant thereto and the decisions of this Court construing the said laws. The facts concerning the status of said Company as a corporation under the laws of the State of Georgia are set forth in the affidavit of L. B. Plummer and the attachments thereto annexed to this return and made a part hereof.

(c) L. R. Powell, Jr., and Henry W. Anderson, as Receivers, are not named as separate defendants as the state of their citizenship is not named in the Amended Bill of Complaint and the connection of their names with the name of Seaboard Air Line Railway Company in the Amended Bill of Complaint as quoted above is descriptive only.

The properties of Seaboard Air Line Railway Company were placed in the hands of Receivers by separate decrees of the District Court of the United States for the Eastern District of Virginia and of the District Court of the United States for the Southern District of Florida each entered on

December 23, 1930, and Legh R. Powell, Jr., and Henry W. Anderson are the presently qualified and acting Receivers of said properties and as such are agents of said Courts acting under their direction and control. However, Seaboard Air Line Railway Company continues to exist as a corporate entity under the laws of said states, having its Board of Directors elected by its stockholders and officers elected by such Board and having capacity to sue and be sued, and the Receivers, who are custodians of its properties and assets, are not the *alter ego* of nor in control of the corporate entity. Moreover no leave has been sought or obtained from the said District Courts of the Eastern District of Virginia and the Southern District of Florida, or either of them, to sue said Receivers and the alleged cause of action set up in the Amended Bill of Complaint is not of such a character as to dispense with the necessity of such leave by virtue of the provisions of Section 66 of the Federal Judicial Code or of any other law, even if complainant should seek to make them parties to this suit.

(d) For the reasons stated, Seaboard Air Line Railway Company makes this response to the Rule to Show Cause in its own sole name and behalf and not under the description contained in the Amended Bill of Complaint and in the Rule to Show Cause, as hereinabove quoted.

2. This Court cannot entertain jurisdiction of this suit in that under the decisions of this Court construing Section of Article 3 of the Constitution of the United States this Court cannot take jurisdiction of a suit between a state and one of its own citizens, Seaboard Air Line Railway Company. *State of California* v. *Southern Pac. Co.* 157 U. S. 229, 257. *State of New Mexico* v. *Lane*, 243 U. S. 52, 58.

3. This Court should not permit the filing of the Amended Bill of Complaint of the State of Georgia or take jurisdiction of the controversy therein sought to be presented for the further and additional reasons set forth in the Return to the Rule to Show Cause filed herein by Atlantic Coast Line Railroad Company; Carolina, Clinchfield and Ohio Railway, Lessor, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, Lessees; Louisville & Nashville Railroad Company; Illinois Central Railroad Company; Gulf Mobile & Ohio Railroad Company; Nashville Chattanooga & St. Louis Railway; and Southern Railway Company, the so-called Southern Defendants, which said return Seaboard Air Line Railway Company adopts and makes its own as a part of this, its return.

SEABOARD AIR LINE RAILWAY COMPANY

By W. R. C. Cocke,
Its Attorney.

AFFIDAVIT OF L. B. PLUMMER

STATE OF VIRGINIA,)
: ss
CITY OF NORFOLK.)

Before me the undersigned, a Notary Public in and for the State and City aforesaid, this day personally appeared L. B. Plummer, who on his oath deposes and says:

I am a member of the Law Department of the Receivers of the properties of Seaboard Air Line Railway Company, holding the position of Assistant General Counsel. I entered the Law Department of Seaboard Air Line Railway in the year 1903, and served continuously as a member of the Law Department of successive companies hereinafter referred to as Seaboard Air Line Railway and of its successor Seaboard Air Line Railway Company until the appointment of Receivers for the properties of the latter company on December 23, 1930. Since that date I have been continuously employed in the Law Department of the Receivers. I am thoroughly familiar with the details of the corporate organization of Seaboard Air Line Railway Company and its predecessor companies and the matters herein stated are derived from my personal knowledge of the facts and from documents in the files of the Company.

The Corporate History of Seaboard Air Line Railway Company.

The present Seaboard Air Line Railway Company is a consolidated corporation under the laws of Virginia, North Carolina, South Carolina, Georgia and Florida. It is also qualified to do business as a common carrier in Alabama

under the laws of that State. It was organized in the year 1915 and is the successor to three successive companies, each known as "Seaboard Air Line Railway," and is the immediate successor to one of said companies so known and to a previous company known as "Carolina, Atlantic & Western Railway," the name of which was changed to "Seaboard Air Line Railway Company."

The Richmond, Petersburg and Carolina Railroad Company, one of the predecessors of Seaboard Air Line Railway Company, was incorporated by a special Act of the General Assembly of Virginia, approved January 12, 1900, which declared that the purchasers of the property and franchises of the Virginia and Carolina Railroad Company in the year 1892 were thereby incorporated as "The Richmond, Petersburg and Carolina Railroad Company," successor to all of the franchises of the former Virginia and Carolina Railroad Company, (Acts of Assembly, Virginia, 1899-1900, Chapter 19, page 27), and by a special Act of the General Assembly of North Carolina, ratified January 31, 1899, The Richmond, Petersburg and Carolina Railroad Company was incorporated in North Carolina. (Public Laws of North Carolina, 1899, Chapter 34, page 127). A special Act of the General Assembly of North Carolina, ratified February 22, 1899, amended the Act of January 31, 1899 to provide that stockholders of the Virginia Corporation should be stockholders of the North Carolina Corporation. (Private Laws of North Carolina, 1899, Chapter 80, page 149). The companies so chartered were duly organized and, pursuant to legislative authority, became the purchasers of the property and franchises of the Virginia and Carolina Railroad Company, a corporation of the States of Virginia and North Carolina. Pursuant to said Virginia Act approved January 12, 1900 and to an order of the Circuit Court of the City of Richmond,

Virginia, entered April 10, 1900, the name of the company was changed to "Seaboard Air Line Railway." (Seaboard No. 1).

A special Act of the General Assembly of North Carolina, ratified February 27, 1901, (Private Laws of North Carolina, 1901, Chapter 168, page 463) authorized Seaboard Air Line Railway, successor to The Richmond, Petersburg and Carolina Railroad Company, to possess and exercise in North Carolina the powers conferred upon the latter Company under its charter and amendments thereof, and conferred certain additional powers, including power to make and enter into leases, purchases and sales, and to unite with other railroad companies.

Seaboard No. 1 acquired by purchase the properties and franchises of Durham and Northern Railway Company under deed dated September 13, 1901.

By Articles of Agreement of Merger and Consolidation effective on November 7, 1901, Seaboard Air Line Railway (Seaboard No. 1) owning the railroad from Richmond, Virginia to Norlina, North Carolina, a distance of about 102.10 miles, was merged and consolidated to form Seaboard No. 2 with the following corporations owning respectively the lines of railroad and branches stated below:

THE RALEIGH AND GASTON RAILROAD COMPANY, a corporation under the laws of the State of North Carolina, railroad from Weldon, North Carolina, through Ridgeway, Noth Carolina, to Raleigh, North Carolina, a distance of about 96.20 miles; also branch, Roanoke Junction, North Carolina, to Roanoke Rapids, North Carolina, 2.6 miles.

THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY, a corporation under the laws of the State of North

Carolina, railroad from Raleigh, North Carolina, to Hamlet, North Carolina,—a distance of about 96.60 miles; also Gibson Branch, Hamlet, North Carolina, to Gibson, North Carolina,—10.13 miles.

THE CAROLINA CENTRAL RAILROAD COMPANY, a corporation under the laws of the State of North Carolina, railroad from Wilmington, North Carolina, to Rutherfordton, North Carolina; also branches—Mill Junction, North Carolina, to Henrietta, North Carolina; Ellenboro, North Carolina, to Caroleen, North Carolina—total, main line and branches, a distance of about 271.63 miles.

THE GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY, a corporation under the laws of the States of North Carolina, South Carolina, and Georgia, railroad from Monroe, North Carolina, to a point near Atlanta, Georgia—a distance of about 266.10 miles.

THE SEABOARD AIR LINE BELT RAILROAD COMPANY, a corporation under the laws of the State of Georgia, railroad from Belt Junction, Georgia, to Wanda Junction, Georgia—a distance of about 8.10 miles.

THE PALMETTO RAILWAY COMPANY, a corporation of the States of North Carolina and South Carolina, railroad from Hamlet, North Carolina, to Cheraw, South Carolina—a distance of about 18.20 miles.

THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY; a corporation of the State of South Carolina, railroad from Cheraw, South Carolina, to Camden, South Carolina—a distance of about 54.91 miles.

THE SOUTH BOUND RAILROAD COMPANY, a corporation of the States of South Carolina and Georgia, railroad from

Camden, South Carolina, to a point at or near Savannah, Georgia—a distance of about 170 miles.

Subsequent to the formation of SEABOARD AIR LINE RAILWAY (Seaboard No. 2) it acquired all of the properties, including lines of railroad, of the respective grantors named in the following deeds:

1. Deed, dated February 27, 1902, LOGANVILLE AND LAWRENCEVILLE RAILROAD OF GEORGIA, a corporation of the State of Georgia, to Seaboard No. 2.

2. Deed, dated February 20, 1902, GEORGIA AND ALABAMA RAILWAY, a corporation of the States of Georgia and Alabama, to Seaboard No. 2 By Indenture, dated March 28, 1896, GEORGIA AND ALABAMA RAILWAY, leased from CENTRAL OF GEORGIA RAILWAY COMPANY, the railroad, Meldrim, Georgia, to Lyons, Georgia, a distance of about 58 miles.

These two railroad companies had previously been controlled and operated by Seaboard No. 2 under stock ownership.

By acquisition of the properties of GEORGIA AND ALABAMA RAILWAY, Seaboard No. 2 acquired control of the capital stock of GEORGIA AND ALABAMA TERMINAL COMPANY, which had previously leased its property to GEORGIA AND ALABAMA RAILWAY, by deed of lease, dated December 20, 1898.

By Articles of Agreement of Merger and Consolidation, dated June 27, 1903, SEABOARD AIR LINE RAILWAY (Seaboard No. 2) a corporation under the laws of the States of

Virginia, North Carolina, South Carolina and Georgia, was merged and consolidated with FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, a corporation of the States of Florida and Georgia, which had theretofore been controlled by Seaboard No. 2 through stock ownership, to form SEABOARD AIR LINE RAILWAY (Seaboard No. 3).

Subsequent to the formation of SEABOARD AIR LINE RAILWAY (Seaboard No. 3) it acquired by deed, dated June 28, 1906, the properties and franchises of OXFORD AND COAST LINE RAILROAD COMPANY, the same having been previously controlled through stock ownership.

On January 2, 1908, the properties of the Company (Seaboard No. 3) were placed in the hands of Receivers. This receivership continued until November 4, 1909, when the properties were returned to the Company, without foreclosure, through reorganization.

During the period of this receivership Seaboard No. 3 acquired by purchase the properties and franchises of the companies listed below:

1. Atlantic, Suwannee River and Gulf Railway Company, dated September 30, 1909.

2. Catawba Valley Railway, Deed, dated September 27, 1909.

3. Tallahassee, Perry and Southeastern Railway, Deed, dated September 29, 1909.

4. Florida West Shore Railway, Deed, dated September 30, 1909.

5. Atlanta and Birmingham Air Line Railway, Deed, dated September 30, 1909.

6. Plant City, Arcadia and Gulf Railway, Deed, dated September 28, 1909.

All of the above properties had previously been controlled and operated by Seaboard No. 3 through stock ownership.

By deed, dated September 15, 1911, Seaboard No. 3 took conveyance of the properties of THE SEABOARD AND ROANOKE RAILROAD COMPANY, which had formerly been controlled and operated through stock ownership.

And by deed, dated September 15, 1911, Seaboard No. 3 took conveyance of the properties of ROANOKE AND TAR RIVER RAILROAD COMPANY, which had formerly been leased to THE SEABOARD AND ROANOKE RAILROAD COMPANY and controlled and operated by Seaboard No. 3 through stock ownership.

By Articles of Agreement of Merger and Consolidation, dated October 11, 1915, SEABOARD AIR LINE RAILWAY (Seaboard No. 3), a corporation under the laws of the State of Virginia, and other States, including Georgia was merged and consolidated with CAROLINA ATLANTIC & WESTERN RAILWAY, a corporation of the States of North Carolina and South Carolina, to form Seaboard Air Line Railway Company (Seaboard No. 4), the present corporation.

Pursuant to the undertakings of CAROLINA ATLANTIC & WESTERN RAILWAY, as expressed in Articles of Agreement

of Merger and Consolidation, it, on or about November 8, 1915, changed its name to SEABOARD AIR LINE RAILWAY COMPANY, under which name the present corporation (Seaboard No. 4) is known.

Seaboard Air Line Railway Company also acquired possession and control by lease and acquisition of stock ownership of the properties of various additional lines of railroad, some of which were operated under such leases as integral parts of the Seaboard System and others controlled by stock ownership were separately operated by their own organizations. In the interest of brevity the details of these additional properties are not set forth herein as they do not affect any question as to the corporate status of Seaboard Air Line Railway Company.

The successive Articles of Agreement of Merger and Consolidation which effected the organizations respectively of Seaboard No. 2, Seaboard No. 3 and Seaboard No. 4, were all filed in the offices of the Secretaries of the States of Virginia, North Carolina, South Carolina, Georgia and Florida. Throughout these successive consolidations the respective corporations above named as Seaboard No. 2, Seaboard No. 3 and Seaboard No. 4, declared themselves in said agreements of merger and consolidation as consolidated corporations created under the laws of each of the said States of Virginia, North Carolina, South Carolina, Georgia and Florida.

True copies of the several Articles of Agreement of Merger and Consolidation dated respectively November 7, 1901, June 27, 1903, and October 11, 1915, with the various certificates of the Secretaries of State of the several states as to the filings thereof, are annexed to this affidavit in the order of their respective dates as Exhibits A, B and C.

The following provisions of the statutes of the State of Georgia relating to the consolidation and merger of railroads were in effect in identical language throughout the entire period of the several successive consolidations hereinbefore referred to. They were contained in Volume 2, Code of the State of Georgia, 1895, Sections 2173 and 2179 and in Volume 2, Park's Annotated Code of Georgia, 1914, Sections 2591 and 2597, which code contained all of the acts of the Georgia Legislature in effect through the year 1914, and remained in effect without amendment throughout the year 1915. Such Sections are copied here as they appeared in Volume 2, Park's Annotated Code, above referred to as Sections 2591 and 2597:

"Sec. 2591. (Sec. 2173). Contracts to connect, merge or consolidate with, or purchase, etc., other companies. Said railroad company shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said company to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest: Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law."

"Sec. 2597. (Sec. 2179). Sale, etc., to, or consolidation with, other companies. Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign, or transfer its stock, prop-

erty, and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other State or of the United States, whose railroad within or without this State shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this Article may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other State or the United States, whose railroad within or without this State shall connect with or form a continuous line or system with the railroad of such company incorporated under this law, upon such terms as may be agreed upon. And it shall be lawful for any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies, or corporation, organized under the laws of this State, or under the laws of this State and any other States, with one or more companies or corporations organized under the laws of any other State, or under the laws of this and other States, to issue its bonds and stock as provided for in this Article, in such amounts as they may deem necessary for the purpose of paying or exchanging the same for or retiring any bonds or stocks theretofore issued by either of the said companies, or corporations, so merged, purchased, or consolidated, or for any other purpose, and to the amount authorized by the laws of the State under which either of said companies, or corporations, so consolidated was organized, and to secure the same, in case of bonds, by mortgages or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this State: Provided, that no railroad company shall make any contract under the provisions of this section with any other railroad company which is a competing line, that is calculated to defeat or lessen competition in this State or to encourage monopoly."

In the year 1929 the charter of the consolidated corporation of Seaboard Air Line Railway Company (Seaboard No. 4) was amended by changing its common stock from par value of $100 a share to no par common stock, by increasing the number of authorized shares of common stock in the Company and making other changes with reference to both common and preferred stock. The amendments to the charter were filed in the year 1929 in the offices of the Secretaries of the State of the States hereinbefore named and there is attached hereto as Exhibit D a true and exact copy of the certificate issued in this connection by the Secretary of State of the State of Georgia under date of December 5, 1929, which shows in detail the several changes concerning said common and preferred stock. This certificate, as did other certificates of the state officials issued upon the filing of the previous agreements of merger and consolidation in respect of Seaboard No. 4 and of the predecessor corporations, recognized the status of Seaboard Air Line Railway Company, the present Company, as a corporation existing under the laws of the State of Georgia.

The Articles of Agreement of Merger and Consolidation, dated June 27, 1903, between Seaboard Air Line Railway and Florida Central and Peninsula Railroad Company, expressly recited that Seaboard Air Line Railway was a corporation under the laws of the State of Georgia among other states and that Florida Central and Peninsula Railroad Company was a corporation under the laws of the States of Georgia and Florida. The certificate of the Secretary of State of the State of Georgia expressly recited that said Articles of Agreement of Merger and Consolidation "forming the Seaboard Air Line Railway, a corporation created by and existing under the laws of Virginia, North Carolina and other states as therein mentioned" were duly filed in his office on the 15th day of August 1903.

The Articles of Agreement of Merger and Consolidation of Seaboard Air Line Railway, the Raleigh and Gaston Railroad Company, the Raleigh and Augusta Railroad Company, the Carolina Central Railroad Company, the Georgia Carolina and Northern Railway Company, the Seaboard Air Line Belt Railroad Company, the Palmetto Railway Company, the Chesterfield and Kershaw Railway Company and the South Bound Railroad Company, filed in the office of the Secretary of State of the State of Georgia on November 17, 1901, provided that the rights, privileges and franchises of each of the constituent companies should be transferred and vested in the consolidated corporation.

The Articles of Agreement of Merger and Consolidation between the Seaboard Air Line Railway and Carolina Atlantic and Western Railway, dated October 11, 1915, filed in the Office of the Secretary of State of the State of Georgia on November 17, 1915, and forming Seaboard Air Line Railway Company (Seaboard No. 4) recited the creation of a new consolidated corporation organized and existing under the laws of the State of Virginia and other states.

L. B. PLUMMER.

Subscribed and sworn to before me this
8th day of December, 1944.

W. H. WALLACE, JR.,
Notary Public.

My Commission expires April 13, 1947.

EXHIBIT A

ARTICLES OF AGREEMENT OF MERGER AND CONSOLIDATION

OF

SEABOARD AIR LINE RAILWAY,

THE RALEIGH AND GASTON RAILROAD COMPANY,

THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY,

THE CAROLINA CENTRAL RAILROAD COMPANY,

THE GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY,

THE SEABOARD AIR LINE BELT RAILROAD COMPANY,

THE PALMETTO RAILWAY COMPANY,

THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY, and

THE SOUTH BOUND RAILROAD COMPANY,

Forming The

"SEABOARD AIR LINE RAILWAY."

EFFECTIVE NOVEMBER 7, 1901.

ARTICLES OF AGREEMENT OF MERGER AND CONSOLIDATION

OF

SEABOARD AIR LINE RAILWAY,
THE RALEIGH AND GASTON RAILROAD COMPANY,
THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY,
THE CAROLINA CENTRAL RAILROAD COMPANY,
THE GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY,
THE SEABOARD AIR LINE BELT RAILROAD COMPANY,
THE PALMETTO RAILWAY COMPANY,
THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY, and
THE SOUTH BOUND RAILROAD COMPANY,

Forming The
"SEABOARD AIR LINE RAILWAY."

WHEREAS, The SEABOARD AIR LINE RAILWAY is a corporation duly created and organized under the laws of the States of Virginia and North Carolina, and is the owner of a railroad constructed and in operation from its northern terminus at the City of Richmond, in the State of Virginia, to its southern terminus at Ridgeway, in the State of North Carolina, where it connects with the railroad of The Raleigh and Gaston Railroad Company, a distance of about one hundred and two and one-tenth miles; And

WHEREAS, The RALEIGH AND GASTON RAILROAD COMPANY is a corporation duly created and or-

ganized under the laws of the State of North Carolina, and is the owner of a railroad constructed and in operation from its northeastern terminus at Weldon, North Carolina, through Ridgeway, North Carolina, where it connects with the railroad of Seaboard Air Line Railway, unto its southern terminus at Raleigh, North Carolina, a distance of about ninety-six and twenty-hundredths miles, and also of a branch railroad known as the Roanoke Rapids Branch, extending from Roanoke Junction to Roanoke Rapids, in the State of North Carolina, a distance of two and six-tenths miles: And

WHEREAS, THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY is a corporation duly created and organized under the laws of the State of North Carolina, and is the owner of a railroad constructed and in operation from its northern terminus at Raleigh, North Caroline, where it connects with the railroad of The Raleigh and Gaston Railroad Company, unto its southern terminus at Hamlet, North Carolina, a distance of about ninety-six and sixty hundredths miles; and also of a branch railroad known as the Gibson Branch, extending from Hamlet, North Carolina, to Gibson, North Carolina, a distance of ten and thirteen-hundredths miles: And

WHEREAS, THE CAROLINA CENTRAL RAILROAD COMPANY is a corporation duly created and organized under the laws of the State of North Carolina, and is the owner of a railroad constructed and in operation from its eastern terminus at Wilmington, North Carolina, and running thence westerly through the town of Hamlet, where it connects with the Raleigh and August Air Line Railroad, through the towns of Monroe, Charlotte and Lincolnton unto the town of Rutherfordton, its western terminus in said State

of North Carolina, and owning and operating a branch known as the Henrietta Branch, extending from Mill Junction, North Carolina, to Henrietta, North Carolina, and also a branch from Wilmington, North Carolina, to Hilton, North Carolina, and a branch from Ellenboro, North Carolina, to Caroleen, North Carolina, a total distance of main line and branches of about two hundred and seventy-one and sixty-three hundredths miles: And

WHEREAS, THE GEORGIA CAROLINA AND NORTHERN RAILWAY COMPANY is a consolidated railroad company of the States of North Carolina, South Carolina and Georgia, and is the owner of a railroad constructed and in operation from its northeastern terminus at Monroe, North Carolina, where it connects with the Carolina Central Railroad, through the State of North Carolina into the State of South Carolina, through the towns of Chester, Clinton, Greenwood and Abbeville, South Carolina, and into the State of Georgia passing through the town of Lawrenceville, in the State of Georgia, unto its junction with the Seaboard Air Line Belt Railroad near the City of Atlanta, Georgia, a distance of about two hundred and sixty-six and ten hundredths miles: And

WHEREAS, The SEABOARD AIR LINE BELT RAILROAD COMPANY is a corporation duly created and organized under the laws of the State of Georgia, and is the owner of a railroad constructed and in operation from its eastern terminus at its junction with the Georgia, Carolina and Northern Railway at Belt Junction, and extending thence in a westerly direction to its southwestern terminus at Wanda Junction, Georgia, a distance of about eight and ten-hundredths miles: And

WHEREAS, The PALMETTO RAILWAY COMPANY is a corporation duly created and organized under the laws of the State of South Carolina, and is the owner of a railroad constructed and in operation from its northeastern terminus at Hamlet, in the State of North Carolina, where it connects with the Raleigh and Augusta Air Line Railroad, to its southwestern terminus at Cheraw, in the State of South Carolina, a distance of about eighteen and twenty-hundredths miles: And

WHEREAS, THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY is a corporation duly created and organized under the laws of the State of South Carolina, and is the owner of a railroad constructed and in operation from its northeastern terminus at Cheraw, in the State of South Carolina, where it connects with the railroad of the Palmetto Railway Company, and extending thence southwesterly unto its southwestern terminus at Camden, in the State of South Carolina, a distance of about fifty-four and ninety-one hundredths miles: And

WHEREAS, THE SOUTH BOUND RAILROAD COMPANY is a corporation duly created and organized under the laws of the States of South Carolina and Georgia, and is the owner of a railroad constructed and in operation from its northern teminus at Camden, in the State of South Carolina, where it connects with the Chesterfield and Kershaw Railroad and extending thence southerly through the City of Columbia, South Carolina, and the town of Cayce, South Carolina, and thence southerly through the towns of Denmark and Fairfax, Georgia, into its southern terminus or point of junction with the railway of The Florida Central and Peninsula Railroad Company, at or near the City of

Savannah, Georgia, a total distance of about one hundred and seventy miles: And

WHEREAS, the railroad of the said SEABOARD AIR LINE RAILWAY intersects, joins and unites at its southern terminus at Ridgeway, North Carolina, with the railroad of the RALEIGH AND GASTON RAILROAD COMPANY in such manner that said railroads form together a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, the said railroad of The RALEIGH AND GASTON RAILROAD COMPANY intersects, joins and unites at Raleigh, in the State of North Carolina, with the railroad of The RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY in such manner that said railroads form together a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, the railroad of THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY intersects, joins and unites at Hamlet, North Carolina, with the railroad of THE CAROLINA CENTRAL RAILROAD in such manner that said railroads form with each other a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passangers: And

WHEREAS, the railroad of The CAROLINA CENTRAL RAILROAD COMPANY intersects, joins and unites at Monroe, in the State of North Carolina, with the railroad of THE GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY in such manner

that said railroads form with each other a continuous line of railroad for the passage of cars without a break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, the railroad of The GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY intersects, joins and unites at Belt Junction, in the State of Georgia, with the railroad of THE SEABOARD AIR LINE BELT RAILROAD COMPANY in such manner that said railroads form with each other a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, the railroad of THE PALMETTO RAILWAY COMPANY intersects, joins and unites at Hamlet, North Carolina, with the railroad of THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY and with the railroad of THE CAROLINA CENTRAL RAILROAD COMPANY in such manner that said railroads form with each other a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, the railroad of THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY intersects, joins and unites at Cheraw, South Carolina, with the railroad of THE PALMETTO RAILWAY COMPANY in such manner that said railroads form with each other a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, the railroad of THE SOUTH BOUND RAILROAD COMPANY intersects, joins and unites at Camden, South Carolina, with the railroad of THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY in such manner that said railroads form with each other a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers: And

WHEREAS, None of the railroads hereinbefore described is a parallel or competing line with any other of said described railroads, but the same are all so connected and united as to form together a continuous line and system of railroads for the passage of cars for the purposes and in the manner hereinabove mentioned: And

WHEREAS, the interests of the said several companies will be promoted and their ability to perform their duty to the public as common carriers will be increased by the merger and consolidation of the capital stock, franchises, railroads and properties of said hereinbefore mentioned several companies into one new consolidated company: And

WHEREAS, such merger and consolidation is authorized by the general and special laws of the said several States of Virginia, North Carolina, South Carolina and Georgia, in which said railroads are respectively situated, and from which the said companies respectively derive their corporate powers:

NOW, THEREFORE, The said several companies acting by their several Boards of Directors, in pursuance of resolutions duly adopted by them respectively, and subject to ratification by the stockholders of said several companies, as required by law, do hereby enter into the following joint agreement in respect to such merger and consolidation:

ARTICLE I.

The capital stock, franchises, railroads, estates and properties, real, personal and mixed of the said SEABOARD AIR LINE RAILWAY, The RALEIGH AND GASTON ROAD COMPANY, The RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY, The CAROLINA CENTRAL RAILROAD COMPANY, The GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY, The SEABOAD AIR LINE BELT RAILROAD COMPANY, The PALMETTO RAILWAY COMPANY, The CHESTERFIELD AND KERSHAW RAILROAD COMPANY, and The SOUTH BOUND RAILROAD COMPANY shall be and they are hereby united, merged and consolidated, to be hereafter known, owned, and controlled as and by one railroad company.

ARTICLE II.

The name of the said Company so formed by the merger and consolidation and union of the said railroad companies shall be and is the "SEABOARD AIR LINE RAILWAY."

ARTICLE III.

The number of directors of said consolidated company shall be eight, which number may, however, be increased from time to time by the stockholders up to twenty-five. The officers of said consolidated company shall be a president, a secretary and a treasurer, and such other officers as the by-laws, rules and regulations adopted by the stockholders from time to time may name and prescribe, and all said officers shall have such power and authority and be charged with such duties as the by-laws, rules and regulations of the com-

pany adopted in accordance with law may permit or prescribe. The names of the directors and other officers of said consolidated company who shall be the first directors and officers to act until the first annual meeting of the stockholders and until their successors are chosen and qualified, and the respective places of residence of said directors and officers are as follows:

Directors.	*Residence.*
JOHN SKELTON WILLIAMS	Richmond, Va.
JAMES H. DOOLEY	Richmond, Va.
WILLIAM F. COCHRAN	New York, N. Y.
C. SIDNEY SHEPARD	New Haven, N. Y.
ROBERT C. DAVIDSON	Baltimore, Md.
WILLIAM A. MARBURG	Baltimore, Md.
JOHN W. MIDDENDORF	Baltimore, Md.
S. DAVIES WARFIELD	Baltimore, Md.

Officers

JOHN SKELTON WILLIAMS, President	Richmond, Va.
JOHN M. SHERWOOD, Secretary	Richmond, Va.
JOHN H. SHARP, Treasurer	Richmond, Va.

ARTICLE IV.

The principal office of said SEABOARD AIR LINE RAILWAY shall be at the City of Petersburg, Virginia, but said Company shall have the right to have general offices at the cities of Richmond and Portsmouth, Va., Raleigh, N. C., Atlanta, Ga., Columbia, S. C., Savannah, Ga., Montgomery, Ala., Jacksonville, Fla., and such other places in the United States as the Board of Directors shall from time to time determine, or as may be required by the laws of any State in which said Company may own or operate a railroad.

Article V.

The annual meeting of the stockholders of the said consolidated company shall be held at its principal office at Petersburg, in the State of Virginia, on the second Thursday of November in each year, beginning in November, 1901, but the time and place of the annual meeting may be changed from time to time by vote of the stockholders at any general meeting. At such annual meeting the directors for the ensuing year shall be elected by ballot, each share of stock entitling the holder to one vote. The directors shall annually, at their first meeting to be held within ten days after their election, choose from their number the president, who shall continue to serve as a director, and the directors shall also at the same time elect a secretary and a treasurer, to hold their respective offices at the pleasure of the Board of Directors, and also such number of vice-presidents or other officers as the by-laws, rules and regulations of the Company may name or prescribe, and shall from time to time elect and appoint all such agents and employes of every description as the Board of Directors shall deem necessary or convenient for the transaction of the business of said Company. The Board of Directors, acting as a whole or by such executive committee as the by-laws may prescribe, shall or may exercise all such other powers and authortiy and perform all such duties as the laws of the several States from which said consolidated company derives its powers may authorize or prescribe, and shall and may exercise all the powers granted to the said consolidated company in accordance with the laws of said States.

Article VI.

The capital stock of said consolidated company shall be one hundred million dollars ($100,000,000), consisting of

one million (1,000,000) shares of the par value of one hundred dollars ($100) each. Of said total capital stock seven hundred and fifty thousand (750,000) shares of one hundred dollars ($100) each, aggregating seventy-five million dollars ($75,000,000), shall or may be presently issued. The remaining two hundred and fifty thousand (250,000) shares of one hundred dollars ($100) each, aggregating twenty-five million dollars ($25,000,000), shall be issuable hereafter for the corporate purposes of the company, but only in the manner and on the conditions hereinafter prescribed. The seven hundred and fifty thousand (750,000) shares of capital stock presently issuable shall be divided into preferred stock and common stock as follows:

Preferred stock, two hundred and fifty thousand (250,000) shares of the par value of one hundred dollars ($100) each, aggregating twenty-five million dollars ($25,000,000);

Common stock, five hundred thousand (500,000) shares of the par value of one hundred dollars ($100) each, aggregating fifty million dollars ($50,000,000).

The said two hundred and fifty thousand (250,000) shares of capital stock not presently issued may be issued hereafter either as common stock or as preferred stock having the preferences, conditions and voting power hereinafter provided, when and as the issue of the same may be authorized and approved by the stockholders, but no increase in the amount of the preferred stock over and above the said amount of twenty-five million dollars ($25,000,000) shall be made except with the consent of the holders of a majority of the whole amount of preferred stock outstanding first obtained and given at a meeting of the stockholders called for

that purpose, and with the consent of the holders of a majority of such part of the common stock as shall be represented at such meeting, the holders of each class of stock voting separately.

ARTICLE VII.

The profits of said consolidated company as the same may be found and declared applicable to dividends by the Board of Directors, but not otherwise, shall be applied in payment of dividends on the preferred stock and the common stock as follows:—

The holders of preferred stock shall be entitled to receive in each year, out of the surplus net profits of the company for the current year, such yearly dividends (non-cumulative) up to four per centum as the Board of Directors may declare, and before any dividend shall be set apart or paid on the common stock. The surplus net profits of the company for the current year, after providing therefrom for the payment of four per centum on the preferred stock, may be applied to the payment of dividends on the common stock if and when declared by the Board of Directors: provided, however, that such dividends on the common stock shall not for any year exceed four per centum unless and until the preferred stock shall have received an additional dividend, non-cumulative, of two per centum, but no more. The dividends on the preferred stock shall not be cumulative.

ARTICLE VIII.

The manner of converting the capital stock of each of said companies into that of the said consolidated company shall be as follows:—

The stockholders of each such constituent company shall be stockholders of the consolidated company hereby created and established, and the shares of the capital stock of the consolidated company shall be issued in exchange for shares of the capital stock of such respective constituent companies on the following basis:

1. To the holders of preferred stock of Seaboard Air Line Railway, one share of the preferred stock of the consolidated company for each share of the preferred stock of said Seaboard Air Line Railway.

To the holders of the common stock of said Seaboard Air Line Railway, one share of the common of the consolidated company for each share of the common stock of said Seaboard Air Line Railway.

2. To the holders of the capital stock of The Raleigh and Gaston Railway Company, two shares of the common stock of the consolidated company for each one hundred dollars par value of the old.

3. To the holders of the capital stock of The Raleigh and Augusta Air Line Railroad Company, two shares of the common stock of the consolidated company for each one hundred dollars par value of the old.

4. To the holders of the preferred stock of The Carolina Central Railroad Company, two shares of the common stock of the consolidated company for each one hundred dollars par value of the old.

To the holders of the common stock of The Carolina Central Railroad Company, one share of the common stock

of the consolidated company for each one hundred dollars par value of the old.

5. To the holders of the preferred stock of The Georgia, Carolina and Northern Railway Company, two shares of the common stock of the consolidated company for each one hundred dollars par value of the old.

To the holders of the common stock of the Georgia, Carolina and Northern Railway Company, one share of the common stock of the consolidated company for each one hundred dollars par value of the old.

6. To the holders of the capital stock of the Seaboard Air Line Belt Railroad Company, one share of the common stock of the consolidated company for each one hundred dollars par value of the old.

7. To the holders of the capital stock of The Palmetto Railway Company, one share of the common stock of the consoidated company for each one hundred dollars par value of the old.

8. To the holders of the capital stock of The Chesterfield and Kershaw Railroad Company, one share of the common stock of the consolidated company for each two hundred dollars par value of the old.

9. To the holders of the capital stock of The South Bound Railroad Company, one share of the common stock of the consolidated company for each one hundred dollars par value of the old.

Article IX.

Whereas, the indenture of mortgage dated April 4th, 1900, executed by the said SEABOARD AIR LINE RAILWAY, a corporation of the States of Virginia and North Carolina, unto THE CONTINENTAL TRUST COMPANY, a corporation of the State of Maryland, as trustee, to secure the issue of said SEABOARD AIR LINE RAILWAY'S first mortgage fifty-year four per cent. gold bonds to the aggregate amount of $75,000,000 principal of such bonds at any one time outstanding, in and by the several sections of Article Ten of said indenture, expressly provides that in case said corporation shall be consolidated or merged with any other corporation, the successor corporation formed by such consolidation or into which the said railway shall have been merged — upon executing and causing to be recorded an indenture with the trustee under said indenture of April 14, 1900, satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions of said indenture of April 14th, 1900, — shall succeed to and be substituted for the said corporation of Virginia and North Carolina with the same effect as if such successor corporation had been named in said indenture as the party of the first part, grantor and mortgagor therein, and such successor corporation thereupon may cause to be signed and may issue either in its own name or in the name of the present SEABOARD AIR LINE RAILWAY any and all such bonds which shall not theretofore have been signed on behalf of such party of the first part and certified by the said trustee, and for every purpose of said indenture of April 14th, 1900, including the execution, issue and use of any and all bonds thereby secured, the terms "RAILROAD COMPANY" and the "SEABOARD

AIR LINE RAILWAY" shall mean not only said corporation of Virginia and North Carolina, but also any such successor corporation, and every such successor corporation shall possess and from time to time may exercise each and every right and power under said indenture of the present SEABOARD AIR LINE RAILWAY in its name or otherwise; and whereas the said indenture dated April 14th, 1900, in and by the several sections of Article First thereof, also expressly provides for the reservation by the trustee and issue from time to time as required of said first mortgage fifty-year four per cent. gold bonds sufficient at par to take up, meet or retire, at or before maturity, all the bonds heretofore issued by the several constituent companies parties hereto other than said SEABOARD AIR LINE RAILWAY of Virginia and North Carolina, and in and by said article and other articles provides for the payment or refunding of the indebtedness of each of said other constituent companies, parties hereto, outside of their indebtedness respectively to the said present Seaboard Air Line Railway;

Now, Therefore, the directors of the consolidated company hereby created are hereby authorized and directed to execute, deliver and cause to be recorded an indenture with THE CONTINENTAL TRUST COMPANY, a corporation of the State of Maryland, trustee as aforesaid, whereby such consolidated company as the successor of the present SEABOARD AIR LINE RAILWAY shall assume the due and punctual payment of the principal and interest of the said SEABOARD AIR LINE RAILWAY'S first mortgage fifty-year four per cent. gold bonds now issued or hereafter to be issued to an amount not exceeding in the aggregate the principal sum of $75,000,000 at any one time outstanding, and shall assume the performance of all the

covenants and conditions of the said indenture dated April 14th, 1900, executed by the said SEABOARD AIR LINE RAILWAY to the said Continental Trust Company, as Trustee, and shall convey all its railroads, estates and property, real, personal and mixed, acquired and to be acquired, and the income, revenue, rents, issues and profits thereof, and also all its rights privileges, franchises and immunities, to secure the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions contained in said indenture dated April 14th, 1900, to be performed by the party of the first part therein; said indenture shall be in such form as shall be satisfactory to the said trustee and as said directors may determine, and shall be recorded in compliance with the laws of any State wherein any railroad or property of the consolidated company hereby created may be located. Upon the execution and delivery of the indenture above authorized the said consolidated company shall possess and from time to time may exercise each and every right and power under said indenture dated April 14th, 1900, of the present SEABOARD AIR LINE RAILWAY in its name or otherwise; an any act or proceeding by any provision of said indenture required to be done or performed by any board or officer of the party of the first part therein shall or may be done or performed with like force and effect by the like board or officer of the consolidated company hereby created.

No additional mortgage other than the indenture above authorized and directed to be executed, further to secure said issue of first mortgage fifty-year four per cent. gold bonds to the aggregate amount of seventy-five million dollars ($75,000,000) principal of such bonds at any one time outstanding; shall be put upon the properties of the company

except with the consent of the holders of a majority of the whole amount of the preferred stock outstanding first obtained and given at a meeting of the stockholders called for that purpose, and with the consent of the holders of a majority of such part of the common stock as shall be represented at such meeting, the holders of each class of stock voting separately. With the consent of the stockholders first obtained and given as aforesaid the Board of Directors may from time to time provide for the execution of other and further mortgages.

Article X.

Upon, from and after the execution of these Articles of Merger and Consolidation, and the ratification thereof by the stockholders of the constituent companies, and the filing of the same as required by law, the rights, privileges and franchises of each of said constituent companies, and all the property, real, personal and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies, shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all property, rights of way and every other interest shall be as effectually the property of the consolidated company as they were of the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities and dues of any of said companies shall thenceforth attach to the consolidated company, and be enforceable against it, to the same extent as if said debts, liabilities and dues had been incurred by it.

ARTICLE XI.

The president or other proper officer of the said consolidated company shall file a counterpart or copy of these Articles of Agreement of Merger and Consolidation, duly authenticated, with the proper officers in the States of Virginia, North Carolina and Georgia, as soon as convenient after the execution thereof.

In order to facilitate the record of these Articles of Merger and Consolidation, the same may be simultaneously executed in ten counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument.

IN TESTIMONY WHEREOF, the said constituent companies have caused their respective corporate names to be hereto subscribed by their respective excutive officers hereto duly authorized, and their respective corporate seals to be hereunto affixed, duly attested, pursuant to and in accordance with resolutions of their respective Boards of Directors, and in confirmation thereof a majority of the directors of each of said companies have hereunto set their signatures, this 7th day of November A. D. 1901.

SEABOARD AIR LINE RAILWAY,

By JNO. SKELTON WILLIAMS, *President.*
Attest:
(Company's Seal) J. M. SHERWOOD, *Secretary.*

DIRECTORS OF SEABOARD AIR LINE RAILWAY.

JOHN SKELTON WILLIAMS,
ROBERT C. DAVIDSON,
WM. A. MARBURG,
J. WM. MIDDENDORF,
C. SIDNEY SHEPARD,
S. DAVIES WARFIELD,
JAMES H. DOOLEY,
WM. F. COCHRAN.

THE RALEIGH AND GASTON RAILROAD COMPANY,

By JNO. SKELTON WILLIAMS, *President.*

Attest:

(Company's Seal) J. M. SHERWOOD, *Secretary.*

DIRECTORS OF THE RALEIGH AND GASTON RAILROAD COMPANY.

E. RANDOLPH WILLIAMS, J. WM. MIDDENDORF,
WM. H. BLACKFORD, W. W. FULLER,
WM. A. MARBURG, JAMES H. DOOLEY.

THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY,

By JNO. SKELTON WILLIAMS, *President.*

Attest:

(Company's Seal) J. M. SHERWOOD, *Secretary.*

DIRECTORS OF THE RALEIGH AND AUGUSTA AIR LINE RAILROAD COMPANY.

T. C. WILLIAMS, JR. B. N. DUKE,
JNO. SKELTON WILLIAMS, ARNOLD ELZEY WATERS,
B. CAMERON, H. A. PARR.
DOUGLAS H. THOMAS,

THE CAROLINA CENTRAL RAILROAD COMPANY,

By JNO. SKELTON WILLIAMS, *President.*

Attest:

(Campany's Seal) JNO. H. SHARP, *Secretary.*

DIRECTORS OF THE CAROLINA CENTRAL RAILROAD COMPANY.

E. B. Addison,
Jno. Skelton Williams,
James C. Stevenson,
John F. McNair,
G. J. Boney,
D. A. Thompkins,
Robert C. Davidson,
R. C. Hoffman,
J. Brander Matthews,
J. Augustus Johnson,
C. Sidney Shepard.

THE GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY,

By R. F. Hoke, *President.*

Attest:

(Company's Seal) J. M. Sherwood, *Secretary.*

DIRECTORS OF THE GEORGIA, CAROLINA AND NORTHERN RAILWAY COMPANY.

Jno. Skelton Williams,
S. M. Jones,
W. A. Shands,
J. K. Durst,
McAlpin Arnold,
M. G. Michael,
J. F. Rhodes,
John Oliver,
R. F. Hoke,
R. C. Hoffman,
J. Wm. Middendorf,
D. O. Dougherty,
Robert J. Lowry.

THE SEABOARD AIR LINE BELT RAILROAD COMPANY,

By Jno. Skelton Williams, *President.*

Attest:

(Company's Seal) J. M. Sherwood, *Secretary.*

DIRECTORS OF THE SEABOARD AIR LINE BELT RAILROAD COMPANY,

E. Randolph Williams,
Jno. Skelton Williams,
J. A. Smith,
Oscar Elsas,
David Woodward,
T. A. Gramling,
R. F. Hoke,
Legh R. Watts,
J. Wm. Middendorf.

THE PALMETTO RAILWAY COMPANY,

By Jno. Skelton Williams, *President.*

Attest:

(Company's Seal) Jno. H. Sharp, *Secretary.*

DIRECTORS OF THE PALMETTO RAILWAY COMPANY.

E. Randolph Williams,
Jno. Skelton Williams,
Legh R. Watts,
J. Wm. Middendorf,
James H. Dooley.

THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY,

By Jno. Skelton Williams, *President.*

Attest:

(Company's Seal) J. M. Sherwood, *Secretary.*

DIRECTORS OF THE CHESTERFIELD AND KERSHAW RAILROAD COMPANY.

E. Randolph Williams,
Jno. Skelton Williams,
Edward McIver,
W. F. Stevenson,
Legh R. Watts,
J. M. Sherwood,
J. Wm. Middendorf,
H. W. Finlayson,
V. E. McBee.

THE SOUTH BOUND RAILROAD COMPANY,

By H. RIEMAN DUVAL, *President.*

Attest:

(Company's Seal) D. C. PORTEOUS, *Secretary.*

DIRECTORS OF THE SOUTH BOUND RAILROAD COMPANY.

A. B. WILLIAMS,
JOHN L. WILLIAMS,
H. L. CABELL,
JNO. SKELTON WILLIAMS,
J. WM. MIDDENDORF,
H. RIEMAN DUVAL,
JAMES H. DOOLEY.

I, D. C. PORTEOUS, Secretary of Seaboard Air Line Railway, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said Seaboard Air Line Railway was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Wednesday, the 1st day of May, A. D., 1901; also that said agreement was submitted to the stockholders of said Seaboard Air Line Railway at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation) called for the purpose of taking the same into consideration at the principal office of the said company in the City of Petersburg, in the State of Virginia, on Friday, the 13th day of September, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; and at which meeting all the shares of the capital stock of said Seaboard Air Line Railway were represented in person or by

proxy; and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 625,000 votes, representing 625,000 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 625,000 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of the capital stock of said company is 625,000, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute the unanimous vote of all outstanding capital stock of said Seaboard Air Line Railway.

Attest:

D. C. PORTEOUS,
Secretary of Seaboard Air Line Railway.

(Seal)

I, D. C. PORTEOUS, Secretary of The Raleigh and Gaston Railroad Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The Raleigh and Gaston Railroad Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Monday, the 29th day of April, A. D. 1901; also that said agreement was submitted to the stockholders of said The Raleigh and Gaston Railroad Company at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation) called for the purpose of taking the same into consideration at the principal

office of the said company in the City of Raleigh, in the State of North Carolina, on Monday, the 20th day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published as required by law in the City of Raleigh (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of same; that 14,988 votes, representing 14,988 shares of stock were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 14,988 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of the capital stock of said company is 15,000, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority in amount of all the outstanding capital stock of said The Raleigh and Gaston Railroad Company.

Attest:

D. C. PORTEOUS,
Secretary of The Raleigh and Gaston Railroad Company.

(Seal)

I, D. C. PORTEOUS, Secretary of The Raleigh and Augusta Air Line Railroad Company, do hereby certify that the

execution of the foregoing agreement of merger and consolidation on the part of said The Raleigh and Augusta Air Line Railroad Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Monday, the 29th day of April, A. D. 1901; also, that said agreement was submitted to the stockholders of said The Raleigh and Augusta Air Line Railroad Company, at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation), called for the purpose of taking the same into consideration at the principal office of the said company in the City of Raleigh, in the State of North Carolina, on Monday, the 20th day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Raleigh (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 8,704 votes, representing 8,704 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 8,704 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 8,736, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority

in amount of all the outstanding capital stock of said The Raleigh and August Air Line Railroad Company.

Attest:

D. C. PORTEOUS,
Secretary of The Raleigh and Augusta Air Line Railroad Company.

(Seal)

I, JNO. H. SHARP, Secretary of The Carolina Central Railroad Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The Carolina Central Railroad Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Monday, the 29th day of April, A. D. 1901; also that said agreement was submitted to the stockholders of said The Carolina Central Railroad Company at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement or merger and consolidation) called for the purpose of taking the same into consideration at the principal office of the said Company in the City of New York, in the State of New York, on Wednesday, the 15th day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Wilmington (the principal office of said company being located in said city) and in the City of New York; and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 19,713 votes,

representing 19,713 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 19,713 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 19,770, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority in amount of all the outstanding capital stock of said The Carolina Central Railroad Company.

Attest:

JNO. H. SHARP,
Secretary of the Carolina Central Railroad Company.

(Seal)

I, D. C. PORTEOUS, Secretary of the Georgia, Carolina and Northern Railway Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The Georgia, Carolina and Northern Railway Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Saturday, the 27th day of April, A. D. 1901; also that said agreement was submitted to the stockholders of said The Georgia, Carolina and Northern Railway Company at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation) called for the purpose of taking the same into consideration at the principal office of the said company in the City of Atlanta, in the State of Georgia, on Friday, the 31st day of May, A. D. 1901, due notice of the

time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Atlanta (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 15,981 votes, representing 15,981 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 15,981 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 16,114, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority in amount of all the oustanding capital stock of said The Georgia, Carolina and Northern Railway Company.

Attest:

D. C. PORTEOUS,
Secretary of The Georgia, Carolina and Northern Railway Company.

(Seal)

I, D. C. PORTEOUS, Secretary of The Seaboard Air Line Belt Railroad Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The Seaboard Air Line Belt Railroad Company was authorized by resolution duly entered on their minutes by the Directors of said company at a meeting thereof duly called, said meeting having been held on Saturday,

the 27th day of April, A. D. 1901; also that said agreement was submitted to the stockholders of said The Seaboard Air Line Belt Railroad Company at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation) called for the purpose of taking the same into consideration at the principal office of the said company in the City of Atlanta, in the State of Georgia, on Friday, the 31st day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Atlanta (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 500 votes, representing 500 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 500 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 500, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority in amount of all the outstanding capital stock of said The Seaboard Air Line Belt Railroad Company.

Attest:

D. C. PORTEOUS,
Secretary of the Seaboard Air Line Belt Railroad Company.

(Seal)

I, JNO. H. SHARP, Secretary of The Palmetto Railway Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The Palmetto Railway Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Monday, the 29th day of April, A. D. 1901; also that said agreement was submitted to the stockholders of said The Palmetto Railway Company at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation; called for the purpose of taking the same into consideration at the principal office of the said company in the City of Raleigh, in the State of North Carolina, on Thursday, the 30th day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Raleigh (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 2,000 votes, representing 2,000 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 2,000 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 2,000, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority

in amount of all the outstanding capital stock of the said The Palmetto Railway Company.

Attest:

JNO. H. SHARP,
Secretary of The Palmetto Railway Company.

(Seal)

I, D. C. PORTEOUS, Secretary of the Chesterfield and Kershaw Railroad Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The Chesterfield and Kershaw Railroad Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Monday, the 29th day of April, A. D. 1901; also, that said agreement was submitted to the stockholders of said The Chesterfield and Kershaw Railroad Company, at a meeting thereof (separate from the meetings of the stockholders of the other parties unto said agreement of merger and consolidation), called for the purpose of taking the same into consideration at the principal office of the said company in the City of Cheraw, in the State of South Carolina, on Monday, the 20th day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Cheraw, S. C. (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for

the adoption or rejection of the same; that 40,000 votes, representing 40,000 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 40,000 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 40,000, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majortiy in amount of all the outstanding capital stock of said The Chesterfield and Kershaw Railroad Company.

Attest:

D. C. PORTEOUS,
Secretary of The Chesterfield and Kershaw Railroad Company.

(Seal)

I, D. C. PORTEOUS, Secretary of The South Bound Railroad Company, do hereby certify that the execution of the foregoing agreement of merger and consolidation on the part of said The South Bound Railroad Company was authorized by resolution duly entered on their minutes by the Directors of said company, at a meeting thereof duly called, said meeting having been held on Monday, the 29th, day of April, A. D. 1901; also, that said agreement was submitted to the stockholders of said The South Bound Railroad Company at a meeting (separate from the meeting of the stockholders of the other parties unto said agreement of merger and consolidation), called for the purpose of taking the same in consideration at the principal office of the said company in the

City of Columbia, in the State of South Carolina, on Monday, the 20th day of May, A. D. 1901, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose post-office address is known, and sent by mail to such post-office address; said notice was also duly published, as required by law, in the City of Savannah (the principal office of said company being located in said city); and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 20,330 votes, representing 20,330 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 20,330 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 20,330, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification or said agreement constitute more than a majority in amount of all the outstanding capital stock of said The South Bound Railroad Company.

Attest:

D. C. PORTEOUS,
Secretary of The South Bound Railroad Company.

(Seal)

VIRGINIA:

OFFICE OF SECRETARY OF THE COMMONWEALTH.

COMMONWEALTH OF VIRGINIA:

I, J. T. LAWLESS, Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of Articles of Agreement of Merger and Consolidation of Seaboard Air Line Railway, The Raleigh and Gaston Railroad Company, The Raleigh and Augusta Air Line Railroad Company, The Carolina Central Railroad Company, The Georgia, Carolina and Northern Railway Company, The Seaboard Air Line Belt Railroad Company, The Palmetto Railway Company, The Chesterfield and Kershaw Railroad Company, and The South Railroad Company, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the State of Virginia, as therein mentioned, which agreement was duly filed in this office on the seventh day of November, 1901.

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this 11th day of November, A. D. 1901.

J. T. LAWLESS,
Secretary of the Commonwealth.

(Seal)

STATE OF NORTH CAROLINA: DEPARTMENT OF STATE

RALEIGH, November 12, 1901.

I, J. BRYAN GRIMES, Secretary of State of the State of North Carolina, do hereby certify that the foregoing is a true copy of Articles of Agreement of Merger and Consolidation of Seaboard Air Line Railway, The Raleigh and Gaston Railroad Company, The Raleigh and Augusta Air Line Railroad Company, The Carolina Central Railroad Company, The Georgia and Northern Railway, The Seaboard Air Line Belt Railroad Company, The Palmetto Railway Company, The Chesterfield and Kershaw Railroad Company, and The South Bound Railroad Company, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the State of Virginia, as therein mentioned, which agreement was duly filed in this office on the seventh day of November, 1901.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 13th day of November, in the year of our Lord, 1901.

J. BRYAN GRIMES,
Secretary of State.

(Seal)

STATE OF GEORGIA:

OFFICE OF SECRETARY OF STATE.

Atlanta, December 16, 1901.

I, PHILLIP COOK, Secretary of State of the State of Georgia, do hereby certify that the attached and foregoing forty-five (45) pages of written and printed matter contain a true and correct copy of the Articles of Agreement of Merger and Consolidation of Seaboard Air Line Railway, The Raleigh & Gaston Railroad Company, The Raleigh & Augusta Air Line Railroad Company, The Carolina Central Railroad Company, The Georgia, Carolina and Northern Ry. Co., The Seaboard Air Line Belt Railroad Company, The Palmetto Railway Company, The Chesterfield & Kershaw Railroad Co., and The South Bound Railroad Company, forming the

"SEABOARD AIR LINE RAILWAY,"

as shown by a copy of said Articles of Agreement of Merger and Consolidation filed in this department at 12 o'clock, meridian, on the seventh day of November, A.D. 1901.

PHILIP COOK,
Secretary of State.

(Seal)

STATE OF SOUTH CAROLINA:
DEPARTMENT OF STATE

COLUMBIA, November 15, 1901.

I, M. R. COOPER, Secretary of State of the State of South Carolina, do hereby certify that the foregoing is a true copy of Articles of Agreement of Merger and Consolidation of Seaboard Air Line Railway, The Raleigh and Gaston Railroad Company, The Raleigh and Augusta Air Line Railroad Company, The Carolina Central Railroad Company, The Georgia, Carolina and Northern Railway, The Seaboard Air Line Belt Railroad Company, The Palmetto Railway Company, The Chesterfield and Kershaw Railroad Company, and the South Bound Railroad Company, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the State of Virginia, as therein mentioned, which agreement was duly filed in this office on the seventh day of November, 1901.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Columbia, this 15th day of November, in the year of our Lord, 1901.

M. R. COOPER,
Secretary of State.

(Seal)

EXHIBIT B

ARTICLES OF AGREEMENT

OF

MERGER AND CONSOLIDATION

OF

SEABOARD AIR LINE RAILWAY

AND

FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY

JUNE 27TH, 1903

ARTICLES OF AGREEMENT
OF
MERGER AND CONSOLIDATION

Made and entered into this 27th day of June, A. D. 1903, by and between the SEABOARD AIR LINE RAILWAY, a consolidated corporation organized and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama, and its Directors, parties of the first part, and the FLORIDA, CENTRAL AND PENINSULAR RAILROAD COMPANY, a corporation duly incorporated and operated under and by virtue of the laws of the States of Florida and Georgia, and its Directors, parties of the second part.

WHEREAS, the said Seaboard Air Line Railway is a corporation duly created and organized under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama, and is the owner of a railroad constructed and in operation from its Northern terminus at the City of Richmond, in the State of Virginia, and through said State and into the State of North Carolina, with branches in said State, and through the State of North Carolina to the State of South Carolina, with branches in said State; through the State of South Carolina to the State of Georgia, with branches in said State, and through the said State of Georgia to the City of Savannah in said State, where it connects with the railroad of the Florida, Central and Peninsular Railroad Company, a distance of about 1,663.37 miles, and

WHEREAS, the Florida, Central and Peninsular Railroad Company is a corporation duly created and organized under the laws of the States of Florida and Georgia and is the owner of a railroad constructed and in operation from its

northern terminus in the City of Savannah, Georgia, where it connects with the railroad of the Seaboard Air Line Railway, extending from Savannah, Georgia, to Jacksonville, Florida, and from Jacksonville, Florida, to the Chattahoochee River, Florida, and from Fernandina, Florida, to Cedar Keys, Florida, and also from Waldo, Florida, to Tampa, Florida, and from Wildwood, Florida, to Lake Charm, Florida, with the several branches thereof; the mileage of said road being about 865.12 miles; and,

WHEREAS, said railroads as above described are not parallel or competing lines, but the same are both so connected and united as to form together a continuous line and system of railroads for the passage of cars, freight and passenger, over said road continuously, without break or interruption; and will connect each with the other and form a continuous line and system of railroads; and,

WHEREAS, the interests of said companies will be promoted and their ability to perform duties to the public as common carriers will be increased by the merger and consolidation of the capital stock, franchises, railroads and properties of said hereinbefore mentioned several companies into one new consolidated company; and,

WHEREAS, said merger and consolidation is authorized by the general and special laws of the said several States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, in which the said railroads are respectively situated and from which the said companies, respectively, derive their corporate powers;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That the said Seaboard Air Line Railway and the Florida, Central and Peninsular Railroad Company, parties hereto,

acting by their several Boards of Directors in pursuance of resolutions duly adopted by them, respectively, and subject to ratification of the Stockholders of said several companies as required by law, do hereby enter into the following joint agreement, and by these presents do agree upon and prescribe the terms and conditions of said merger and consolidation and the mode of carrying the same into effect, which said terms and conditions and mode of carrying the same into effect they mutually agree to observe as follows, to-wit.

ARTICLE I.

The capital stock, franchises, railroads, estates and properties, real, personal and mixed, of the said Florida, Central and Peninsular Railroad Company shall be, and they are hereby, united, merged and consolidated with the Seaboard Air Line Railway and are to be hereafter owned and controlled as one railroad company.

ARTICLE II.

The name of said company so formed by the merger and consolidation and union of said railroad companies shall be, and is, the "SEABOARD AIR LINE RAILWAY."

ARTICLE III.

The number of directors of said consolidated company shall be thirteen, which number may, however, be increased from time to time by the stockholders up to twenty-six. The officers of said consolidated company shall be a president, a secretary and a treasurer, and such other officers as the by-laws, rules and regulations adopted by the stockholders from time to time may name and prescribe, and all said officers shall have such power and authority and be charged with such

duties as the by-laws, rules and regulations of the company adopted in accordance with law may permit or prescribe. The names of the directors and other officers of said consolidated company who shall be the first directors and officers to act until the first annual meeting of the stockholders and until their successors are chosen and qualified, and the respective places of residence of said directors and officers are as follows

Directors	*Residence*
John Skelton Williams	Richmond, Va.
James H. Dooley	Richmond, Va.
F. R. Pemberton	New York, N. Y.
J. M. Barr	Portsmouth, Va.
C. Sidney Shepard	New Haven, N. Y.
Robert C. Davidson	Baltimore, Md.
William A. Marburg	Baltimore, Md.
J. Wm. Middendorf	Baltimore, Md.
S. Davies Warfield	Baltimore, Md.
E. B. Addison	Richmond, Va.
Geo. W. Watt	Durham, N. C.
W. W. Mackall	Savannah, Ga.
Ernst Thalmann	New York, N. Y.

Officers.

John Skelton Williams, *President*	Richmond, Va.
John H. Sharp, *Treasurer*	Portsmouth, Va.
D. C. Porteous, *Secretary*	New York, N. Y.

Article IV

The principal office of said Seaboard Air Line Railway shall be at the City of Petersburg, Virginia, but said Company shall have the right to have general offices at the cities of Richmond and Portsmouth, Va., Raleigh, N. C., Atlanta, Ga., Columbia, S. C., Savannah, Ga., Montgomery, Ala., Jacksonville, Fla., and such other places in the United States as the Board of Directors shall from time to time determine, or as may be required by the laws of any State in which said Company may own or operate a railroad.

Article V.

The annual meeting of the stockholders of the said consolidated company shall be held at its principal office at Petersburg, in the State of Virginia, on the second Thursday of November in each year, beginning in November, 1903, but the time and place of the annual meeting may be changed from time to time by vote of the stockholders at any general meeting. At such annual meeting the directors for the ensuing year shall be elected by ballot, each share of stock entitling the holder to one vote. The director shall annually, at their first meeting to be held within ten days after their election, choose from their number the president, who shall continue to serve as a director, and the directors shall also at the same time elect a secretary and a treasurer, to hold their respective offices at the pleasure of the Board of Directors, and also such number of vice-presidents or other officers as the by-laws, rules and regulations of the Company may name or prescribe, and shall from time to time elect and appoint all such agents and employes of every description as the Board of Directors shall deem necessary or convenient for the transaction of the business of said Company. The Board of Direc-

tors, acting as a whole or by such executive committee as the by-laws may prescribe, shall or may exercise all such powers and authority and perform all such duties as the laws of the several States from which said consolidated company derives its powers may authorize or prescribe, and shall and may exercise all the powers granted to the said consolidated company in accordance with the laws of said States.

ARTICLE VI.

The capital stock of said consolidated company shall be one hundred million dollars ($100,000,000), consisting of one million (1,000,000) shares of the par value of one hundred dollars ($100) each. Of said total capital stock seven hundred and fifty thousand (750,000) shares of one hundred dollars ($100) each, aggregating seventy-five million dollars ($75,000,000) shall or may be presently issued. The remaining two hundred and fifty thousand (250,000) shares of one hundred dollars ($100) each, aggregating twenty-five million dollars ($25,000,000) shall be issuable hereafter for the corporate purposes of the company, but only in the manner and on the conditions hereinafter prescribed. The seven hundred and fifty thousand (750,000) shares of capital stock presently issuable shall be divided into preferred stock and common stock as follows:

Preferred stock, two hundred and fifty thousand (250,000) shares of the par value of one hundred dollars ($100) each, aggregating twenty-five million dollars ($25,000,000).

Common stock, five hundred thousand (500,000) shares of the par value of one hundred dollars ($100) each, aggregating fifty million dollars ($50,000,000).

The said two hundred and fifty thousand (250,000) shares of capital stock not presently issued may be issued hereafter either as common stock or as preferred stock having the preferences, conditions and voting powers hereinafter provided, when and as the issue of the same may be authorized and approved by the stockholders, but no increase in the amount of the preferred stock over and above the said amount of twenty-five million dollars ($25,000,000) shall be made, except with the consent of the holders of a majority of the whole amount of preferred stock outstanding first obtained and given at a meeting of the stockholders called for that purpose, and with the consent of the holders of a majority of such part of the common stock as shall be represented at such meeting, the holders of each class of stock voting separately.

ARTICLE VII.

The profits of said consolidated company as the same may be found and declared applicable to dividends by the Board of Directors, but not otherwise, shall be applied in payment of dividends on the preferred stock and the common stock as follows:

The holders of preferred stock shall be entitled to receive in each year, out of the surplus net profits of the company for the current year, such yearly dividends, non-cumulative, up to 4 per centum, as the Board of Directors may declare, and before any dividend shall be set apart or paid on the common stock. The surplus net profits of the company for the current year, after providing therefrom for the payment of 4 per centum on the preferred stock, may be applied to the payment of dividends on the common stock if and when declared by the Board of Directors; provided, how-

ever, that such dividends on the common stock shall not for any year exceed 4 per centum unless and until the preferred stock shall have received an additional dividend, non-cumulative, of 2 per centum, but no more. The dividends on the preferred stock shall not be cumulative.

ARTICEL VIII.

The manner of converting the capital stock of each of said companies into that of the said consolidated company shall be as follows:—

The stockholders of each of said constituent companies shall be stockholders of the consolidated company hereby created and established, and the shares of the capital stock of the consolidated company shall be issued in exchange for shares of the capital stock of said respective constituent companies on the following basis:—

1. To the holders of preferred stock of Seaboard Air Line Railway, one share of the preferred stock of the consolidated company for each share of the preferred stock of said Seaboard Air Line Railway.

To the holders of the common stock of said Seaboard Air Line Railway, one share of the common stock of the consolidated company for each share of the common stock of said Seaboard Air Line Railway.

It being understood that the amount of preferred stock of said Seaboard Air Line Railway outstanding is 250,000 shares of the par value of one hundred dollars ($100) each, and the amount of common stock of said Seaboard Air Line Railway outstanding is 375,000 shares of the par value of one hundred dollars ($100) each.

2. To the holders of preferred stock of Florida, Central and Peninsular Railroad Company, one share of the preferred stock and one share of the common stock of the consolidated company for each share of the preferred stock of said Florida, Central and Peninsular Railroad Company.

To the holders of the common stock of said Florida, Central and Peninsula Railroad Company, one share of the common stock of the consolidated company for each share of the common stock of said Florida, Central and Peninsular Railroad Company.

But in the exchange of stock, both common and preferred, of the Florida Central and Peninsular Railroad Company, for the common and preferred stock, respectively, of said Seaboard Air Line Railway, no exchange is to be made for the stock of said Florida, Central and Peninsular Railroad Company, either common or preferred, now held and owned by said Seaboard Air Line Railway.

Article IX.

The Directors of the consolidated company hereby created are hereby authorized to execute, deliver and cause to be recorded an indenture with THE CONTINENTAL TRUST COMPANY, a corporation of the State of Maryland, trustee under the indenture of mortgage, dated April 14th, 1900, executed by the original Seaboard Air Line Railway, a constituent company of said party of the first part, whereby such consolidated company, as the successor of the present SEABOARD AIR LINE RAILWAY, shall assume the due and punctual payment of the principal and interest of the said SEABOARD AIR LINE RAILWAY'S first mortgage fifty-year 4 per cent. gold bonds now issued or hereafter to be issued to an amount not exceeding in the

aggregate the principal sum of $75,000,000 at any one time outstanding, and shall assume the performance of all the covenants and conditions of the said indenture dated April 14th, 1900, adopted by the said SEABOARD AIR LINE RAILWAY in and by an indenture dated December 31st, 1901, executed by said SEABOARD AIR LINE RAILWAY to the said Continental Trust Company, as Trustees, and shall convey all its railroads, estates and property, real, personal and mixed, acquired and to be acquired, and the income, revenue, rents, issues and profits thereof, and also all its rights, privileges, franchises and immunities, to secure the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions contained in said indenture dated April 14th, 1900, to be performed by the party of the first part therein; said indenture shall be in such form as shall be satisfactory to said trustee, and as said directors may determine, and shall be recorded in compliance with the laws of any State wherein any railroad or property of the consolidated company hereby created may be located. Upon the execution and delivery of the indenture above authorized the said consolidated company shall possess, and from time to time may exercise each and every right and power under said indenture dated April 14th, 1900, of the present SEABOARD AIR LINE RAILWAY in its name or otherwise; and any act or proceeding by any provision of said indenture required to be done or performed by any board or officer of the party of the first part therein shall or may be done or performed with like force and effect by the like board or officer of the consolidated company hereby created.

No additional mortgage other than the indenture above authorized and directed to be executed, further to secure said issue of first mortgage fifty-year 4 per cent. gold bonds to

the aggregate amount of seventy-five million dollars ($75,000,000) principal of such bonds at any one time outstanding, shall be put upon the properties of the company except with the consent of the holders of a majority of the whole amount of the preferred stock outstanding first obtained and given at a meeting of the stockholders called for that purpose, and with the consent of the holders of a majority of such part of the common stock as shall be represented at such meeting, the holders of each class of stock voting separately. With the consent of the stockholders, first obtained and given as aforesaid, the Board of Directors may from time to time provide for the execution of other and further mortgages.

ARTICLE X.

Upon, from and after the execution of these Articles of Merger and Consolidation, and the ratification thereof by the stockholders of the consolidated companies, and the filing of the same as required by law, the rights, privileges and franchises of each of said constituent companies, and all the property, real, personal and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies, shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all property, rights of way and every other interest shall be as effectually the property of the consolidated company as they were of the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities and dues of said companies shall thenceforth attach to the consolidated company, and be enforceable against it, to the same extent as if said debts, liabilities and dues had been incurred by it.

ARTICLE XI.

The President or other proper officer of the said consolidated company shall file a counterpart or copy of these Articles of Agreement of Merger and Consolidation, duly authenticated, with the proper officers in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, as soon as convenient after the execution thereof.

In order to facilitate the record of these Articles of Merger and Consolidation, the same may be simultaneously executed in ten counterparts, each of which shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument.

IN TESTIMONY WHEREOF, The said constituent companies have caused their respective corporate names to be hereto subscribed by their respective excutive officers heretofore duly authorized and their respective corporate seals to be hereunto affixed, duly attested, pursuant to and in accordance with resolutions of their respective Boards of Directors, and in confirmation thereof a majority of the Directors of each of said companies have hereunto set their signatures, this 27th day of June, A. D. 1903.

SEABOARD AIR LINE RAILWAY,

By J. S. WILLIAMS,

President.

(Seal)

Attest:

D. C. PORTEOUS,
Secretary.

DIRECTORS OF SEABOARD AIR LINE RAILWAY:

J. S. WILLIAMS,
C. SIDNEY SHEPARD,
F. R. PEMBERTON,
J. WM. MIDDENDORF,
S. DAVIES WARFIELD,
ROBERT C. DAVIDSON,
W. W. MACKALL,
J. M. BARR.

FLORIDA, CENTRAL AND PENINSULAR RAILROAD COMPANY,

By J. M. BARR,
First Vice-President.

(Seal)

Attest:

ROBT. L. NUTT,
Asst. Secretary.

DIRECTORS OF FLORIDA, CENTRAL AND PENINSULAR RAILROAD COMPANY:

J. S. WILLIAMS,
H. RIEMAN DUVAL,
C. SIDNEY SHEPARD,
F. R. PEMBERTON,
J. AUGUSTUS JOHNSON,
J. WM. MIDDENDORF,

I, D. C. PORTEOUS, Secretary of Seaboard Air Line Railway, do hereby certify that the execution of the foregoing Agreement of Merger and Consolidation on the part of said Seaboard Air Line Railway was authorized by resolution, duly entered on their minutes by the directors of said company, at a meeting thereof duly called; said meeting having been held on Wednesday, the 24th day of June, A. D. 1903; also that said agreement was submitted to the stockholders of said Seaboard Air Line Railway at an adjourned annual meeting thereof (separate from the meetings of the stockholders of the other party to said Agreement of Merger and

Consolidation) hld at the principal office of the said company in the City of Petersburg, in the State of Virginia, on Saturday, the 27th day of June, A. D. 1903, at which said meeting all the shares of the capital stock were represented in person or by proxy (notice of said meeting having been given to each stockholder whose name is registered on the books of the Company, by transmitting to their address notice of said meeting and each and every stockholder having signed a waiver of notice of the meeting), and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 625,000 votes, representing 625,000 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 625,000 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 625,000 and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority in amount of all outstanding capital stock of said Seaboard Air Line Railway.

Attest.
(Seal)

D. C. PORTEOUS,
Secretary of Seaboard Air Line Railway.

I, ROBT. L. NUTT, Asst. Secretary of the Florida, Central and Peninsular Railroad Company, do hereby certify that the execution of the foregoing Agreement of Merger and Consolidation on the part of said Florida, Central and Peninsular Railroad Company was authorized by resolution

duly entered on their minutes by the Directors of said Company, at a meeting thereof duly called; said meeting having been held on Wednesday, the 24th of June, A. D. 1903; also that said agreement was submitted to the stockholders of said Florida, Central and Peninsular Railroad Company at a meeting thereof (separate from the meetings of the stockholders of the other party to said Agreement of Merger and Consolidation) called for the purpose of taking the same into consideration at the principal office of the said company in the City of Jacksonville, in the State of Florida, on Tuesday, the 30th day of June, A. D. 1903, due notice of the time, place and object of said meeting having been given by printed notice addressed to each stockholder, whose name is registered on the books of the company, or whose postoffice address is known, and sent by mail to such postoffice address; said notice was also duly published as required by law in the City of Jacksonville, the principal office of said company being located in said city), and in the City of New York; and that at said stockholders' meeting said agreement was considered, and a vote by ballot taken for the adoption or rejection of the same; that 240,470 votes, representing 240,470 shares of stock were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, or which 240,470 votes were cast in favor of the adoption and ratification of said agreement, and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said company is 245,000, of which number, 2,521 shares is treasury stock in the custody of the Secretary of the Company (which was not voted at said meeting), and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said agreement constitute more than a majority in amount of all the outstanding capital

stock of said Florida, Central and Peninsular Railroad Company.

Attest:

ROBT. L. NUTT,
Asst. Secretary of the Florida, Central and Peninsular Railroad Company.

(Seal)

VIRGINIA.

OFFICE OF SECRETARY OF THE COMMONWEALTH.

I, B. O. JAMES, Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of Articles of Merger and Consolidation of Seaboard Air Line Railway and Florida, Central and Peninsular Railroad Company, dated June 27th, 1903, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created and existing under the laws of the States of Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the fifteenth day of August, 1903.

(Seal)

Given under my hand and the Lesser Seal of the Commonwealth, at Richmond, this the 20th day of February, A. D. 1911.

B. O. JAMES,
Secretary of the Commonwealth.

STATE OF NORTH CAROLINA.

DEPARTMENT OF STATE

RALEIGH, N. C., Feby. 18, 1911.

I, J. BRYAN GRIMES, Secretary of State of the State of North Carolina, do hereby certify that the foregoing is a true copy of Articles of Agreement and Consolidation of Seaboard Air Line Railway and Florida, Central and Peninsular Railroad Company dated June 27th, 1903, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the States of Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the 17th day of August, 1903.

IN WILNESS WHEREOF, I have hereunto set my hand and official seal.

Done in office at Raleigh, this 18th day of February, in the year of our Lord, 1911.

J. BRYAN GRIMES,
Secretary of State.

(Seal)

STATE OF SOUTH CAROLINA.
DEPARTMENT OF STATE.

COLUMBIA, S. C., Feb. 20, 1911.

I, R. M. McCOWN, Secretary of State of the State of South Carolina, do hereby certify that the foregoing is a true copy of Articles of Agreement of Merger and Consolidation of Seaboard Air Line Railway and Florida, Central and Peninsular Railroad Company, dated June 27th, 1903, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the States of Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the fifteenth day of August, 1903.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

Done in office at Columbia, S. C., this 20th day of February, in the year of our Lord, 1911.

R. M. McCOWN,
Secretary of State.

(Seal)

STATE OF GEORGIA.

OFFICE OF SECRETARY OF STATE,
ATLANTA.

I, PHILIP COOK, Secretary of State of the State of Georgia, do hereby certify that the foregoing is a true copy of Articles of Agreement and Consolidation of Seaboard Air Line Railway and Florida, Central and Peninsular Railroad Company, dated June 27th, 1903, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of Virginia, North Carolina and other States, as therein mentioned, which agreement was duly filed in this office on the 15th day of August, 1903.

Given under my hand and official seal, this 20th day of February, 1911.

PHILIP COOK,
Secretary of State.

(Seal)

STATE OF FLORIDA.

OFFICE OF SECRETARY OF STATE.

I, H. CLAY CRAWFORD, Secretary of State of the State of Florida, do hereby certify that the foregoing is a true copy of Articles of Agreement and Consolidation of Seaboard Air Line Railway and Florida, Central and Peninsular Railroad Company, dated June 27th, 1903, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the States of Virginia, North Carolina, and other States, as

therein mentioned, which agreement was duly filed in this office on the fifteenth day of August, 1903.

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capitol, this the twenty-first day of February, A. D., 1911.

H. CLAY CRAWFORD,
Secretary of State.

(Seal)

THE STATE OF ALABAMA.

DEPARTMENT OF STATE.

I, CYRUS B. BROWN, Secretary of State, do hereby certify that the pages hereto attached, contain a true, accurate and literal copy of Articles of Agreement and Consolidation of Seaboard Air Line Railway and Florida, Central Peninsular Railroad Company, dated June 27th, 1903, forming the

"SEABOARD AIR LINE RAILWAY,"

a corporation created by and existing under the laws of the States of Virginia, North Carolina and other States, as therein mentioned, was duly filed in this office on the 15th day of August, 1903, as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, this 20th day of February, One Thousand Nine Hundred and Eleven.

CYRUS B. BROWN,
Secretary of State.

(Seal)

EXHIBIT C.

ARTICLES AND AGREEMENT

OF

MERGER AND CONSOLIDATION

BETWEEN

SEABOARD AIR LINE RAILWAY

AND

CAROLINA ATLANTIC & WESTERN RAILWAY

FORMING

"SEABOARD AIR LINE RAILWAY COMPANY"

OCTOBER 11, 1915

AS AMENDED PURSUANT TO RESOLUTIONS
ADOPTED BY BOARD OF DIRECTORS
APRIL 4, 1929

AND BY STOCKHOLDERS
OCTOBER 12, 1929,

AND

NOVEMBER 4, 1929.

ARTICLES AND AGREEMENT OF MERGER AND CONSOLIDATION made and entered into this 11th day of October, A. D. 1915, by and between SEABOARD AIR LINE RAILWAY, a consolidated corporation organized and existing under the laws of the State of Virginia, and other states (hereinafter called the "Virginia Company"), party of the first part and CAROLINA ATLANTIC & WESTERN RAILWAY, a consolidated corporation of North Carolina and South Carolina (hereinafter called the "Carolina Company"), party of the second spart; and also by and between the Directors of the said Virginia Company and the Directors of the said Carolina Company.

WHEREAS, the Virginia Company is a consolidated railroad corporation organized and existing under the laws of the State of Virginia and other states, owning lines of railroad in the states of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama, and having an authorized capital stock of $100,000,000, of which there has been issued $25,000,000 of preferred capital stock and $37,516,000 of common capital stock, of which amount $1,105,900 par value of preferred capital stock and $496,600 of common capital stock has been delivered into the treasury of said company; and said company has heretofore executed its Refunding Mortgage dated October 1, 1909, securing an authorized issue of $125,000,000 face amount of Four Per Cent. Refunding Gold Bonds due 1959, whereof $24,010,000 face amount are outstanding and in the hands of the public at the date hereof, and its Adjustment Mortgage dated October 1, 1909, securing an authorized issue of $25,000,000 Five Per Cent. Adjustment Mortgage Gold Bonds due 1949, whereof the entire issue is outstanding at the date hereof, and has outstanding various issues of underlying and divisional bonds; and

WHEREAS, the Carolina Company is a consolidated railroad corporation organized and existing under the laws of the states of North Carolina and South Carolina, having an authorized capital stock of $2,525,000, consisting of 25,250 shares of common capital stock of the par value of $100 each, and has heretofore executed and delivered its Refunding Mortgage dated April 6, 1914, to Guaranty Trust Company of New York and James M. Pratt, Trustees, securing an authorized issue of $25,000,000 principal amount of Refunding Mortgage Gold Bonds due 1964, whereof there are outstanding at the date hereof $2,280,000 principal amount, designated as Series A, bearing interest at the rate of five per cent. per annum, and redeemable on any interest payment date at 105 per cent. of their face amount and accrued interest, and also has outstanding $5,725,000 of underlying divisional first mortgage six per cent. bonds; and

WHEREAS, the Carolina Company heretofore, by proper action of its board of directors and stockholders, has authorized an issue of $300,000,000 of bonds issuable in series, which series may vary as to maturity and interest and redemption rates and in other respects as is provided in the indenture to secure the same, and also a mortgage and deed of trust bearing date September 1, 1915, to secure the said bonds, conveying to the trustees of said mortgage and deed of trust all the railways, franchises and property of the Carolina Company, including a projected extension of the line of railway of said company from Charleston, S. C., to a connection with the Savannah terminals of the Virginia Company at or near Savannah, Ga., and said company proposes forthwith to execute and deliver said mortgage and deed of trust and to issue forthwith $25,644,000 face amount of said bonds to be designated as Series A, bearing interest at the rate of six per cent. per annum, maturing thirty years from their date and

redeemable as a whole or in amount of not less than $1,000,000 at 107½ per cent. of their face amount of any interest payment date; and

WHEREAS, the line of railroad of the Virginia Company and the line of railroad of the Carolina Company are connected with each other so as to form with each other continuous lines of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers; and

WHEREAS, the lines of railroad of the Virginia Company and the lines of railroad of the Carolina Company are not parallel or competing lines, but the same are so connected and united as to form together a continuous line and system of railroads; and

WHEREAS, the interests of the said two companies will be promoted and their ability to perform their duties to the public as common carriers will be increased by the merger and consolidation of the capital stock, franchises, railroads and properties of said companies into one new consolidated company; and

WHEREAS, such merger and consolidation is authorized by the laws of the said several states from which the said companies derive their corporate powers, and in which their said railroads are respectively situate;

NOW, THEREFORE, the said Seaboard Air Line Railway and the said Carolina Atlantic & Western Railway, parties hereto, acting by their several boards of directors in pursuance of resolutions duly adopted by them respectively, and subject to the ratification of the stockholders of said several companies as required by law, do hereby enter into the follow-

ing joint agreement, and by these presents do agree upon and prescribe the terms and conditions of said merger and consolidation, and the mode of carrying the same into effect, which said terms and conditions and mode of carrying the same into effect they mutually agree to observe as follows, to wit:

ARTICLE ONE.—The said Virginia Company and the said Carolina Company, their respective capital stocks, franchises, railroads, assets and properties, real, personal and mixed, shall be and hereby are merged and consolidated into a single corporation upon the terms and conditions hereinafter set forth, which are hereby agreed to and prescribed for such consolidation. Said corporation shall be and is distinct from each of its constituent corporations parties hereto, and is created by consolidation of said constituent corporations, thereby forming a new consolidated corporation, hereinafter called the "Consolidated Company."

ARTICLE TWO.—The name of the Consolidated Company shall be Seaboard Air Line Railway Company. The Consolidated Company shall continue perpetually.

ARTICLE THREE.—The business, property and concerns of the Consolidated Company shall be managed by its board of directors, consisting of such number as the by-laws may from time to time prescribe, not exceeding twenty-five. The directors may elect from their number an Executive Committee, which may exercise all of the powers of the board of directors, when said board shall not be in session, subject to such limitations, if any, as shall be designated by vote of said directors or by the by-laws of the company. The officers of said Consolidated Company shall be a president, as many vice-presidents as the board of directors may appoint, a treasurer, a secretary, and such other officers as may from

time to time be provided for by the by-laws or appointed by the board of directors; and said officers respectively shall have such powers and authority and be charged with such duties as the by-laws, rules and regulations of the company may from time to time permit or prescribe. The by-laws of the Virginia Company now in force shall become and shall be the by-laws of the Consolidated Company, and shall be subject to amendment or repeal by the board of directors. The number and names of the directors and principal officers of said Consolidated Company who shall be the first directors and officers, to act until the first annual meeting of the stockholders and until their successors are chosen and qualified, and the respective post-office addresses and places of residence of said directors and officers are as follows:

DIRECTORS.

S. Davies Warfield	Baltimore, Md.
Milton E. Ailes	Washington, D. C.
James A. Blair	New York, N. Y.
W. R. Bonsal	Hamlet, N. C.
Franklin Q. Brown	New York, N. Y.
Chas. R. Capps	Norfolk, Va.
Jas. C. Colgate	Bennington, Vt.
Samuel L. Fuller	New York, N. Y.
W. J. Harahan	Norfolk, Va.
Wilson S. Kinnear	New York, N. Y.
Mills B. Lane	Savannah, Ga.
L. F. Loree	New York, N. Y.
Robert F. Maddox	Atlanta, Ga.
J. Wm. Middendorf	Baltimore, Md.
Robert C. Ream	New York, N. Y.
Fergus Reid	Norfolk, Va.
W. T. Rosen	New York, N. Y.

CHARLES H. SABIN	New York, N. Y.
TOWNSEND SCOTT	Baltimore, Md.
F. N. B. CLOSE	New York, N. Y.
J. P. TALIAFERRO	Jacksonville, Fla.
GEORGE W. WATTS	Durham, N. C.
A. H. WIGGIN	New York, N. Y.
A. H. WOODWARD	Birmingham, Ala.
B. F. YOAKUM	New York, N. Y.

OFFICERS.

S. DAVIES WARFIELD	Baltimore, Md.

Chairman of the Board

W. J. HARAHAN, *President*	Portsmouth and Norfolk, Va.
CHAS. R. CAPPS, *Vice-President*	Norfolk, Va.
W. R. BONSAL, *Vice-President*	Hamlet, N. C.
D. C. PORTEOUS, *Secretary*	New York, N. Y.
R. L. NUTT, *Treasurer*	Portsmouth, Va.

The several departmental officers of the consolidating companies shall be continued, subject to the provisions of the by-laws, as departmental officers of the Consolidated Company, with such changes, if any, in titles and duties as their officers superior in rank, or the board of directors, may determine.

ARTICLE FOUR.—The principal office of the Consolidated Company shall be at the City of Petersburg, Virginia, but said company shall have the right to have general offices and principal offices in the several States at such other places in the United States as the board of directors shall from time to time determine or as may be required by the laws of any State in which said company may own or operate a railroad.

ARTICLE FIVE.—The annual meeting of the stockholders of the Consolidated Company shall be held at its principal office on the third Thursday of November in each year, beginning in November, 1916; but the time and place of the annual meeting may be changed from time to time by vote of the stockholders at any general meeting. Special meetings of the stockholders may be held at such places in either of the states of Virginia, North Carolina or South Carolina as shall be designated in the notice calling said meeting. At such annual meeting (or, in case of failure to hold said meeting or to elect directors thereat for any reason, at a special meeting called in lieu of said annual meeting) or adjournment or adjournments thereof, the directors for the ensuing year shall be elected by the stockholders, in accordance with the by-laws, each share of stock entitling the holder to one vote. The directors shall annually, at their first meeting, which they are hereby directed to hold within ten days after their election, choose from their number a president, the same time, elect a secretary and a treasurer, to hold their respective offices at the pleasure of the board of directors; and also such number of vice-presidents or other officers as the by-laws, rules and regulations of the company may name or prescribe; and shall from time to time elect and appoint all such agents and employees of every description as the board of directors shall deem necessary or convenient for the transaction of the business of the company. The board of directors, or, subject to the provisions of the by-laws, its executive committee, may, subject to the mandatory restrictions of the laws applicable to the company, exercise any and all of the powers of the said Consolidated Company.

ARTICLE SIX—The capital stock of the consolidated Company shall be one hundred million dollars ($100,000,000) par value, consisting of one million

(1,000,000) shares of the par value of $100 each. 673,210 shares of said stock shall be exchanged for outstanding securities of said consolidating corporation, on the basis hereinafter set forth in Article Nine of this agreement. Of the said 673,210 shares of stock, at the outset 400,410 shares shall be common stock and 272,800 shares shall be preferred stock. Of the said 272,800 shares of preferred stock, at the outset 22,800 shares shall be entitled to dividends as provided in paragraph (*a*) of Article Eight here, the said stock being hereinafter for convenience called six per cent. preferred stock, and 250,000 shares shall be entitled to dividends as povided in paragraph (*b*) of Article Eight hereof, the said stock being hereinafter for convenience called four per cent. preferred stock. Each share of the four per cent. preferred stock shall be convertible on or after July 1, 1916, and prior to July 1, 1921, at the option of the holder, either into two-thirds of a share of six per cent. preferred stock and one-third of a share of common stock, or into an equal par amount of preferred stock entitled to dividends as provided in paragraph (*c*) of Article Eight hereof, the said stock being hereinafter for convenience called five per cent. preferred stock. Each and every holder of four per cent. preferred stock shall be entitled on or any time after July 1, 1916, and prior to July 1, 1921, except when the books of the corporation are closed for the payment of dividends or other proper purpose, to deliver to the Consolidated Company for cancelation a certificate or certificates for four per cent. preferred stock properly endorsed. Such certificates or certificates for four per cent. preferred stock shall be forthwith cancelled and thereupon such preferred stock the certificate or certificates for which shall be so cancelled either shall become an equal par value of five per cent. preferred stock or, at the option of the holder surrendering said certificate or certificates, shall become as to two-thirds thereof six per cent. preferred stock and as to one-

third thereof common stock, and such holder shall be entitled accordingly to receive a certificate or certificates for a like par value of five per cent. preferred stock or a certificate or certificates for six per cent. preferred stock of a par value equal to two-thirds of the par value of said certificate or certificates surrendered and a certificate or certificates for common stock of a par value equal to one third of the par value of the certificate or certificates surrendered; to the end that the capital stock of the company outstanding shall neither be increased nor decreased by such exchange, but the terms, rights and privileges of the shares held by such holder and represented by such certificates shall be changed, transmuted and converted as above set forth; provided that should any holder be entitled, upon such exchange, to a fraction of a share of stock, a certificate of ownership thereof shall be issued to him, which shall provide that when certificates for fractions of shares of said stock equal to one or more full shares of said stock shall be delivered or surrendered to the company, a certificate for a full share or shares of said stock equal in amount to the aggregate of such fractions of shares shall be issued in place thereof; but such fractions of shares shall not be entitled to any interest or dividend nor shall any holder thereof be entitled to vote thereon at any meeting of the stockholders.

The remainder of said 1,000,000 shares of capital stock of the Consolidated Company, namely 326,790 shares, may be issued from time to time, when authorized by vote of the stockholders as hereinafter in Article Seven provided, either as common stock or as six per cent. preferred stock or five per cent, preferred stock, or, subject to the provisions of Article Eight hereof, as a special stock or a preferred stock differing from said six per cent. preferred stock and five per cent. preferred stock, with such preferences, privileges, voting powers

or limitations thereof as shall be approved by said stockholders.

ARTICLE SEVEN.—Subject to the provisions of the last paragraph of Article Eight hereof, the right is reserved to increase such capital stock, and to increase or decrease the amount of any class or kind or grade of the capital stock of the Consolidated Company; and the said Consolidated Company may increase or decrease from time to time its capital stock, and it may issue the same in one or more classes or kinds and in one or more series or grades, with such preferences, conditions, rights and burdens with respect to the distribution of assets, participation in earnings or profits, voting powers or limitations thereof, or otherwise, and with such provisions for the redemption or retirement of any class or classes of said stock and the terms and conditions thereof, or for the reconversion of stock of one class into stock of another class, as shall be provided in the resolutions of a majority in amount of the stockholders authorizing the issue of the same; and may sell or otherwise dispose of any of its capital stock at such prices and on such terms as may be approved by a majority of the stockholders at any meeting, and may receive in payment thereof property, securities or shares of stock, and any stock so issued and sold and disposed of shall be deemed fully paid and non-assessable; and from time to time it may increase or decrease the amount of any class or kind or grade of such stock with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose or at which all the shares of capital stock are represented in person or by proxy; unless and except as otherwise expressly provided in certificates representing stock previously issued. Preferred stock or any special stock may be sold or otherwise disposed of without being first offered to the stockholders.

ARTICLE EIGHT.—The surplus or net profits of the Consolidated Company as the same from time to time may be found and declared applicable to dividends by the board of directors, but not otherwise, shall be applied in payment of dividends on the preferred stock and common stock as follows:

(*a*) The 22,800 shares of preferred stock mentioned in Article Six hereof and other shares of preferred stock having the same dividend rights, whether by conversion as hereinbefore provided or by the issue of additional stock as authorized in these articles (all of said stock being herein for convenience termed six per cent. preferred stock), shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (*d*) of this Article, at and up to the rate of six per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any dividends on the common stock in such fiscal year.

(*b*) The 250,000 shares of preferred stock mentioned in Article Six hereof (said stock being herein for convenience termed four per cent. preferred stock), shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (*d*) of this Article, and and up to the rate of four per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any dividends on the common stock in such fiscal year, and when the board of directors shall have declared and set apart or paid in such fiscal year on

the common stock dividends at the rate of four per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, shall be entitled in said fiscal year to additional dividends, non-cumulative, at and up to the rate of two per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any further dividends on the common stock in such fiscal year. The four per cent. preferred stock shall be convertible at the option of the holder as provided in Article Six hereof.

(*c*) The five per cent. preferred stock shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (*d*) of this Article, at and up to the rate of five per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any dividends on the common stock in such fiscal year.

(*d*) The said dividends provided for in the foregoing paragraphs (*a*), (*b*), and (*c*) shall be payable only when and as declared by the board of directors. When declaring dividends in any fiscal year on any of said preferred stock the board of directors shall declare dividends on all the six per cent. preferred stock, four per cent. preferred stock and five per cent. preferred stock then outstanding, and all outstanding shares of said preferred stock shall be entitled to receive such dividends, without preference or priority in time or order of declaration or payment between any of said shares of pre-

ferred stock and any other of said shares, but in the ratio of six dollars for each share of six per cent. preferred stock outstanding to four dollars for each share of four per cent. preferred stock outstanding and four dollars for each share of five per cent. preferred stock outstanding until each share of six per cent. preferred stock outstanding shall receive dividends at the rate of full six per cent. per annum, and each share of four per cent. preferred stock outstanding shall receive dividends at the rate of full four per cent. per annum, and each share of five per cent. preferred stock outstanding shall receive dividends at the rate of full four per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall determine. After declaring and paying or providing for the payment of dividends at such rates on all the preferred stock as above provided, dividends may be declared on the five per cent. preferred stock outstanding at and up to the rate of one per cent. per annum additional, payable annually, semi-annually or quarterly, as the board of directors shall determine, in preference and priority to the payment of any dividends on the common stock in such fiscal year.

(*e*) The surplus or net profits of the Consolidated Company, after providing therefrom for the payment of dividends at the rate of six per cent. per annum on the six per cent. preferred stock, and at the rate of four per cent. per annum on the four per cent. preferred stock, and at the rate of five per cent. per annum on the five per cent. preferred stock, in any fiscal year, may be applied to the payment of dividends on the common stock in such fiscal year, if and when declared by the board of directors; provided, however, that such dividends on the common stock shall not in any fiscal year

exceed four per cent., unless and until there shall have been paid, or provision made for the payment of, additional dividends, non-cumulative, at the rate of two per cen. per annum, as above provided, on the four per cent. preferred stock, but no more. Notwithstanding the preferences declared in this Article, if, after paying or providing for the payment of dividends in any fiscal year on the preferred stock as above provided, there shall remain an overplus of surplus or net profits, the board of directors may declare and pay dividends on the common stock of the Consolidated Company in such year out of such surplus or net profits.

Except as expressly authorized in Article Six hereof, no stock shall be issued entitled to any dividends on a parity with or in preference to the preferred stock described in this Article at the time outstanding, except with the consent of the holders of a majority of the whole amount of preferred stock of the character described in this Article then outstanding, first obtained and given at a meeting of the stockholders called for that purpose, or for that and other purposes, and with the consent of the holders of a majority of such part of the common stock as shall be represented at such meeting, the holders of the preferred stock and the holders of the common stock voting separately.

ARTICLE NINE.—The manner of converting the capital stock of each of said companies into that of the said Consolidated Company shall be as follows:

The stockholders of each of said constituent companies shall be stockholders of the Consolidated Company hereby created and established, and the shares of the capital stock of the Consolidated Company shall be exchanged for shares

of the capital stock and bonds of said respective constituent companies, on the following basis:

1.—To the holders of preferred stock of the Virginia Company one share of four per cent. preferred stock of the Consolidated Company for each share of the preferred stock of the Virginia Company.

2.—To the holders of common stock of the Virginia Company one share of the common stock of the Consolidated Company for each share of the common stock of the Virginia Company.

3.—To the holders of stock of the Carolina Company one share of the common stock of the Consolidated Company for each share of stock of the Carolina Company.

4.—To the holders of the Refunding Mortgage Gold Bonds, Series A, of the Carolina Company consenting hereto one share of the six per cent. preferred stock of the Consolidated Company for each $100 principal amount of the said Refunding Bonds.

Any of said securities owned by the Virginia Company or held in the treasury of the Virginia Company may be exchanged as aforesaid, and the stock of the Consolidated Company received in exchange placed in the treasury of the Consolidated Company.

Until surrendered and exchanged for certificates issued by it, the Consolidated Company shall recognize the now outstanding certificates of stock of the said consolidating corporations as evidencing the rights and interests of the several holders thereof as stockholders of the Consolidated Company, to the same extent and in the same manner as those

rights and interests would be evidenced by certificates issued by it had such outstanding certificates been exchanged for. After the consolidation shall have become effective, however, there shall be no further issue or transfer of certificates of stock of the consolidating corporations, but from time to time, as such certificates are presented to the Consolidated Company, they shall be canceled, and certificates of stock of the Consolidated Company shall be issued on the several bases set forth in exchange therefor.

ARTICLE TEN.—The Carolina Company agrees to change its name, prior to said consolidation becoming effective and prior to the execution and delivery of its said mortgage securing an authorized issue of $300,000,000 of bonds, to "Seaboard Air Line Railway," and to use said name in the execution of said bonds and mortgage. The Virginia Company agrees, forthwith upon the ratification of this agreement by its stockholders, to deposit with the Guaranty Trust Company of New York, corporate trustee of the said mortgage all Seaboard Air Line Railway Refunding Bonds then in its treasury or subject to its control, and other collateral securities owned by the Virginia Company referred to in the granting clauses of said mortgage, and to agree with said trustee to pledge with and deliver to said trustee the Seaboard Air Line Railway Refunding Bonds now pledged with the Bankers Trust Company to secure its $6,000,000 of Three-Year Five Per Cent. Notes maturing March 1, 1916, immediately upon the discharge of the indenture securing the said notes.

The Consolidated Company shall, and does hereby, as part of the consolidation, expressly assume to make due and punctual payment of the principal and interest of all bonds that shall be issued under or secured by the mortgage and

deed of trust of the Carolina Company securing an authorized issue of $300,000,000 bonds hereinbefore recited, and to perform all the covenants and conditions of the said mortgage and deed of trust, and shall and does hereby, as part of the consolidation, assume and adopt the said mortgage and deed of trust and covenant to secure to the said mortgage and deed of trust and the trustees thereof the prior lien of the said mortgage and deed of trust, in accordance with the terms and intent thereof, upon all after-acquired property of every kind and description which from time to time in the manner therein provided shall be purchased or otherwise acquired by the Consolidated Company or its successors by the use of any of the bonds issued under or secured by said mortgage and deed of trust or their proceeds (other than bonds delivered or proceeds of bonds paid to the Consolidated Company or its successors for its reimbursement or proceeds of bonds so delivered) or in respect of which the Consolidated Company or its successors shall receive reimbursement in the said bonds or their proceeds, excepting, however, property appurtenant to the lines of railway and property subject to the liens of the Seaboard Air Line Railway Refunding Mortgage dated October 1, 1909, and Adjustment Mortgage dated October 1, 1909, and other property to which the liens of said indenture shall, in accordance with the necessary effect of said instruments, attach. The Consolidated Company shall and does hereby, as part of said consolidation, expressly assume to make due and punctual payment of the principal and interest of all the Refunding Bonds issued under or secured by the Seaboard Air Line Railway Refunding Mortgage dated October 1, 1909, made to The New York Trust Company and Mortimer N. Buckner, Trustees, and to perform all the covenants and conditions of the said indenture, and in particular to preserve the prior lien of said Refunding Mortgage upon after-acquired property and equipment, whether ac-

quired by the Virginia Company or by the Consolidated Company; but this provision and covenant to preserve said lien is not intended to enlarge or extend the said lien or to grant or create any new lien or charge, but only to preserve such lien as is created by the said Refunding Mortgage. The Consolidated Company shall, and does hereby, as part of said consolidation, expressly assume to make due and punctual payment of the principal and interest of all the Adjustment Bonds issued under or secured by the Seaboard Air Line Railway Adjustment Mortgage dated October 1, 1909, made to The Fidelity Trust Company (of Baltimore, Maryland) and Van Lear Black, as Trustees, as and when said principal and interest shall require to be paid in accordance with the terms and provisions of said bonds and indenture, and to perform all the covenants and conditions of said indenture, and in particular to preserve the prior lien of said indenture upon after-acquired property and equipment, whether acquired by the Virginia Company or by the Consolidated Company; but this provision and covenant to preserve said lien is not intended to enlarge or extend the said lien or to grant or create any new lien or charge, but only to preserve such lien as is created by the said Adjustment Mortgage.

The directors of the Consolidated Company are hereby authorized to cause to be executed and delivered such indentures with the trustees of the respective mortgages above recited, and of any other mortgages existing upon any part of the railways or property of the Consolidated Company, as they shall approve, containing such covenants and provisions as they shall approve, whether those hereinbefore set forth or otherwise, assuming the due and punctual payment of the principal and interest of the obligations secured thereby and the performance of the covenants and conditions of the said indentures respectively.

No mortgage additional to the mortgages above recited, other than purchase money mortgages, shall be made upon the lines of railway and other property of the Consolidated Company, except with the consent of the holders of a majority of the whole amount of the preferred stock outstanding, first obtained and given at a meeting of the stockholders called for that purpose, or for that and other purposes, and with the consent of the holders of a majority of such part of the common stock as shall be represented at such meeting, the holders of the preferred stock and of the common stock voting separately. With the consent of the stockholders, obtained and given as aforesaid, the board of directors may from time to time provide for the execution of other and further mortgages.

ARTICLE ELEVEN.—Upon, from and after the execution of these articles and the ratification thereof by the stockholders of the constituent companies, and the filing of the same as required by law, the rights, privileges, exemptions, powers and franchises of each of said constituent companies, and all their railways and property, real, personal and mixed, and all debts due on every account as well as stock subscriptions and other things in action belonging to each of said companies, shall be transferred to and vest in the Consolidated Company without further act or deed, as effectually as they were in the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired, and all debts, liabilities and dues of said companies shall forthwith attach to the Consolidated Company and be enforceable against it.

ARTICLE TWELVE.—In order to facilitate the filing and record of these articles the same may be simultaneously executed in seven counterparts, each of which shall be deemed an

original, but all of such counterparts taken together shall constitute but one and the same instrument.

IN TESTIMONY WHEREOF the said constituent companies parties hereto have caused their respective corporate names to be hereto subscribed by their respective officers hereto duly authorized, and their respective corporate seals to be hereunto affixed, duly attested, pursuant to and in accordance with resolutions of their respective boards of directors, and at least a majority of the directors of each of said companies have hereunto set their signatures, this 11th day of October, 1915.

SEABOARD AIR LINE RAILWAY,

By W. J. HARAHAN,
President.

Attest:
D. C. PORTEOUS,
Secretary.

(Corporate Seal)

DIRECTORS OF SEABOARD AIR LINE RAILWAY:

S. DAVIES WARFIELD
WALTER T. ROSEN
FRANKLIN Q. BROWN
FERGUS REID
JAS. C. COLGATE
SAMUEL L. FULLER
JAMES A. BLAIR
B. F. YOAKUM
CHARLES H. SABIN
JAMES P. TALIAFERRO
M. E. AILES
F. N. B. CLOSE
ROBERT C. REAM
W. S. KINNEAR
A. H. WIGGIN
L. F. LOREE
W. J. HARAHAN
N. S. MELDRUM
M. B. LANE
J. W. MIDDENDORF
C. R. CAPPS

CAROLINA ATLANTIC & WESTERN RAILWAY,

By W. R. BONSAL,
President.

(Corporate Seal.)

Attest:

S. O. BAUERSFELD,
Secretary.

DIRECTORS OF CAROLINA ATLANTIC & WESTERN RAILWAY:

W. R. BONSAL
D. T. McKEITHAN
D. R. COKER
J. J. LAWTON
S. O. BAUERSFELD
GEO. E. DARGAN
B. H. INNESS BROWN
W. R. CROSS

I, D. C. PORTEOUS, Secretary of Seaboard Air Line Railway, do hereby certify that the execution of the foregoing Articles and Agreement of Merger and Consolidation on the part of said Seaboard Air Line Railway was authorized by resolution duly adopted by the directors of said Company and entered on the minutes at a meeting thereof duly called, said meeting having been held on Thursday, the 7th day of October, A. D. 1915; also that said Articles and Agreement of Merger and Consolidation were submitted to the stockholders of said Seaboard Air Line Railway at a special meeting thereof (separate from the meetings of the stockholders of the other party to said Articles and Agreement of Merger and Consolidation) called by the directors for the purpose of taking the same into consideration, at the principal office of said Company in the City of Petersburg in the State of

Virginia on the 15th day of November, A. D. 1915, at which said meeting 483,913 shares of the capital stock were represented in person or by proxy (notice of said meeting and of the object thereof having been mailed to each stockholder at his address as shown by the stock books 30 days before said meeting was held and also having been duly published and advertised), and that at said stockholders' meeting said Articles and Agreement of Merger and Consolidation were considered an a vote by ballot taken for the adoption or rejection of the same, and that 483,913 votes, representing 483,913 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 483,519 votes were cast in favor of the adoption and ratification of said Articles and Agreement of Merger and Consolidation and 394 votes were cast against the same.

I also further certify that the total number of shares of capital stock of said Company is 625,160, of which 250,000 shares are preferred stock and 375,160 shares common stock, and that the votes cast as aforesaid at said meeting in favor of the adoption and ratification of said Articles and Agreement of Merger and Consolidation constitute a majority and more than two-thirds in amount of all outstanding capital stock of said Company; and I do further certify that 4,966 shares of common stock and 11,059 shares of preferred stock, held in the treasury of said Company, were not voted.

WITNESS my hand and the seal of Seaboard Air Line Railway this 15th day of November, A. D. 1915.

D. C. PORTEOUS,
Secretary of Seaboard Air Line Railway.

(Corporate Seal.)

I, S. O. BAUERSFELD, Secretary of Seaboard Air Line Railway Company, a consolidated corporation organized and existing under the laws of the States of North Carolina and South Carolina (the name whereof at the time of the execution of the foregoing Articles and Agreement of Merger and Consolidation by the officers and directors thereof was Carolina Atlantic & Western Railway, the said name having been thereafter changed to Seaboard Air Line Railway Company by due proceedings), do hereby certify that the execution of the foregoing Articles and Agreement of Merger and Consolidation on the part of said Carolina Atlantic & Western Railway, now Seaboard Air Line Railway Company, was authorized by resolution duly adopted by the directors of said Company and entered on the minutes at a meeting thereof duly called and held, said meeting having been held on October 11th, A. D. 1915; also that said Articles and Agreement of Merger and Consolidation were submitted to the stockholders of said Seaboard Air Line Railway Company at a special meeting thereof (separate from the meetings of said stockholders of the other party to said Articles and Agreement of Merger and Consolidation), called by the directors for the purpose of taking the same into consideration, at the principal office of said Company in the City of Hamlet in the State of North Carolina, on the 15th day of November, A. D. 1915, at which said meeting 25,250 shares of the capital stock of said Company, to wit, all the shares of the capital stock of said Company, were represented in person or by proxy (notice of said meeting and of the object thereof having been mailed to each stockholder at his address as shown by the stock books twenty days before said meeting was held, and each and every stockholder having signed a waiver of notice of said meeting), and that at said stockholders' meeting said Articles and Agreement of Merger and Consolidation were considered and a vote by ballot taken for

the adoption or rejection of the same, and that 25,250 votes, representing 25,250 shares of stock, were cast on the question of the adoption or rejection of the same at said meeting, either in person or by proxy, of which 25,250 votes were cast in favor of the adoption and ratification of the said Articles and Agreement of Merger and Consolidation and no votes were cast against the same.

I also further certify that the total number of shares of capital stock of said Company is 25,250, and that the votes cast aforesaid at said meeting in favor of the adoption and ratification of said Articles and Agreement of Merger and Consolidation constitute a majority of all the outstanding capital stock of said Company, to wit, the entire capital stock of said Company.

WITNESS my hand and the seal of Seaboard Air Line Railway Company this 15th day of November, A. D. 1915.

S. O. BAUERSFELD,
Secretary of Seaboard Air Line Railway Company, formerly Carolina Atlantic & Western Railway.

(Corporate Seal.)

SEABOARD AIR LINE RAILWAY.

I, D. C. PORTEOUS, Secretary of Seaboard Air Line Railway, Do Hereby Certify, that at a meeting of the stockholders of the Company duly called and held at the principal office of the company in the City of Petersburg in the State of Virginia on the 15th day of November, 1915, the stockholders of the company duly authorized and approved the consolidation of the company with Seaboard Air Line Railway Company (formerly Carolina Atlantic & Western Railway) upon the terms and conditions set forth in those certain Articles and Agreement of Merger and Consolidation dated October 11th, 1915, made by and between Seaboard Air Line Railway and Carolina Atlantic & Western Railway and their respective Directors, and that at said meeting the following resolution was adopted:

> *Resolved*, that the stockholders of this Company do hereby designate S. Davies Warfield, W. J. Harahan and W. R. Bonsal, and such persons as upon such consolidation may be, or thereafter may become associated with them as the owners and stockholders of the Consolidated Company, and their successors, as the persons to whom shall be issued any charter or certificate of incorporation provided by law to be granted or issued for the new company to be formed by said consolidation.

WITNESS my hand and the seal of the company.

D. C. PORTEOUS,
Secretary of Seaboard Air Line Railway.

(Seal)

SEABOARD AIR LINE RAILWAY COMPANY.

(formerly CAROLINA ATLANTIC & WESTERN RAILWAY)

Office of the Secretary.

The undersigned, S. O. BAUERSFELD, Secretary of Seaboard Air Line Railway Company (formerly Carolina Atlantic & Western Railway) does hereby certify that at a meeting of the Stockholders of the Company duly called and held at Hamlet, North Carolina, on the 15th day of November, 1915, the Stockholders of the Company authorized and approved the consolidation of the Company with Seaboard Air Line Railway upon the terms and conditions set forth in those certain Articles and Agreement of Merger and Consolidation dated October 11, 1915, made by and between Carolina Atlantic & Western Railway and Seaboard Air Line Railway and their respective Directors; and that at said meeting the following resolution was duly adopted and entered upon the minutes of the same:

> *Further Resolved* that the stockholders of this Company do hereby designate S. Davies Warfield, W. J. Harahan and W. R. Bonsal, and such persons as upon such consolidation may be, or thereafter may become associated with them as the owners and stockholders of the Consolidated Company, and their successors, as the persons to whom shall be issued any charter or certificate of incorporation provided by law to be granted or issued for the new Company to be formed by said merger and consolidation.

WITNESS my hand and the seal of the Company.

S. O. BAUERSFELD,
Secretary, Seaboard Air Line Railway Company (formerly Carolina Atlantic & Western Railway.)

(Seal)

COMMONWELATH OF VIRGINIA.

Office of the Secretary of the Commonwealth.

I, B. O. JAMES, Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of the Merger and Consolidation between the Seaboard Air Line Railway and Carolina Atlantic & Western Railway under the name of "Seaboard Air Line Railway Company," filed in the office of the Secretary of the Commonwealth, November 15th, 1915, at 3:50 o'clock P. M. pursuant to chapter 19, Acts 1899-1900, page 27.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this the twenty-fourth day of November in the year of our Lord one thousand nine hundred and fifteen and in the one hundred and fortieth year of the Commonwealth.

B. O. JAMES,
Secretary of the Commonwealth.

(Seal of the Commonwealth
of Virginia.)

STATE OF NORTH CAROLINA.

Department of State.

Raleigh, November 15th, 1915.

I, J. BRYAN GRIMES, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (thirteen sheets) to be a true copy from the records of this office, as taken from and compared with the original instrument filed at 6:40 P. M., on November 15th, 1915, and recorded in Book of Railroad Certificates No. 2, as File No. 177.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 15th day of November, in the year of our Lord 1915.

J. BRYAN GRIMES,
Secretary of State.

(Seal of State of North Carolina.)

STATE OF SOUTH CAROLINA.

Office of Secretary of State.

I, R. M. MCCOWN, Secretary of State of the State of South Carolina, do hereby certify that the foregoing instrument has been recorded in the office of the Secretary of State in Railroad Record Book "H" page 120 *et seq.* at 9:10 o'clock A. M., this the 16th day of November A. D. 1915.

Given under my hand and the seal of the State at Columbia, this the 16th day of November, 1915.

R. M. MCCOWN,
Secretary of State.

(Seal)

STATE OF SOUTH CAROLINA.

Executive Department.

By the Secretary of State.

This is to certify the foregoing and hereto attached copy of Articles and Agreement of Merger and Consolidation between Seaboard Air Line Railway and Carolina Atlantic & Western Railway forming "Seaboard Air Line Railway Company" dated October 11th, 1915, to be a true and correct copy of said Articles and Agreement of Merger and Consolidation as taken from and compared with the original, filed in this office of even date herewith.

In testimony whereof I have hereunto set my hand and affixed the seal of the State, at Columbia, this the 16th day of November A. D. 1915.

R. M. McCOWN,
Secretary of State.

(Seal of State of South Carolina.)

STATE OF SOUTH CAROLINA.

Executive Department.

By the Secretary of State.

WHEREAS it appears from the certificates on file in my office of the Secretaries, respectively, of Seaboard Air Line Railway and Seaboard Air Line Railway Company that Articles and Agreement of Merger and Consolidation have been duly entered into by and between said Companies and their respective directors (the name of Seaboard Air Line Railway Company at the time of the execution of said Articles and Agreement being "Carolina Atlantic & Western Rail-

way," the said name having been thereafter changed to "Seaboard Air Line Railway Company" by due proceedings) and said Articles and Agreement are filed with, and as a part of, each of said certificates of the Secretaries of said Companies; and

WHEREAS it further appears from said certificates of the Secretaries of said Companies that said Articles and Agreement of Merger and Consolidation were submitted to the stockholders of each of said Companies separately at meetings thereof duly called for the purpose of considering the same and of which due notice of the time, place and purpose was given in the manner prescribed by law; and that at said stockholders' meetings held as aforesaid said Articles and Agreement of Merger and Consolidation were considered and a vote by ballot taken for the adoption or rejection of the same; and that said Articles and Agreement of Merger and Consolidation were duly ratified, approved, sanctioned and confirmed and adopted by the respective stockholders of each of said Companies at said meetings held as aforesaid; and

WHEREAS it further appears from said certificates of the Secretaries of said Companies that the stockholders of each of said Companies at their meetings held as aforesaid duly adopted a resolution designating S. Davies Warfield, W. J. Harahan and W. R. Bonsal, and such persons as, upon such consolidation might be, or thereafter might become, associated with them as the owners and stockholders of the merged and consolidated company, and their successors, as the persons to whom should be issued any charter or certificate of incorporation provided by law to be granted or issued for the new company to be formed by said merger and consolidation:

NOW, THEREFORE, I, R. M. McCOWN, Secretary of State of the State of South Carolina, by virtue of the power

and authority vested in me, in the name of the State of South Carolina, do hereby issue unto S. Davies Warfield, W. J. Harahan and W. R. Bonsal, and such persons as now may be, or hereafter may become, associated with them as the owners and stockholders of the merged and consolidated company, and their successors, a charter as a merged and consolidated body politic and corporate in perpetuity, under the name of "Seaboard Air Line Railway Company," having, possessing, holding and enjoying all and every the rights, privileges, powers, exemptions, immunities and franchises of each of said constituent companies, and all and every their railways and property, real, personal and mixed, and all debts due on every account as well as stock subscriptions and other things in action belonging to each of said companies; and I do hereby certify that the fees provided by law for consolidation have been paid by the consolidated company, Seaboard Air Line Railway Company.

Given under my hand and the seal of the State of South Carolina at Columbia this sixteenth day of November in the year of our Lord one thousand nine hundred and fifteen and in the one hundred and fortieth year of the Independence of the United States of America.

R. M. McCown,
Secretary of State.

(Seal of State of South Carolina.)

STATE OF GEORGIA.

Office of Secretary of State.

I, Philip Cook, Secretary of State of the State of Georgia, do hereby certify, that the Twenty-three pages of printed and written matter hereto attached contain a true and

correct copy of the Articles and Agreement of Merger and Consolidation between Seaboard Air Line Railway, and Carolina Atlantic and Western Railway, forming "Seaboard Air Line Railway Company," as the same appears from the original filed in this office this the 17th day of November, 1915, at 10 A. M.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of my office, at the Capitol, in the City of Atlanta, this 17th day of November in the Year of our Lord one thousand nine hundred and fifteen and of the independence of the United States of America the One Hundred and Fortieth.

PHILIP COOK,
Secretary of State.

(Seal of State of Georgia.)

THE STATE OF ALABAMA

Montgomery County.

Office of the Secretary of State of the State of Alabama.

I, JOHN PURIFOY, Secretary of State of the State of Alabama, hereby certify that the foregoing is a true and correct copy of the original, which was filed for record in my office at Montgomery, Alabama, at 10:07 o'clock A. M., November 17, 1915, which original is recorded in Book J, Corporations at page 103 *et seq.*

WITNESS my hand and official seal, this the 17th day of November, 1915.

JOHN PURIFOY,
Secretary of State of the State of Alabama.

(Seal of State of Alabama.)

STATE OF FLORIDA.

Office of Secretary of State ss:

I, H. CLAY CRAWFORD, Secretary of State of the State of Florida, do hereby certify that the foregoing is a true, correct and literal copy of the Articles and Agreement of Merger and Consolidation between Seaboad Air Line Railway and Carolina Atlantic & Western Railway forming "Seaboard Air Line Railway Company" bearing date October 11th, A. D 1915, as the same appears of record in the records of my office in Book No. 2, Contracts Railroad Equipment, page 209 *et seq*. The original of which was filed in my said office in Florida at 10:25 A. M., November 17, 1915, for record.

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the seventeenth day of November, A. D. 1915.

H. CLAY CRAWFORD,
Secretary of State.

(Seal of State of Florida.)

THIS IS TO CERTIFY that at a meeting of the stockholders of Seaboard Air Line Railway Company, a consolidated corporation organized and existing under the laws of the States of North Carolina and South Carolina (the name whereof at the time of the execution of the foregoing Articles and Agreement of Merger and Consolidation by the Officers and directors thereof was Carolina Atlantic & Western Railway, the said name having been thereafter changed to Seaboard Air Line Railway Company by due procedure), held on the 15th day of November, A. D. 1915, at

Hamlet, N. C., called for the purpose of taking the same into consideration, of the time, place and general object of which meeting due notice was given or waived as required by law, the foregoing Articles and Agreement of Merger and Consolidation dated October 11, 1915, was submitted to the stockholders of said Company and considered by them; that a vote of said stockholders by ballot, in person or by proxy, was taken for the adoption or rejection of the same, and a majority of all the votes cast at said meeting, to wit, the votes representing all the shares of capital stock of the said Company, were unanimously cast in favor of the said Agreement and of the merger and consolidation therein provided for; which facts are hereby certified by the undersigned as vice-president of said Company.

IT IS HEREBY FURTHER CERTIFIED that the merger and consolidation provided for in said Agreement was and is made under and by virtue of the provisions and authority of the Act of the Assembly of Virginia relating to Richmond, Petersburg and Carolina Railroad Company (now Seaboard Air Line Railway), approved January 12, 1900, among other things granting such power to merge and consolidate, and under the other provisions of law of the several States relating to the within mentioned Carolina Atlantic & Western Railway (now Seaboard Air Line Railway Company) and the within mentioned Seaboard Air Line Railway, and that a copy of said Articles and Agreement of Merger and Consolidation was filed on November 15, 1915, in the office of the Secretary of the Commonwealth of Virginia in all respects as provided for in said Act approved January 12, 1900; and that said merger and consolidation was not and is not made under or by virtue of the provisions of the Act of the General Assembly of Virginia entitled An Act Concerning Corporations, which became a law the 21st day of May, 1903, the

procedure provided in and by the said act, however, being also followed out, and this certificate being made, in order to comply with said procedure in case the same should be thought or held to have been submitted by law for the proceduce in said Act approved January 12, 1900, to make the merger and consolidation therein authorized effective.

In Witness Whereof this certificate is executed by the undersigned as vice-president of said Seaboard Air Line Railway Company (formerly Carolina Atlantic & Western Railway) and the corporate seal of said company is hereto affixed attested by its assistant secretary this 19th day of November, 1915.

Frank Marsh,
Vice-President.

Attest:

Robert Le Roy,
(Seal) *Assistant Secretary.*

Attest:

S. O. Bauersfeld,
Secretary.

STATE OF NEW YORK.

County of New York. ss.:

I, Howard H. Brown, a Notary Public in and for the State and County aforesaid, do certify that Frank Marsh and Robert Le Roy, whose names are signed to the foregoing certificate bearing date the 19th day of November, 1915, as vice-president and assistant secretary, respectively, of Seaboard Air Line Railway Company, have acknowledged the same before me in my County and State aforesaid.

Given under my hand this 19th day of November, 1915.

My Commission expires March 30, 1916.

HOWARD H. BROWN,
Notary Public in and for the County and State aforesaid.

STATE OF VIRGINIA.

City of Richmond, to-wit:

I, HAMILTON H. CHALKLEY, a Notary Public in and for the City and State aforesaid, do certify that S. O. Bauersfeld, whose name is signed to the foregoing certificate bearing date the 19th day of November, 1915, as Secretary of the Seaboard Air Line Railway Company, as acknowledged the same before me in my city and state aforesaid.

Given under my hand this 20th day of November, 1915.

My Commission expires June 3rd, 1916.

HAMILTON H. CHALKLEY,
Notary Public.

THIS IS TO CERTIFY that at a meeting of the stockholders of Seaboard Air Line Railway, held on the fifteenth day of November, A. D. 1915, at Petersburg, Virginia, called for the purpose of taking the same into consideration, of the time, place and object of which meeting due notice was given by publication at least six times a week for two successive weeks in a newspaper published in the place where the principal office in Virginia of said corporation is located, and by mailing a copy of such notice at least ten days prior

to such meeting to the last known postoffice of each of the stockholders of record, the foregoing Articles and Agreement of Merger and Consolidation, dated October 11, 1915, was submitted to the stockholders of Seaboard Air Line Railway and considered by them; that a vote of said stockholders by ballot, in person or by proxy, was taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote; and that a majority of all the votes cast at said meeting were cast in favor of said Agreement and the merger and consolidation therein provided for; which facts are hereby certified by the undersigned as vice-president of the corporation.

It Is Hereby Further Certified that the merger and consolidation therein provided for was and is made under and by virtue of the provisions and authority of the Act of the Assembly of Virginia, relating to Richmond, Petersburg and Carolina Railroad Company (now Seaboard Air Line Railway), approved January 12, 1900, among other things granting such power to merge and consolidate, and under the other provisions of law of the several States relating to the said company and the within mentioned Carolina Atlantic & Western Railway, and that a copy of the said Articles and Agreement of Merger and Consolidation was filed on November 15, 1915, in the office of the Secretary of the Commonwealth of Virginia in all respects as provided for in said Act approved January 12, 1900; and that said merger and consolidation was not and is not made under or by virtue of the provisions of the Act of the General Assembly of Virginia entitled An Act Concerning Corporations, which became a law the 21st day of May 1903, the procedure provided in and by the said act, however, being also followed out, and this certificate being made, in order to comply with said procedure in case the same should be thought or held to have been substituted by law for the procedure provided in

said Act approved January 12, 1900, to make the merger and consolidation therein authorized effective.

IN WITNESS WHEREOF this certificate is executed by the undersigned as vice-president of Seaboard Air Line Railway, and the corporate seal of said corporation is hereto affixed attested by its secretary, this 19th day of November, 1915.

CHAS. R. CAPPS,
Vice-President.

Attest:

D. C. PORTEOUS,
(Seal) *Secretary.*

STATE OF NEW YORK.

County of New York. ss:

I, Howard H. Brown, a Notary Public in and for the State and County aforesaid, do certify that Charles R. Capps and D. C. Porteous, whose names are signed to the foregoing certificate bearing date the 19th day of November, 1915, as vice-president and secretary, respectively, of the Seaboard Air Line Railway, did acknowledge the same before me in my County and State aforesaid.

Given under my hand this 19th day of November, 1915.

My Commission expires March 30, 1916.

HOWARD H. BROWN,
Notary Public in and for the County and State aforesaid.
(Seal)

COMMONWEALTH OF VIRGINIA.

City of Richmond, 22nd day of November, 1915.

This day there was presented to the State Corporation Commission the certificate of the Vice-President of the Seaboard Air Line Railway under the corporate seal of said company attested by its Secretary, and the certificate of the Vice-President of the Seaboard Air Line Railway Company under the corporate seal of said company attested by its Secretary, which said certificates were acknowledged by the Vice-Presidents signing the same and by the secretary of each of said corporations before an officer authorized by the laws of this State to take acknowledgments to deeds; together with the original of a joint agreement of merger and consolidation between the Seaboard Air Line Railway and Seaboard Air Line Railway Company, the name whereof at the time of the execution of the said agreement by the officers and directors thereof was Carolina, Atlantic and Western Railway, the said name having been thereafter changed to Seaboard Air Line Railway Company, bearing date the 11th day of October, 1915, the object of said agreement and certificates being to merge and consolidate the Seaboard Air Line Railway and the Seaboard Air Line Railway Company under the name of Seaboard Air Line Railway Company.

And it appearing from said papers and from the charters of said companies that said companies were granted under their respective charters the right to merge and consolidate with any other company or companies engaged in a similar business, upon such terms and under such name as may be agreed upon between the companies so consolidating and merging, the said Seaboard Air Line Railway having been organized and being in existence under a charter granted by the General Assembly of Virginia prior to the 10th day of

July, 1902, and the said Seaboard Air Line Railway Company being a consolidated corporation organized and being in existence under the laws of the States of North Carolina and South Carolina;

And it further appearing from said papers that the said agreement of merger and consolidation was entered into by and between the boards of directors of said respective corporations and was executed by the proper officers of said corporations and by at least a majority of all the members of their respective boards of directors under the corporate seals of said respective companies, and that it was submitted to the stockholders of each of said companies separately at meetings called and held as required by law, and that at each of said meetings the said agreement was considered and a vote by ballot in person or by proxy taken for the adoption or rejection of the same, each share of said respective companies being given one vote thereon and that a majority of all votes cast at each of said meetings was in favor of said merger and consolidation.

And it further appearing from said certificates that it is the intention of said companies parties thereto that the merger and consolidation therein provided and made shall be made under and by virtue of the provisions of an authority contained in the charters of said respective companies, the procedure provided by Section 41 of Chapter V of an Act of the General Assembly of Virginia Entitled "An Act Concerning Corporations," which became a law on the 21st day of May, 1903, being followed in so far as the same has been substituted by law for the procedure provided in the charter of the Seaboard Air Line Railway to make said merger and consolidation effective.

And it further appearing from said papers that all the

requirements of Law have been complied with by said companies;

The State Corporation Commission doth certify that it has been ascertained and doth now declare that the Seaboard Air Line Railway and the Seaboard Air Line Railway Company have by complying with the requirements of their respective charters and of the laws of the State of Virginia entitled themselves to the merger and consolidation applied for and the merger and consolidation of the Seaboard Air Line Railway and Seaboard Air Line Railway Company under the corporate name of Seaboard Air Line Railway Company in accordance with the terms and provisions and subject to all the conditions contained in said agreement or articles of merger and consolidation beaing date the 11th day of October, 1915, aforesaid, to the same extent as if the said agreement were now herein transcribed in full and the said merged and consolidated Seaboard Air Line Railway Company is hereby declared to have all the powers and privileges conferred and to be subject to all the conditions and restrictions imposed by law; and the said certificates presented to the State Corporation Commission by the Vice-Presidents, respectively of the said companies above named together with the said agreement of merger and consolidation are with this order certified to the Secretary of the Commonwealth of Virginia as required by law.

ROBERT R. PRENTIS,
Chairman.

(Seal)

T. G. STRACHAN,
First Assistant Clerk.

COMMONWEALTH OF VIRGINIA,
Office of Secretary of the Commonwealth.

In the City of Richmond, the 22nd day of November, 1915.

The foregoing merger and consolidation of Seaboard Air Line Railway and Seaboard Air Line Railway Company under the name Seaboard Air Line Railway Company was this day received and duly recorded in this office according to law.

B. O. JAMES,
Secretary of the Commonwealth.

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH.

I, B. O. James, Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of the Articles of Merger and Consolidation of Seaboard Air Line Railway and Carolina Atlantic & Western Railway, into and under the name "Seaboard Air Line Railway Company," recorded in this office on the 22nd day of November, A. D. 1915.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this the twenty-fourth day of November in the year of our Lord one thousand nine hundred and fifteen and in the one hundred and fortieth year of the Commonwealth.

B. O. JAMES,
Secretary of the Commonwealth.

(Seal of Commonwealth
of Virginia.)

AMENDMENTS MADE IN CHARTER OF SEABOARD AIR LINE RAILWAY COMPANY AS SET FORTH IN THE ARTICLES AND AGREEMENT OF MERGER AND CONSOLIDATION MADE OCTOBER 11, 1915, BY SEABOARD AIR LINE RAILWAY AND CAROLINA ATLANTIC & WESTERN RAILWAY, PURSUANT TO RESOLUTIONS ADOPTED BY THE BOARD OF DIRECTORS AT MEETING HELD AT NEW YORK ON APRIL 4, 1929, AND BY THE STOCKHOLDERS AT MEETINGS HELD AT PETERSBURG, VIRGINIA, AND RALEIGH, NORTH CAROLINA, ON OCTOBER 12, 1929, AND NOVEMBER 4, 1929.*

Article Six and Article Eight of said Articles and Agreement of Merger and Consolidation were stricken out and the following inserted in lieu thereof:

"ARTICLE SIX. The capital stock of the Consolidated Company shall be 3,500,000 shares, consisting of

(a) 22,800 shares of Preferred Stock of the par value of $100 each, entitled to dividends as provided in paragraph (a) of ARTICLE EIGHT hereof, said stock being herein designated SIX PER CENT. Preferred Stock;

(b) 250,000 shares of Preferred Stock of the par value of $100 each, entitled to dividends as provided in paragraph (b) of ARTICLE EIGHT hereof, said stock being herein designated FOUR PER CENT. Preferred Stock; and

(c) 3,227,200 shares of Common Stock without nominal or par value.

Of said 3,227,200 shares of Common Stock without nominal or par value 400,410 shares thereof shall represent the 400,410 shares of the previously authorized Common Stock of the par value of $100 each, and all shares of said previously authorized Common Stock of the par value of $100 each, now outstanding or in the treasury of the Company, are changed into, and shall be exchanged, share for share, for, Common Stock without nominal or par value."

"ARTICLE EIGHT. The surplus or net profits of the Consolidated Company as the same from time to time may be found and declared applicable to dividends by the board of directors, but not otherwise, shall be applied in payment of dividends on the Preferred Stock and Common Stock as follows:

(a) The 22,800 shares of Six Per Cent, Preferred Stock mentioned in ARTICLE SIX hereof, shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (c) of this Article, at and up to the rate of six per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any dividends on the Common Stock in such fiscal year.

(b) The 250,000 shares of Four Per Cent. Preferred Stock mentioned in ARTICLE SIX hereof, shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (c) of this Article, at and up to the rate of four per cent. per annum, payable annually, semi-annually or quarterly as the board of

directors shall from time to time determine, in preference and priority to the payment of any dividends on the Common Stock in such fiscal year, and when the board of directors shall have declared and set apart or paid in such fiscal year on the Common Stock dividends at the rate of four dollars ($4) per share per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, shall be entitled in said fiscal year to additional dividends, non-cumulative, at and up to the rate of two per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any further dividends on the Common Stock in such fiscal year.

(c) The said dividends provided for in the foregoing paragraphs (a) and (b) shall be payable only when and as declared by the board of directors. When declaring dividends in any fiscal year on any of said Preferred Stock the board of directors shall declare dividends on all the Six Per Cent. Preferred Stock and Four Per Cent. Preferred Stock then outstanding, and all outstanding shares of said Preferred Stock shall be entitled to receive such dividends, without preference or priority in time or order of declaration or payment between any of said shares of Preferred Stock and any other of said shares, but in the ratio of six dollars for each share of Six Per Cent. Preferred Stock outstanding to four dollars for each share of Four Per Cent Preferred Stock outstanding until each share of Six Per Cent. Preferred Stock outstanding

shall receive dividends at the rate of full six per cent. per annum, and each share of Four Per Cent. Preferred Stock outstanding shall receive dividends at the rate of full four per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall determine.

(d) The surplus or net profits of the Consolidated Company, after providing therefrom for the payment of dividends at the rate of six per cent. per annum on the Six Per Cent. Preferred Stock, and at the rate of four per cent. per annum on the Four Per Cent. Preferred Stock, in any fiscal year, may be applied to the payment of dividends on the Common Stock in such fiscal year, if and when declared by the board of directors; provided, however, that such dividends on the Common Stock shall not in any fiscal year exceed four dollars ($4) per share unless and until there shall have been paid or provision made for the payment of, additional dividends, non-cumulative, at the rate of two per cent. per annum, as above provided, on the Four Per Cent. Preferred Stock, but no more. Notwithstanding the preferences declared in this Article, if, after paying or providing for the payment of dividends in any fiscal year on the Preferred Stock as above provided, there shall remain an overplus of surplus or net profits, the board of directors may declare and pay dividends on the Common Stock of the Consolidated Company in such year out of such surplus or net profits.

No stock shall be issued entitled to any dividends on a parity with or in preference to the Preferred Stocks de-

scribed in this Article at the time outstanding, except with the consent of the holders of a majority of the whole amount of Preferred Stock of the character described in this Article then outstanding, first obtained and given at a meeting of the stockholders called for that purpose, or for that and other purposes, and with the consent of the holders of a majority of such part of the Common Stock as shall be represented at such meeting, the holders of the Preferred Stock and the holders of the Common Stock voting separately, unless the consent of a greater percentage of such Preferred and/or Common Stock shall be expressly required by law."

— — — — —

*Recorded in the office of the Secretary of the Commonwealth of Virginia, December 27 ,1929.

Filed in the office of the Secretary of State of North Carolina, November 27, 1929.

Recorded in the office of the Secretary of State of South Carolina, December 2, 1929.

Filed in the office of the Secretary of State of Georgia, December 2, 1929.

Recorded in the office of the Secretary of State of Florida, December 11, 1929.

— — — — —

EXHIBIT D.

STATE OF GEORGIA
OFFICE OF THE SECRETARY OF STATE

WHEREAS, Seaboard Air Line Railway Company, a consolidated Corporation, created and existing under the laws of the States of Virginia, Georgia and other states has filed in this office, in terms of the law, a Petition asking that its Charter, as set forth in the Articles and Agreement of Merger and Consolidation, made on October 11, 1915, by and between Seaboard Air Line Railway and Carolina Atlantic and Western Railway, be amended:

(1) to change 400,410 shares of Common Stock of the par value of $100 each, now authorized, whether or not outstanding, into 400,410 shares of Common Stock without nominal or par value, and to provide for the exchange of all shares of Common Stock of the par value of $100 each now outstanding and in the treasury of the Company for shares of Common Stock without nominal or par value, share for share;

(2) to change and classify 326,790 shares of authorized but unissued capital stock of the par value of $100 each, heretofore unclassified but reserved for issue either as Common Stock or as Preferred Stock, into 326,790 shares of Common Stock without nominal or par value;

(3) to increase the number of authorized shares of Common Stock from 727,200 shares to 3,227,200 shares of Common Stock without nominal or par value;

(4) to eliminate from said Articles and Agreement of Merger and Consolidation all reference to Five Per Cent, Preferred Stock and any provision for the conversion of Four Per Cent. Preferred Stock; and

(5) to strike out Article Six and Article Eight of said Articles and Agreement of Merger and Consolidation and insert in lieu thereof, respectively, the following:

"Article Six. The capital stock of the Consolidated Company shall be 3,500,000 shares, consisting of

(a) 22,800 shares of Preferred Stock of the par value of $100 each, entitled to dividends as provided in paragraph (a) of Article Eight hereof, said stock being herein designated Six Per Cent. Preferred Stock;

(b) 250,000 shares of Preferred Stock of the par value of $100 each, entitled to dividends as provided in paragraph (b) of Article Eight hereof, said stock being herein designated Four Per Cent. Preferred Stock; and

(c) 3,227,200 shares of Common Stock without nominal or par value.

Of said 3,227,200 shares of Common Stock without nominal or par value 400,410 shares thereof shall represent the 400,410 shares of the previously authorized Common Stock of the par value of $100 each, and all shares of said previously authorized Common Stock of the par value of $100 each, now outstanding or in the treasury of the Company, are changed into, and shall be exchanged, share for share, for, Common Stock without nominal or par value."

"Article Eight. The surplus or net profits of the Consolidated Company as the same from time to time may be found and declared applicable to dividends by the board of directors, but not otherwise, shall be applied in payment of dividends on the Preferred Stock and Common Stock as follows:

(a) The 22,800 shares of Six Per Cent. Preferred Stock mentioned in Article Six hereof, shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (c) of this Article, at and up to the rate of six per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any dividends on the Common Stock in such fiscal year.

(b) The 250,000 shares of Four Per Cent. Preferred Stock mentioned in Article Six hereof, shall be entitled in each and every fiscal year to receive non-cumulative dividends, when and as declared as provided in paragraph (c) of this Article, at and up to the rate of four per cent, per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any dividends of the Common Stock in such fiscal year, and when the board of directors shall have declared and set apart or paid in such fiscal year on the Common Stock dividends at the rate of four dollars ($4) per share per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, shall be entitled in said fiscal year to additional dividends, non-cumulative, at and up to the rate of two per cent. per annum, payable annually, semi-annually or quarterly as the board of directors shall from time to time determine, in preference and priority to the payment of any further dividends on the Common Stock in such fiscal year.

(c) The said dividends provided for in the foregoing paragraphs (a) and (b) shall be payable only when and as declared by the board of directors. When declaring dividends in any fiscal year on any of said Preferred Stock the board of directors shall declare dividends on all Six Per Cent. Preferred Stock and Four Per Cent. Preferred Stock then outstanding, and all outstanding shares of said Preferred Stock shall be entitled to receive such dividends, without preference or priority in time or order of declaration or payment between any of said shares of Preferred Stock and any other of said shares, but in the ratio of six dollars for each share of Six Per Cent. Preferred Stock outstanding to four dollars for each share of Four Per Cent. Preferred Stock outstanding until each share of Six Per Cent. Preferred Stock outstanding shall receive dividends at the rate of full six per cent. per annum, and each share of Four Per Cent. Preferred Stock outstanding shall receive dividends at the rate of full four per cent. per annum, payable annually, semi-annually or quarterly or as the board of directors shall determine.

(d) The surplus or net profits of the Consolidated Company, after providing therefrom for the payment of dividends at the rate of six per cent. per annum on the Six Per Cent. Preferred Stock, and at the rate of four per cent. per annum on the Four Per Cent. Preferred Stock, in any fiscal year, may be applied to the payment of dividends on the Common Stock in such fiscal year, if and when declared by the board of directors; provided, however, that such dividends on the Common Stock shall not in any fiscal year exceed four dollars

($4) per share unless and until there shall have been paid or provision made for the payment of, additional dividends, non-cumulative, at the rate of two per cent. per annum, as above provided, on the Four Per Cent. Preferred Stock, but no more. Notwithstanding the preferences declared in this Article, if, after paying or providing for the payment of dividends in any fiscal year on the Preferred Stock as above provided, there shall remain an overplus or surplus or net profits, the board of directors may declare and pay dividends on the Common Stock of the Consolidated Company in such year out of such surplus or net profits.

No stock shall be issued entitled to any dividends on a parity with or in preference to the Preferred Stocks described in this Article at the time outstanding, except with the consent of the holders of a majority of the whole amount of Preferred Stock of the character described in this Article then outstanding, first obtained and given at a meeting of the stockholders for that purpose, or for that and other purposes, and with the consent of the holders of a majority of such part of the Common Stock as shall be represented at such meeting, the holders of the Preferred Stock and the holders of the Common Stock voting separately, unless the consent of a greater percentage of such Preferred and/or Common Stock shall be expressly required by law."

WHEREAS, said Seaboard Air Line Railway Company has complied with all requirements of the law in such cases made and provided;

THEREFORE, the State of Georgia, acting by and through its Secretary of State, does hereby (in so far as the

Secretary of State may be authorized by law in the premises, and to the full extent of any power and authority hereunto enabling him) amend the charter of said Seaboard Air Line Railway Company in the respects hereinabove set forth and as prayed in its said Petition or Application for amendment.

IN WITNESS WHEREOF, these presents have been signed by the Secretary of State, and the great seal has been attached hereto, at the Capitol in Atlanta, on this 2nd day of December, 1929.

GEO. H CARSWELL,
Secretary of State.

(SEAL)

STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Geo. H. Carswell, Secretary of State of the State of Georgia, do hereby certify, That the five pages of printed matter, hereto attached, is a true copy of the amendment to the charter of the Seaboard Air Line Railway Company, as the same appears of file and record in this office.

(Seal) In Testimony Whereof, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 5th day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-nine and of the Independence of the United States of America the One Hundred and Fifty-fourth.

GEO. H. CARSWELL,
Secretary of State.

FILE COPY

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CLERK

Supreme Court of the United States

OCTOBER TERM 1944

ORIGINAL NUMBER 10

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

BRIEF ON BEHALF OF THE STATE OF GEORGIA ON MOTION TO FILE AMENDED BILL OF COMPLAINT

ELLIS ARNALL, *Governor of Georgia*

T. GRADY HEAD, *Attorney General of Georgia*

MARSHALL L. ALLISON, *Assistant Attorney General of Georgia*

CLAUDE SHAW, *Assistant Attorney General of Georgia*

EDGAR WATKINS, *Deputy Assistant Attorney General of Georgia*

FOOTE & DAVIES, ATLANTA

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Supreme Court of the United States

OCTOBER TERM 1944

ORIGINAL NUMBER.....

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

BRIEF ON MOTION TO FILE AMENDED BILL OF COMPLAINT

SUMMARY OF THE ARGUMENT

Georgia has a right to bring this original suit in this Court and to the relief prayed for in the Amended Bill of Complaint, because of the following reasons:

1. This suit is brought under the authority contained in Article 3, Section 2, Clauses 1 and 2 of the Constitution of the United States. Congress cannot deprive the soverign State of this constitutional right, nor can Congress divest this Court of original jurisdiction.

United States vs. Hudson and Goodwin
7 Cranch 32;
Stevenson vs. Fain
195 U. S. 165;
Wisconsin vs. Pelican Insurance Co.
127 U. S. 265;

(2) Congress cannot deprive the State of its constitutional right to bring an original suit in this court.

Marbury vs. Madison
1 Cranch 137;
Ames vs. Kansas
111 U. S. 449.

In addition to the constitutional reason, the Interstate Commerce Commission does not have jurisdiction over the controversy presented by Georgia. The Commission has not been granted jurisdiction over the matters involved in this suit.

Alabama vs. New York Central Railroad Co.
235 I. C. C. 255.

The chief complaint which Georgia makes in its amended bill is directed at the conspiracy operated by the defendants, the impact of which is felt by Georgia and her citizens. This conspiracy in restraint of trade is not only a violation of the common law rights of Georgia and her citizens, but is likewise a violation of the provisions of the anti-trust laws. The Interstate Commerce Commission is not a part of the judiciary and is without authority to grant to Georgia relief from this illegal conspiracy and the attending injuries sustained by the State therefrom.

(3) The amended complaint presents a justiciable controversy. This case does not present a political question such as was dealt with by this Court in

Massachusetts vs. Mellon
262 U. S. 447.

Neither does it seek to extend the prosecution powers of the State as was the case in

Wisconsin vs. Pelican Insurance Co.
127 U. S. 265.

This Court can grant to the State of Georgia the relief desired by simply passing an order restraining the

continuance of the conspiracy and directing the defendants herein to discontinue the operation of the rate fixing machinery, described with particularity in the amended bill of complaint, and of which adequate proof can be produced upon the trial of this issue. It is surely a judicial question as to whether or not the defendants have entered into a conspiracy to fix freight rates and whether the State of Georgia has been injured and damaged as a result of the rates so fixed by this conspiracy. It is not necessary for Georgia to show that these rates are unreasonable or unjustly discriminatory in order to state a legal case against these defendants. It is sufficient if Georgia shows that these rates are fixed by a conspiracy among the defendants named herein and that competition has been arbitrarily removed by these parties.

United States vs. Trans-Missouri Freight Association
166 U. S. 290;
United States vs. Joint-Traffic Association
171 U. S. 505;
United States vs. Trenton Potteries Company
273 U. S. 392;
United States vs. Socony-Vacuum Oil Company
310 U. S. 150, 214.

(4) The State of Georgia has a sufficient interest to maintain this suit. The amended complaint is based on four separate and distinct counts, each showing a different interest of the State in the controversy. If any of these counts show a proper interest on the part of the State, the bill of complaint must be retained.

Rhode Island vs. Massachusetts
12 Pet. 657.

The State of Georgia sues in the first count as a sovereign. The mere fact that the State's interest in the controversy under this count transcends measurement in pecuniary terms is not sufficient to exclude it from the courts. It is a sufficient interest if it be shown that the State sues as a sovereign in order to safeguard the performance of the obligations of government placed upon it as a part of the United States and under its own Constitution.

In Re Debs
158 U. S. 564.

In the second count, Georgia sues in its capacity as a quasi-sovereign and shows that the damage done to the State and its citizens, while perhaps incapable of estimate in money, is nevertheless both direct and positive, not only to the State but to the people as an organized community thereof.

Georgia vs. Tennessee Copper Company
206 U. S. 230;
Pennsylvania vs. West Virginia
262 U. S. 553.

In the third count, Georgia sues in its capacity as a proprietor, showing that the State itself has suffered as a result of the conspiracy. The incidence of this conspiracy is made manifest by unjust and unreasonable freight rates paid by the State of Georgia itself to the defendants named herein. The State therefore has a proprietary interest to maintain this suit.

Pennsylvania vs. Wheeling etc. Bridge Company
13 How. 518.

In the fourth count the State sues in its capacity as protector of a large general class of its citizens who by necessity are required to ship over the defendant rail-

roads. While not every citizen of the State of Georgia may be directly affected by the acts of the defendants, necessarily a large percentage of the people of Georgia are directly affected.

Kansas vs. Colorado
185 U. S. 125; citing,

Missouri vs. Illinois
180 U. S. 208.

(5) Georgia is entitled to be protected from an illegal combination formed by these defendants outside the borders of this State. Without the support of this Court, Georgia is helpless to rid itself of the impact of this conspiracy. The State is entitled to injunctive relief under the equity powers of this Court as well as under the express terms of Section 16 of the Clayton Act, together with any supplementary or other relief available at common law. The State seeks relief from the conspiracy on the part of these defendants as set forth in the amended bill of complaint. Once the conspiracy is ended, competition will be revived and Georgia will receive fair and equitable freight rates.

As a further means of vindicating the position of the State in this controversy token damages, the amount to be fixed by this Court, are requested. It should particularly be stressed here that Georgia is not primarily interested in seeking damages for past injuries to the State and her citizens, since we full well recognize that it would be impossible for these defendants to fully compensate for the wrongs they have committed against the State and its people.

What we are interested in is the future welfare of the State and her people. We desire to enter upon a

post war economy which will not be hampered and curtailed by the existing conspiracy on the part of these defendants. If this conspiracy on the part of the defendant railroads named in the amended complaint is dissolved, then a new day will dawn for Georgia and her citizens, and the secondary question of receiving just and equitable freight rates can and will be accomplished.

STATEMENT OF THE CASE

The State of Georgia brings this original suit before this Court charging the defendants named therein with forming a conspiracy in order that arbitrary and non-competitive freight rates could be charged against the State of Georgia and its citizens. We show that these defendants use some sixty rate bureaus, committees, and other agencies (see Exhibit 2 of the amended complaint) in order to monopolize freight rates and charges on transportation to and from the State of Georgia and other States. We submit that the State can prove the existence of this rate making machinery and the fact that such conspiracy sets arbitrary and non-competitive freight rates effective in this State.

We notice that none of the defendants in their various returns to the rule issued by this Court deny the existence of this conspiracy. Apparently the defendants concede that such a conspiracy does exist and that freight rates are fixed and collected as a result of this illegal arrangement. Their only defenses are, first, that the State of Georgia does not have a proper interest to maintain this suit, and secondly that no judicial question is presented to the Courts.

We anticipated both of these defenses prior to receiv-

ing copies of these returns. In order to more clearly show the interest of the State in this controversy, we amended our original bill of complaint by spelling out in detail the four different grounds on which the State is vitally interested in this controversy. In brief, our amendment shows the following four interests of the State in this suit:

FIRST COUNT: The State of Georgia sues in its capacity as a sovereign to safeguard the performance of the obligations of government with which as a State of the Union it is charged.

SECOND COUNT: The State of Georgia sues in its capacity as a quasi-sovereign or as agent and protector of its people against a continuing wrong done to the people of Georgia as an organized community in their lives, liberties, and estates.

THIRD COUNT: The State of Georgia sues in its capacity as a proprietor, against wrongs suffered by, and damage done to, the State as the owner of a railroad, as the owner and operator of various institutions maintained by the State, all of which makes necessary the purchase by the State of Georgia of certain merchandise and materials which are transported by defendants into this State to be used by the State of Georgia itself.

FOURTH COUNT: The State of Georgia sues in its capacity as protector, and in behalf of, a large general class of its citizens, who by necessity are required to ship over the defendant railroads and have been damaged by the acts of which complaint is made herein.

We further believe that the amended bill of com-

plaint clearly states a justiciable cause. The State is seeking to dissolve a conspiracy, the impact of which is shown to be injuring the State and its citizens. Whether a conspiracy exists or not, and whether that conspiracy is injuring and damaging the State of Georgia and its citizens as alleged, is clearly shown to be a judicial question. In our prayer for relief we seek to enjoin the defendants from engaging in or continuing in this conspiracy. (Pages 25, 26 of the amended complaint, particularly Paragraphs C, D, and E thereof.)

QUESTIONS PRESENTED

There are only two basic questions presented in this controversy, namely:

(1) Does the State of Georgia have a sufficient interest to maintain this suit?

(2) Does the amended bill of complaint present a judicial issue to the Court and one upon which the Court can grant relief?

We respectfully submit that these questions should be answered in the affirmative and that the Court should take jurisdiction of this cause and permit the State to prove the charges alleged in its amended bill of complaint.

ARGUMENT AND CITATION OF AUTHORITIES

RIGHT OF THE STATE TO BRING AN ORIGINAL CASE IN THIS COURT

(1) Article 3, Section 2 of the United States Constitution provides that the judicial power of the United States "shall extend to all cases in law and equity . . . between a State and citizens of another State." By the second clause of Section 2 of Article 3, it is provided

that in cases "in which a State shall be party, the Supreme Court shall have original jurisdiction." We seek to file this amended bill of complaint by virtue of the express authority contained in the Constitution itself. We do not depend upon statutory sanction for our authority. The very fact that this suit is maintained by a sovereign State, immediately places this case in a different category from those cases cited by defendants which were brought by individuals. This feature of the case should constantly be borne in mind as we proceed with the argument. See Supplement attached hereto and made a part of this brief. Private individuals are required to look to some statutory authority in order to maintain a suit. The defendants in their various briefs would likewise have this Court place the State of Georgia in that same position. A much clearer picture of this case will be seen when we completely erase all statutory laws from the scene and view the case in its true light as being based squarely upon the constitutional provision above cited.

Congress cannot by the passage of legislation deprive Georgia of its constitutional right to bring this case here.

United States vs. Hudson and Goodwin
7 Cranch 32;
Stevenson vs. Fain
195 U. S. 165;
Wisconsin vs. Pelican Insurance Co.
127 U. S. 265;
Marbury vs. Madison
1 Cranch 137;
Ames vs. Kansas
111 U. S. 449.

(2) Defendants argue that this suit should not in their view be filed because Congress has given to the Interstate Commerce Commission jurisdiction over the subject matter contained in the amended complaint. This very argument tends to put Georgia in the same position as that of a private individual and blindly ignore the constitutional grant of authority to the States. It is no answer to Georgia's complaint to simply state in general terms that the Interstate Commerce Commission has been given jurisdiction over freight rates.

This argument of defendants also overlooks the fact that the chief complaint of the State of Georgia goes to the very foundation of the rate making structure, rather than simply sniping at the rates themselves. Georgia desires to get at the root of the tree rather than pluck leaves from the twigs and branches of the tree. The defendants naturally would much prefer to have us content ourselves with attempting to pull a few bright colored leaves from the tree, rather than begin tampering with its roots. We are interested in the conspiracy formed by these defendants which has for its purpose, removing competition in the field of rate making. Once the conspiracy complained of is ended, competition will be revived and Georgia will have attained its constitutional rights to the enjoyment of free trade.

The defendants attempt to becloud the issue by going into a long dissertation of the rights of Georgia under the Interstate Commerce Act. After having by main force and awkwardness attempted to pull us under the provisions of that legislative enactment, they very adroitly come to the conclusion that we have no rights

thereunder and necessarily our amended complaint should not be filed. They seek to tell us how we ought to proceed with our case, and at the same time argue that if we do proceed under the Interstate Commerce Act we should be barred from court. It would be well for the defendants, once and for all, to clearly understand that the State of Georgia does not bring this suit pursuant to any authority contained in the Interstate Commerce Act, and neither do we depend upon any provision of that Act to maintain our case. This is not a reparation or "rate damage" case as so eagerly desired by the defendants, nor is an overcharge the bone of contention herein. The Interstate Commerce Commission is not a tribunal which exercises the judicial power of the United States. It is not a part of the judiciary but is an administrative board.

Cincinnati Railroad Company vs. Interstate Commerce Commission
162 U. S. 184;
Pennsylvania Railroad Company vs. United States
288 Fed. 88;
Texas & P. Railway Company vs. Interstate Commerce Commission
162 U. S. 197.

While within its appointive sphere the Commission does exercise quasi-judicial powers, it neither has nor does it claim authority to try conspiracy cases. The Commission itself has stated that it is without authority over anti-trust law violations.

Alabama vs. New York Central Railroad Co.
235 I. C. C. 255.

The Commission is therefore without power or authority to try the very issue of fact which is involved in

this controversy, that is, the existence of a conspiracy on the part of these defendants which controls freight rate charges within the State of Georgia.

(3) A justiciable issue is presented in our amended bill of complaint. Of course we realize that this Court has no jurisdiction of this proceeding if the matter involved is not of justiciable character.

Massachusetts vs. Mellon
262 U. S. 447.

We also recognize and agree with the proposition that this Court will not determine political questions.

Luther vs. Borden
7 How. 1.

However, this case presents neither an administrative nor a political issue. The only issue that is involved in this case is whether the defendants have entered into a combination or conspiracy to control freight rates. The existence or non-existence of a conspiracy or monopoly is precisely the type of judicial question which courts determine every day.

The defendants argue that we are presenting an administrative question. What administrative question can be involved in the issue of whether or not a monopoly exists? Monopolies were held to be unlawful at common law, because of their restriction upon individual freedom of contract and their attending injury to the general public.

Standard Oil Company vs. United States
221 U. S. 1.

Monopolies have also been made illegal by virtue of the anti-trust laws. (Title 15, U. S. Code Ann.) Georgia alleges that the violation of these laws against monoplies by the defendants injures complainant by

putting within the hands of these parties the illegal power to control freight rates to the detriment of Georgia and her citizens. It can only be a judicial question as to whether or not these charges made by the State can be properly substantiated with adequate proof. If the State proves its case as laid, the Court can certainly grant specific relief through a decree of a conclusive character finding the existence of the monopoly as charged and ordering such conspiracy to be perpetually enjoined.

When the defendants disabuse their minds of the proposition that Georgia seeks a decree from this Court fixing freight rates they will then be in a position to see this case in its true light as being aimed at destroying their conspiracy which has functioned so well for them through the years. We can understand why the defendants do not want to see this in the case because well they know that the monopoly question presents a justiciable issue to this Court.

From *United States vs. Trans-Missouri Freight Association*,
166 U. S. 290,
we quote the following pertinent headnotes:

"(6) Competing and nonconnecting railroads are not authorized by the commerce act to make an agreement of maintenance of rates and the curbing of competition.

"(13) The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates."

"(16) An agreement between railroad companies for the purpose of mutual protection by es-

tablishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, is by its necessary effect an agreement to restrain trade or commerce within the meaning of the act of Congress of July 2, 1890, no matter what the intent was on the part of those who signed it."

The Court in the Trans-Missouri Freight Association case clearly held that such agreements in restraint of commerce not only violated the Sherman Act, but were also violative of the common law. Justice Peckham speaking for the Court, stated:

"The general reasons for holding agreements of this nature to be invalid even at common law, on the part of railroad companies are quite strong, if not entirely conclusive. . . . It may be urged that Congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce, regardless of the question whether such agreements were reasonable or the reverse."

In *United States vs. Joint-Traffic Association* 171 U. S. 505,

this Court held:

"(3) Congress has the power to forbid any agreement or combination among or between competing railroad companies for interstate commerce, by means of which competition is prevented."

"(4) The constitutional freedom of contract in

the use and management of property does not include the right of railroad companies to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable."

All agreements which have for their object control of rates or prices are in violation of the anti-trust laws regardless of the intention of the parties or the reasonableness of the rate agreed upon by the conspirators.

United States vs. Trenton Potteries Company
273 U. S. 392.

The question of whether the freight rates being charged the State of Georgia and its citizens are reasonable and non-discriminatory is not before the Court. If it can be shown that these rates are arrived at by and through an agreement on the part of these defendants to set and control rates, the State of Georgia has made out a justiciable case. This suit is aimed at the evils of monopoly and rate control exercised by the defendants. Justice Stone speaking in, *United States vs. Trenton Potteries Company*, supra, at page 397, stated:

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints,

without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. . . ."

In *Keogh vs. Chicago and Northwestern Railway Co.*
260 U. S. 156,
it was held:

"(3) A combination of carriers to fix reasonable and nondiscriminatory rates may be illegal under the Anti-trust Act."

In *Socony-Vacuum Oil Company vs. United States*
310 U. S. 150,
the Supreme Court re-affirmed the former cases of *United States vs. Trans-Missouri Freight Association*, supra; *United States vs. Joint Traffic Association*, supra, and *United States vs. Trenton Potteries Company*, supra. Two headnotes from this case clearly summarize the law on this subject.

"(5) Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of a conspiracy under Section 1 of the Federal Anti-trust Act."

"(9) A combination to fix prices of a commodity in violation of the Federal Anti-trust Act, may be found to have the power to do so although the combination does not control a substantial part of the commodity, where the means for price-fixing are purchases or sales of the commodity in a mar-

ket operation, or purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the market; and in such case that power may be established if as a result of market conditions, the resources available to the combination, the timing and the strategic placement of orders and the like, effective means are at hand to attain the desired objective."

In line with the above case it would appear that when the State proves the existence of a conspiracy between the railroads to maintain higher freight rates within the State and that this conspiracy has actually resulted in increased rates, we have carried the burden of proof in showing the actual consummation of a conspiracy under the Federal anti-trust Act. On pages 177, 221 of the opinion it is interesting to note the following:

"The alleged conspiracy is not to be found in any formal contract or agreement. It is to be pieced together from the testimony of many witnesses and the contents of over 1,000 exhibits. . . Any combination which tampers with price structures is engaged in an unlawful activity."

Since the chief concern of the State of Georgia in this controversy addresses itself to the conspiracy and monopoly operated by the defendants and does not concern itself with the right of the State or its citizens to seek damages as a private shipper, it necessarily follows that decisions such as

Great Northern Railway vs. Merchants Elevator Company
259 U. S. 285;

Texas and Pacific R. Co. vs. Abilene Cotton Oil Company
204 U. S. 426;
Keogh vs. Chicago and Northwestern Railway Co.
260 U. S. 156,

have no application. These cases simply hold that where damages are sought by a private shipper because of alleged unjustly discriminatory rates, the matter must be determined as an administrative question by the Interstate Commerce Commission before the shipper would have any standing in court.

Since the case here does not depend upon a preliminary administrative determination of rates in order for this Court to grant the judicial relief sought, the decisions pointing out the necessity of prior resort to the Interstate Commerce Commission are inapplicable.

The question of whether a monopoly is in existence as charged by Georgia does not call for the exercise of administrative discretion on the part of the Interstate Commerce Commission, but is purely a judicial question for this Court.

(4) The interest of Georgia in this controversy is plain. Georgia, with great particularity, has shown its interest in this controversy by bringing its amended bill in four separate and distinct counts. We feel that the decisions of this Court will sustain our right to bring this suit on each of the counts, but in the event that the Court should find that any one of the counts taken alone was sufficient, our amended bill would still be retained as to that particular count.

Rhode Island vs. Massachusetts
12 Pet. 657.

Defendants argue that it is necessary for the State

of Georgia to allege and prove that it has been damaged in so many dollars before it can be said to have a sufficient interest in this controversy. We completely disagree with such an argument. It is not necessary for Georgia to show that the interest she has can be reduced to a pecuniary sum. It is sufficient for Georgia to show that the monopoly in question affects the public at large in this State. Even if it should be conceded, which of course we do not, that Georgia has no pecuniary interest in this controversy, this fact would not be sufficient to exclude her from having a standing in court.

In Re Debs
158 U. S. 564;
Missouri vs. Illinois
180 U. S. 208;
Pennsylvania vs. West Virginia
262 U. S. 553.

In addition to alleging that Georgia and her citizens are directly affected by the existence of this monopoly, it is also shown that the State itself pays exorbitant freight rates on goods and materials transported by the defendants for the State of Georgia. Clearly, this fact alone would be sufficient to show that the State has an interest in enjoying competitive rail rates rather than be subjected to a monopoly in the matter. We will deal with each of the four counts of the amended petition in the order named therein.

(A) FIRST COUNT: The State of Georgia sues in its capacity as a sovereign to safeguard the performance of the obligations of government with which as a State of the Union it is charged.

Georgia is placed in a different position from a pri-

vate party who seeks to redress a personal wrong to himself. The State is sovereign and owes an obligation to its people to promote the interest and welfare of all its people. The Preamble to the Constitution of the State of Georgia provides:

> "To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to posterity the enjoyment of liberty, we, the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution."

Certainly, the interest and welfare of the citizens of this State necessarily suffer when an illegal combination of railroads control freight rates in this State. Certainly the State in its sovereign capacity has some recourse in court to see that such a conspiracy is dissolved. Georgia alleges that such a monopoly does hinder the economical growth and development of the State and its people. This we can prove very easily upon a trial of this issue. The State has a right to maintain this suit because it is a sovereign and is the only representative of all the people within its borders.

In Re Debs
158 U. S. 564.
In *Pennsylvania vs. West Virginia*
262 U. S. 553,
the court held:

> "(3) The attitude of a state in bringing suit to enjoin the enforcement of the statute of another state which will prevent the continued transportation of natural gas into its borders, for the purpose of preventing injury to its public institutions

and the consuming public, is not that of a mere volunteer, attempting to vindicate the freedom of interstate commerce or to redress purely private grievances, but its interests are such as entitle it to maintain the suit."

"(4) The State, as representative of the public, has an interest in preventing the interruption of a flow of natural gas to a substantial portion of its population, which might seriously jeopardize their health, comfort, and welfare, apart from that of the individuals affected, so as to entitle it to maintain a suit to prevent the interruption."

(B) SECOND COUNT: The State of Georgia sues in its capacity as a quasi-sovereign or as agent and protector of its people against a continuing wrong done to the people of Georgia as an organized community in their lives, liberties, and estates.

In *Georgia vs. Tennessee Copper Company*
206 U. S. 230,

the State was successful in securing an injunction against the Tennessee Copper Company prohibiting that company from discharging sulphurous fumes from its plant in Tennessee whereby the air over large tracts of territory in North Georgia was contaminated which caused and threatened damage to forests and vegetable life in these counties. Mr. Justice Holmes in delivering the opinion of the Court, stated:

"The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the

damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

"When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. Missouri vs. Ill. 45 L. ed. 497."

In *Missouri vs. Illinois*
180 U. S. 208,

it was again held that the State has a proper interest where it seeks to prohibit another State from continuing a nuisance which is alleged to be detrimental to the health and welfare of its inhabitants. Justice Shiras, speaking for the Court, held:

"An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that

failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering."

In *Oklahoma vs. Cook*
304 U. S. 387,

this Court again recognized that "the interests of the State are not deemed to be confined to those of a strictly proprietary character but embrace its 'quasi-sovereign' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'" In that case however, it was found that the suit instituted by the State was purely for the benefit of depositors and creditors of a bank. It was not made to appear in that case that the State was bringing the suit on behalf of the public at large or because of the State's own proprietary interest in the controversy. The facts of that case are not analogous to the Georgia case now under consideration. Of course we recognize the principle of law that a State cannot use its sovereign or quasi-sovereign power as a collection agency for private claims or as a camouflage to benefit a certain class or limited group of its citizens. The amended bill in this case certainly shows not only the interest of the State personally in the goods and materials it purchases, but also its genuine interest in the growth and economic development of the State as a whole.

The State, as a representative of the public, has an interest in preventing a substantial portion of its population from suffering because of the acts of persons

outside the borders of the State.

Pennsylvania vs. West Virginia
262 U. S. 553.

(C) THIRD COUNT: The State of Georgia sues in its capacity as a proprietor, against wrongs suffered by, and damage done to, the State as the owner of a railroad, as the owner and operator of various institutions maintained by the State, all of which makes necessary the purchase by the State of Georgia of certain merchandise and materials which are transported by defendants into this State to be used by the State of Georgia itself.

Our investigation reveals that all of the cases are uniform in holding that where the proprietary rights of the State are involved, the State has a sufficient interest to maintain a suit to protect such interest.

Pennsylvania vs. Wheeling etc. Bridge Company
13 How. 518;
South Dakota vs. North Carolina
192 U. S. 286;
Florida vs. Anderson
91 U. S. 667.

Again, we point out that this case should not be confused with such cases as Oklahoma vs. Atchison, etc. R. Company, 220 U. S. 277, where the State of Oklahoma undertook to enjoin certain rates on certain specified commodities. Oklahoma failed to show that she was engaged in transporting any of these commodities, and further failed to show that the case was being brought on behalf of a substantial portion of the citizens of the State. In the present case Georgia and all of its citizens are vitally interested in breaking up an illegal combination of the named defendants. When

we show that Georgia in its proprietary capacity transports goods and materials over the defendant lines, we have shown a sufficient interest for the State to seek to have this monopoly dissolved.

(D) FOURTH COUNT: The State of Georgia sues in its capacity as protector, and in behalf of, a large general class of its citizens, who by necessity are required to ship over the defendant railroads and have been damaged by the acts of which complaint is made herein.

While we concede that the State would not be authorized to use its sovereign powers to represent individuals or a limited class of its citizens, we do believe however, that these powers can properly be used to represent a large and substantial part of its citizens.

Georgia vs. Tennessee Copper Company
206 U. S. 230;
Missouri vs. Illinois
180 U. S. 208.

The arguments advanced heretofore relative to Counts 1 and 2 of the amended complaint also apply to this Count.

(5) Georgia is entitled to injunctive relief. At common law, monopolies were unlawful.

Standard Oil Company vs. U. S.
221 U. S. 1.

Even before Section 16 of the Clayton Act was enacted, the State was entitled to injunctive relief at common law against monopoly. Clearly, the Clayton Act did not divest the State of any constitutional right that it had prior to this time. We therefore take the view that Georgia is entitled to an injunction under the common law.

We are also of the opinion that the proviso of Section 16 of the Clayton Act, (15 U. S. C. Sec. 26) which reads as follows: "Provided, that nothing contained in Sections 12-13-14-21, 22-27 of this Title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of Chapters 1 and 8 of Title 49, *in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission,*" does not prevent the State from having injunctive relief in this case. That part of the proviso which we have italicized grants to any person the right to have injunctive relief against carriers in respect to any matter which is not subject to regulation or supervision by the Interstate Commerce Commission. Since the Interstate Commerce Commission is not a part of the judiciary and does not therefore have jurisdiction over conspiracies or anti-trust violations, we submit that the matter now before the Court is not one in which the State is prohibited from obtaining injunctive relief under Section 16 of the Clayton Act. We respectfully submit that Georgia is entitled to an injunction under the common law or under the terms of the Clayton Act at the discretion of the Court.

The only order or final judgment which Georgia seeks in this controversy is a decree from this Court dissolving the monopoly operated by the defendants, and secondly, an award of token or nominal damages by the Court in order to further vindicate Georgia's position in this controversy. Since we take this view of the case and waive any and all claims to damages, other than token or nominal, it is not necessary to deal with all of the voluminous cases cited by defendants

dealing with the questions of rate making. These cases cited by defendants have no application to this controversy.

SPECIAL PLEAS OF TWO OF THE DEFENDANTS

Two of the defendants herein present special pleas to the Court, stating that they are citizens of Georgia, and not of other States as alleged in our amended bill of complaint. This of course is a question of fact, and does not enter into the question of whether our bill of complaint as amended should be filed. (Even if this plea could be proven it could be met by an amendment on our part, dismissing these parties, neither of which is an indispensable party, although both are proper parties.)

The Seaboard Air Line Railway Company (Page 13 of Seaboard's return) claims to be a Georgia corporation and a citizen of Georgia by virtue of a consolidation and merger under the authority of legislative enactments which are now codified as Sections 94-311 and 94-318 of the Code of Georgia of 1933, which is set forth in the return.

The Georgia statutes do not make that defendant a citizen of Georgia within the meaning of the Constitution of the United States and the Federal Judicial Code relating to diversity of citizenship by virtue of its alleged claim.

St. Louis and S. F. Railway Company vs. James
161 U. S. 545;
Southern Railway Company vs. Allison
190 U. S. 326;

Atlantic Coast Line R. Company vs. Dunning
166 Fed. 855.

The Nashville, Chattanooga and St. L. Railway claims that it is a citizen of Georgia because it leased a railroad from the State. The Georgia statute cited in the return does not and could not change the citizenship of the respondent. The statute does no more than continue the lessor corporation for the purpose of permitting it to be sued in Georgia for torts committed on its line.

Respondents also rely on the Small Business Mobilization Act (Title 50, U. S. C. Appendix, Sections 1101 and 1112) as a special plea. Of course this plea also involves a question of fact and in addition to that, the certificate does not have a retroactive effect and the monopoly charged by Georgia was in existence prior to the issuance of the certificate.

At the time of sending this brief to the printers December 21, 1944, the State of Georgia has not been served with copies of any returns of ten of the "Northern Railroad" defendants.

CONCLUSION

In conclusion we submit that the amended bill of complaint presents a justiciable issue and shows sufficient interest on the part of the State of Georgia to maintain the suit. We therefore respectfully urge this Court to grant leave to file the amended bill of complaint.

THE STATE OF GEORGIA,

BY:

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SUPPLEMENT

ON

THE CONSTITUTIONAL BASIS FOR THIS SUIT

The action brought by the State of Georgia against the Pennsylvania Railroad, et al., is no ordinary suit. It is as simple as it is significant in character. It raises in a form in which it has not been raised before the question of the right of access of a state in the federal union to this Court to seek protection for its orderly processes of government against a conspiracy of citizens of other states. Although the suit is in close accord with the decisions of this Court which are closest in kind, its far-reaching significance transcends those causes of action whose decisions have been recited in the body of the brief.

The State of Georgia here sues in its official, or sovereign, right. It seeks to be left unmolested in the performance of the usual functions of government in behalf of its people. It seeks to vindicate its right to assert its police power, to develop its resources, to promote its agriculture, to encourage its industry, to quicken its commerce. It asks to have dissolved a conspiracy which has driven a barrier between its public policies and the results which are normally expected to flow from them.

In bringing this action the State of Georgia sues as a member of the federal union. It seeks no intrusion upon the powers of the general government. It claims for itself only the right to shape and develop its State economy within the pattern of the national economy as shaped by Congress. It has, however, surrendered no power it once possessed save to the Government of

the United States; it has yielded none of its authority to—and it invokes the protection of this Court against —a private government operated as a conspiracy by citizens of other States.

For these reasons the State of Georgia asserts a right, granted to it by the Constitution, to be heard by this Court in the first instance. So basic in this plea as to demand a recitation in some detail of the constitutional argument upon which it grounds its prayer for original jurisdiction.

I.

This suit meets all the requirements of original jurisdiction as specified by the Constitution of the United States.

All the requisites of original jurisdiction are met in this case. The proper parties are before this Court; it is a suit between a State and persons of other States. An adversary relation exists between them; that is abundantly set forth in the body of this brief. A justifiable question is presented; this action is brought under this Constitution and the laws of the United States. The common law against conspiracy and the common law against tort were sanctions in the reach of the State of Georgia at its admission to the Union. The right to sue has been strengthened by Sections 1 and 2 of the Sherman Act, which restate and fortify the common law against conspiracy. In seeking to enjoin the conspiracy and to secure an award of token damages, the State of Georgia invokes the relief in "law and equity" afforded by the judicial power. And, since a State is a party, this Court has original jurisdiction. In 1789, 1839, 1889 the State of Georgia could

have instituted a suit of this kind. For its kind. For its cause of action derives from the Constitution. The Sherman Act reinforces, it does not create, the right of resort to this Court.

II.

The conspiracy charged presents a case of the very kind which the Framers of the Constitution intended to entrust to this Court.

It is submitted that this cause of action falls clearly within the judicial power of the United States; that this suit represents the very kind of "dispute" the Framers had in mind in appointing this Court as the forum for cases to which a state was a party. It is true that the conspiracy charged deals with a mode of transportation unknown at the time which Article Three of the Constitution was formulated. But the gentlemen who met at Philadelphia sought to promote "the progress of the useful arts"[1] and visualized an instrument of government flexible enough to accommodate itself "to the infinite variety of the changing circumstances of life."[2] To that end Edmund Randolph of Virginia, set down for the Committee of Detail two things which "deserve attention" in "the draught of a fundamental constitution." One of these was "to use simple and precise language, and general propositions," the reason being that "the construction of a constitution, of necessity, differs from that of law."[3] The other[4]

[1] The Constitution, Article I, Section 8, Subsection.
[2] Mr. Justice Moody, dissenting, in *Employers Liability Cases*, 207 U. S. 463, at p. 504. The dissent was not on this point. No better statement of the intent of the Framers appears anywhere in the U. S. Reports.
[3] The Fourth Draft of the Committee of Detail, reproduced in Max Farrand, *The Records of the Federal Convention of* 1787, II, 1937, hereafter referred to as Farrand. The text is in the handwriting of Edmund Randolph, with emendations in the hand of John, later Mr. Justice, Rutledge. The reason recited here is in Rutledge's handwriting. See Vol. IV, p.
[4] Ibid. II, 137.

was "to insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."[5]

It is true, of course, that the Framers were unacquainted with railroads, rate bureaus, class and commodity rates, the strategic place of the rate structure in the operation of the industrial system. But they were acquainted with traffic, freights, staple crops, port charges, manufacture, toll gates, the dependence of a state upon markets beyond its borders, the creation of political barriers as a result of trade disputes, the trend of an intense state jealousy towards a series of thirteen distinct state economies. It was, in fact, concern over these very matters which led Virginia to propose that the States send commissioners to examine "the trade of the United States and of the said States."[6] The result was the meeting at Annapolis, where delegates found they were confined by their instructions; and, deeming "the power of regulating trade" to be "of such comprehensive extent" as to "require a correspondent adjustment of the other parts of the federal system," issued the call "to meet at Philadelphia in the second Monday in May," 1787.[7] How an attempt to subdue the spirit of competitive localism into a more perfect union led to the provisions in the Constitution for the regulation of commerce—and to the extension of the jurisdiction of this Court to a suit in which a

[5] William Pierce, a delegate from Georgia, quoting George Wythe, reports the "necessity to adopt general principles before we go into detail or very shortly Gentlemen would find themselves in confusion." The Formation of the Union of the American States, 69th Congress, 1st Session, House Document 398, p. 80. The book is hereafter referred to as Formation of Union.

[6] Jonathan Eliot, *The Debates in the Several State Conventions on the adoption of the Federal Constitution*, etc. I, p. 115.

[7] *Ibid.*, I, p. 118.

state is a part—is of such relevancy to this cause of action as to warrant detailed recitation. In the paragraphs which follow it is hoped to show that a dispute, such as that which the State of Georgia now seeks to lay before this Court, was the very sort of controversy which the mandate in respect to original jurisdiction was intended to make provision for.

A. In the years immediately following the separation from Great Britain, a controversy over trade or commerce between state and state or between a state and citizens of another state presented a political or diplomatic question.

The separation from Great Britain was attended by a breach in the American economy. Each of thirteen colonies became an independent state, charged with the regulation of its own commercial affairs. As a result the states newly sovereign were subject to a double jeopardy. Each acting alone was exposed to the militant policy of foreign countries. And each acting alone was a menace to the wealth and prosperity of the others. Along the foreign front the exports of the disunited states were confronted by the hostile mercantile systems of England, France, Spain, Portugal and Holland. Spain had closed to the states the Mississippi; Great Britain, the Saint Lawrence; England was regulating our trade by Orders in Council; circumvention had to be employed in the trade with the West Indies, carried on in Colonial days openly and above board. As the Framers viewed it our commerce abroad was "equally unprotected" by "arms and negotiation." It was imperative to see to it that a world of hostile nations did not close in with reprisals and

military force upon the separate and divided states.[8]

A situation equally critical attended commerce among the several states. Each of the separate commonwealths was as anxious to keep—or to gain—the market across the state line as it was to exclude "the foreigner" from its own local territory. Economic disputes, which under happier conditions might have been settled by judicial procedure, led to political action. Alert to protect its domestic interests, a state would use its police power to levy a tariff on a product from over the boundary, or would exclude it altogether. And the state discriminated against would employ its newfound sovereignty to retort in kind.

The annals of the legislatures—and the minds of the Framers—were filled with instances of such settlement by reprisal. Each of the states, as an attribute of sovereignty, had a right to create for itself the monies which were legal tender within its own dominion. Its monetary system was often manipulated to favor its own products at the expense of those of neighbor states.[9] The system of taxes was likewise employed to secure a kindred mercantile advantage. At the end of the Revolution all the states except New Jersey, imposed small duties on imports to raise revenue. As time passed, and rivalries grew, the rates were raised.[10] As a result of such excises, angry disputes flared between states. A quarrel between New York and its neighbors, New Jersey and Connecticut, almost broke into armed strife. Into this feud Massa-

[8] For the facts seeAllan Novins, *The American States During and After the Revolution*, 1775-1789, passim. For the state of mind see Elliot, especially III, pp. 44-45; IV, 20, 102, 202. See also the Federalist, No. 4.
[9] The proficiency of Rhode Island—which sent no delegates to the Convention—in this pecuniary competition won universal and lasting renown.
[10] For the tariff acts passed by the legislature of Georgia, see Watkins, Digest 280-282, 325.

chusetts and New Hampshire were drawn by the attempt of Connecticut to retaliate against adjacent states.[11] Controversies, often bordering on violence, pitted the interests and the states of South Carolina and Georgia against each other. North Carolina complained that South Carolina and Virginia taxed its consumption. Virginia protested that Pennsylvania and Maryland laid a "tribute" on its commodities at the ports of Philadelphia and Baltimore. The complaint was general that the maritime states exploited their ports to the disadvantage of their non-maritime neighbors. Along with all this, commerce was obstructed by acts emanating from various state capitals, making it extremely difficult—or even impossible—for creditors to collect from local debtors.[12] Animosities between states divided the shaky Confederation into warring entities.[13]

Those innumerable conflicts strikingly resembled the dispute which the State of Georgia seeks to bring into this Court. The State sought to protect itself, its interests, its citizens from a harm to its economy coming from over its borders.[14] As the Framers met at Philadelphia, they were determined to find means of coping with the rivalries which kept the new commonwealths from utilizing to the full their industrial resources.

[11] Ferrand, III, 548.
[12] Nevins, *op. cit., passim;* J. Frank Jameson, *The American Revolution Considered as a Social Movement, passim.*
[13] For the recitation of a contemporary witness, see John Marshall, *Life of Washington*, IV.
[14] The credentials of the delegates of the State of Georgia read "for the purpose of revising and discussing all such alterations and farther provisions as may be necessary to render the Federal Constitution adequate to the Exigencies of the Union," p. 82.

B. A determined effort was made in the Convention to narrow the area of controversy within which a state might be a party.

The gentlemen who met at Philadelphia were intent upon creating orderly channels for dealing with the conflicts which disturbed "the peace and harmony" of the Union. To that end certain powers were delegated to Congress, which, in a substantial economic area, was with a single voice to displace the discordant voices of the several states. Certain types of state action were specifically prohibited. And, lastly, that the state might be assured of justice against economic harm from over the boundary, it was granted access to this Court as a means of protection against acts of other states and their citizens such as had made the period of the Confederation notorious.

To appreciate the intent and symmetry in this pattern of the distribution of powers, it is necessary to examine in some detail the proceedings of the Constitutional Convention.

The Framers were conscious of the need for a general regulation of trade. It was, as later put into classic terms, essential that "all the powers necessary" to the regulation of "commerce, finance, negotiation and war" be "lodged in the national depository."[15] In the Randolph resolutions, the new Congress—as later it came to be called—was to "legislate in all cases to which the separate states are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[16] After a series

[15] The Federalist, No. 7.

[16] Resolution VI, as reported by Madison, Farrand I, 21; III, 593, of the Randolph Plan, also known as the Virginia Plan. The three drafts of the Randolph Plan are given in Formation of Union, pp. 953 ff.

of debates, a substitute was proposed by Bedford, "to legislate in all cases for the general interest of the Union," was carried six states to four; and, as a guiding principle, was referred to the Committee of Detail.[17] Here was "a mere sketch" where "general term and phrases" needed "to be reduced to proper detail." In the Committee of Detail, the general language moved towards concrete expression, and emerged "The Legislature of the United Shall have the Power . . . to regulate Commerce with foreign nations and among the several states."[18] In due course it was presented to the Convention and an entry in Madison's Journal prosaically records, "clause for regulating commerce with foreign nations, etc., agreed to nom. con."[19]

But "the commerce clause" does not stand alone; it is a single one in a galaxy of powers set up for a unified control of a national economy. The best way to settle conflicts between states or the citizens thereof was to stop them at their source. To that end the Congress was given a wide range of economic powers in respect to finance, taxation, science and the useful arts, foreign affairs, and war. And, in respect to persistent sources of conflict, current or prospective, the Convention became quite explicit in seeking to avoid disturbance to the peace and harmony of the Union. Thus to the states were forbidden acts, such as entering into a treaty or alliance with a foreign power, laying duties on its own imports or exports, making any thing but gold and silver coin a tender in payment of debts, passing an *ex post facto* law, or impairing the obligations of contract, all of which had proved them-

[17] *Ibid.* II, 26-27.
[18] *Ibid.*, II, 181. Its fortunes, verbal and substantive, may be traced in the successive drafts of the Report of the Committee.
[19] *Ibid.*, II, 308.

selves to be breeders of disputes between the several states, acting for themselves or for interests under their protection.

It was, however, only after debate and compromise that the several states surrendered to the general government their political and diplomatic powers. For a time it was feared that the great difference in their "situations" might prove a bar to a really effective union. Jealousy between the old and the new, the Northern and the Southern, the maritime and the inland states, prompted largely by the economic interests which each was intent to secure, was much in evidence in deliberation, proposal, and vote. In particular friction flared between the small and the large states.[20] There was fear, in the language of today, that a group of states might "gang up" on one of their number. Mr. Oliver, later Chief Justice, Ellsworth, did not think the "danger of combinations" among the big states "imaginary"; he could easily "conceive cases"; and, even the possibility was "sufficient to alarm him," and Bedford, declaring that "if you possess the power the abuse of it could not be checked," insisted that "the larger states will be rivals, but not against each other —they will be rivals against *the rest of the states.*"[21] In the end it was agreed[22] that compacts between states were to be allowed but that none was to become effective without the consent of Congress. Again, another source of conflict was, at least formally, removed with the provision that the general government which col-

[20] Farrand. I, 491. The big states were Virginia, Pennsylvania and Massachusetts. Although not as small as Deleware and Rhode Island, Connecticut and New York played along with Georgia as a small state.
[21] Farrand. I, 500-501.
[22] The absence of delegates from Rhode Island, the departure of Yates and Lansing, representatives of the small state of New York, alarmed at the nationalistic trend; and the failure of a number of delegates to sign indicate a distrust in provision for the rights of the several states.

lectively the members were to set up should give no preference to the ports of one state over those of another.[23] And in like manner, the clash of interests flared in the consideration of the taxing power of Congress. All Duties, Imposts and Excises were to be uniform throughout the United States. Madison argued that a right to tax exports, however, "inexpedient at present," may and "probably will be necessary" in the future to procure "equitable regulations from other nations." And Wilson added that "to deny this power is to take from the common government half the regulation of trade."[24] But fears would not yield before such reasons; and in the end the power to levy excises on exports was denied to the Congress. The Southern states had scored a victory over those of the North; the newly created Union was not to be allowed to drive a wedge between the staple crops and their markets overseas. By many it was felt that the "great power" to regulate commerce ought not to be exercised by a mere majority vote. It was feared that "the merchants of the Northern and Eastern States" would be able "not only to demand an exorbitant freight" but also "to monopolize the purchase of commodities . . . to the great injury of the landed interests."[25] Such distrust found expression in a requirement of a two-thirds vote for the regulation of commerce,[26] a provision which was not relaxed until delegates were assured that it was guarded against abuse. An eye was out by all the states, large and small, to see to it that barriers were not driven between a state and its products; that a state's industries were not impeded by restraints which came from over the border.

[23] Farrand. II, 618.
[24] Farrand II, 362.
[25] George Mason, Elliot, I, 495.
[26] Farrand III, 599, Article VI, Pinckney Plan.

Thus the zone of controversy was narrowed by a kind of generic injunction against certain kinds of acts which would touch off disputes between interests in the several states. To that end the delegates voted to commute certain political powers of their states into a federal power of commercial regulation. But they were careful to set down precautions against the use of the delegated powers to their own disadvantage. Thus the states gave up the right severally to shape the national economy; they retained the right, within the limits of an industrial system so shaped, to give direction to their domestic economies. And in the exercise of the powers delegated, they expected a justice untainted by local advantage or sectional favoritism.

It is foolish to suppose that states, which would not surrender their destinies to a combination of other states, were willing to entrust control over their industries to a combination or conspiracy of citizens of other states.

C. In the residium which was left, the dispute to which the state was a party was brought within the judicial power of the United States.

It was not to be expected, however, that controversies between states, their interests, and their citizens could be completely eliminated. Conflicts were still possible over territory, jurisdiction, public lands, trade policy. And so long as products of a state found a market beyond its borders, or the citizens of one state were in a position to injure the economy of another, disputes were bound to occur. Nor would the states have been willing to surrender their political and diplomatic power unless some other instrument of redress were given them in lieu of that which was

being surrendered. It was thus essential, within the framework of the union, to make some provision for the orderly and peaceful settlement of disputes to which the state might be a party. It is, therefore, of concern to follow the various steps in the process of thought by which the Convention converted a residuum of political and diplomatic authority into a right to invoke the judicial power of the United States. To the Framers it seemed obvious from the first that if a union was to be effected among independent states, some sort of a court of inter-state justice would have to be set up. All the plans, in fact, which served as raw material for the Constitution provided for a Judiciary to settle disputes affected with a federal interest.[27] The Ninth of the Randolph Resolutions, which served as a tentative text for the debates, proposed "a national judiciary to be established and to be chosen by the national legislature." In the Committee of the Whole House, to which it was referred, the proposal for "one supreme tribunal" and of "one or more tribunals" was "passed in the affirmative."[28] A little later the desirability of the lower tribunals was questioned. John, later Mr. Justice, Rutledge saw in them needless duplication and urged in their stead the use of the courts of the several states. James Madison, Jr., did not regard the state courts as suitable for federal work. He voiced the prevailing fear that, where parties from more than a single state were in controversy, the alien had to take the hazards of local prejudice; and predicted, "Verdicts in state tribunals obtained under the biased directions of a dependent Judge, or the local

[27] For the Patterson article see Farrand I; for the Pinckney proposal, which seems to have survived in a greatly altered form, see Farrand III, 600, Article IV.
[28] Farrand I, 95, 104-5.

prejudices of a undirected jury." If it were tried, appeals would be multiplied to a most oppressive degree."[29] Although no move was made to utilize the state courts, the proposal to establish local federal tribunals was voted down in the Committee of the Whole, five states to four, two being evenly divided.[30] It was then moved that, at its discretion, "the National Legislature be empowered to institute inferior tribunals."[31] And this passed in the affirmative, eight states to two. Although the wording was changed, the substance endured; and this delegation to Congress of the power to appoint inferior tribunals was accepted by the Convention, nem. con.[32]

The same solicitude to secure a forum free from local bias is exhibited in the debate over where the power to appoint judges was to be lodged. It was among the conferees rather generally agreed that "the judges ought to be diffused" in order to cancel out local prejudice. To that end the second branch—later the Senate—appeared to offer a better instrument than the joint action of the two Houses. The legislature would be too numerous and would afford full play to intrigue and cabal. The Executive, free from local bias, suffered the disadvantage of inadequate knowledge about all possible characters. Madison suggested uniting "the advantage of responsibility in the Executive with the security afforded in the second branch against any incautious or corrupt nomination." A motion to that effect resulted in a tie,[33] a postponement, a clash of views in committee and on the floor, a protracted dead-

[29] Farrand I, 124.
[30] Farrand I, 125.
[31] By Mr. Wilson and Mr. Madison, "in pursuance of the idea" of Mr. Dickinson, Farrand I, 125.
[32] Farrand II, 46.
[33] Farrand II, 41-44.

lock, and the eventual compromise which reposed the appointment of Supreme Court judges in the Executive with the advice and consent of the Senate.[34] The greatest pains were taken to secure a tribunal of high competence and freedom from local bias, to which great controversies could with confidence be entrusted.

A scrutiny equally careful was given to the orbit of jurisdiction. The Patterson and the Pinkney plan alike stress the importance of a forum in which the "stranger" would not be at a disadvantage.[35] The Randolph resolution stressed a capacity to do justice in respect to "foreigners or citizens of other States" and an ambit broad enough "to hear and determine" questions "which may involve the national peace and harmony."[36] The proposals underwent numerous verbal and some substantive charges. The "jurisdiction" of higher and lower tribunals became "the judicial power."[37] This was made to extend to all cases arising under this Constitution and the laws of the United States.[38] The judicial power was enlarged to extend to all cases "both in law and equity."[39] And it was decided that appeals were to lie "both as to Law and Facts."[40]

The Framers were mindful of the period through which they had just lived. They had experienced the use of tariffs, port charges, freights, to hamper commerce, levy tolls on consumption, cripple industries of adjacent states. As a result they were much concerned with disputes between states and the interests and the

[34] Farrand II, *passim*.
[35] Farrand I, 244 and III, 576.
[36] Farrand I, 22.
[37] Agreed to nom. con., Farrand II, 425, 431.
[38] Farrand.
[39] Farrand II, 425.
[40] Farrand.

citizens thereof. They were, as Ellsworth put it for them, intent upon imposing "every reasonable check" upon unbridled controversy. Quarrels there were bound to be; but, if there was "need of a coercive principle," he, like the other delegates, was for "coercion by law."[41] His pithy expression points the problem—now that power had been reposed in the Congress to regulate commerce among the several states—with which the Convention was concerned. Now was the residue of controversy, which among independent states had prompted resort to political and diplomatic action, to be handled within the more perfect union? To this question two separate and distinct answers were given, one still clinging to the tradition of diplomacy, the other seeking to convert political issues into judicial questions.

At first the trend was toward adopting the diplomatic approach,[42] which naturally was the most obvious[43] to delegates of independent states.[44] According to the Pinckney Plan, the second branch was to determine all disputes between the States,[45] for the Senate at that time was looked upon somewhat as an assembly of ambassadors from the various states.[46] It was not unnatural to look to it to do for the states what severally they had done for themselves. Yet it was expected

[41] Ellsworth to the Connecticut Convention called to ratify the Constitution, Farrand III, 241.
[42] Many of the states had compacts with other states and Virginia had what was in fact a secretary of "foreign commerce," and its legislature ratified the peace treaty. Madison, Works II, 658, 659.
[43] The State of Georgia was accustomed to exercise the treaty making power. Saye, New View Points in Georgia History, 197-207.
[44] According to John Adams the Continental Congress, lacking the power to regulate the economy of the country, had been looked upon as a diplomatic body, Saye 204-5.
[45] Farrand, II, 599, Article VII.
[46] As late as the VI and even the IX draft of the Report of the Committee of Detail the Senate was given "Power to make Treaties; to send Ambassadors; and to appoint the Judges of the Supreme (National) Court." Farrand II, 155-169.

to perform the office of mediation in a body having a membership so diffused as to cancel out all local prejudice. A number of successive drafts of the report of the Committee of Detail exhibit the movement in that direction. At one stage it was provided that the Senate was "to have authority in all disputes and controversies, now subsisting or that may arise between two or more states."[47] As finally written, a separation of disputes was effected; those involving jurisdiction and territory were left to the Senate, and others, including those of a commercial character were placed under the judicial power.[48] In respect to "jurisdiction and territory"[49] an elaborate procedure was set up; a memorial was to be filed, a day was to be set on which the adverse party was to appear, agents were to be appointed by the disputants; and a Commission acceptable to the two sides was to take testimony and pronounce judgment.[50]

Meanwhile progress was being made towards converting the diplomatic into the judicial question. Some substitute had to be contrived for the political instruments which were given up. The general line in the Randolph resolution pointed the direction. As the matter took its way in the Convention and Committee of

[47] Farrand, II, 160.
[48] Farrand, II, 170, 173. In this decision the matter was reported to the Convention by the Committee of Detail, Farrand, II, 183-184, 186. The phrasing, however, now reads "between a State and Citizens of another State."
[49] Note that the provision to comprehend within the judicial power the controversy to which the state was a party was not suggested by the boundary or the jurisdictional dispute. On the contrary, as will presently appear, these were the last objects of controversy brought under the judicial power.
[50] The procedure was doubtless suggested by that which obtained in a dispute between two colonies. An appeal was taken to the Crown, that is to the Privy Council; a Committee—taking various names and much later emerging as the Judicial Committee—took the matter under advisement; and a Commission was appointed to hear and decide, usually on the spot.

the House, it was reiterated over and over that the federal jurisdiction shall extend to all questions which may "involve the national peace and harmony."[51] In the Committee of Detail, as the several drafts indicate, the general principle was reduced to the particular terms of disputes between state and state, and between a state and the citizens of another state; and in this form it survived the scrutiny of the Committee of Style and Arrangement and was engrossed on parchment as the now famiilar clause, "The judicial Power shall extend . . . to Controversies between two or more States;—between a State and Citizens of another State."

Sometime earlier, however, the distinction between disputes over jurisdiction and territory and over other forms of controversy had been broken down. When the Convention reached Article IX of the emerging Constitution as reported by the Committee of Detail, attention was given to sections 2 and 3 where the procedure was prescribed by which, under the auspices of the Senate, disputes between states in regard to jurisdiction and territory were to be settled. Rutledge pointed out that, since a federal judiciary was being set up, the lodgment of power in the Senate to settle such disputes was no longer proper. What was "necessary under the Confederation" had been "rendered unnecessary by the National Judiciary."[52] So, seconded by Dr. Johnson, he moved to strike those provisions. The motion was passed in the affirmative, eight states to two.[53] A little later, however, in considering Article XI on the judicial power, the Convention failed to fol-

[51] Farrand, I, II, p.
[52] The variations in language are easily followed in Farrand. The eventual language is set down at II, 660-661.
[53] Farrand II, 406.

low up its acting by striking the phrase "except such as involve jurisdiction or territory"; and it was not until sometime later that this oversight was detected and the phrase omitted.[54]

Thus, the political and diplomatic disputes to which a state might be a party assumed the character of justiciable controversies to which the judicial power became applicable.

D. **In this residuum of controversy the state was accorded the right of access to this Court for the settlement of disputes with the citizens of other states.**

The first part of Section 2 of Article III of the Constitution defines the limits of the judicial power. The second part distributes this power between the Supreme Court and such inferior tribunals as Congress might provide.

The history of the part of the section is to be read against the background of the times. The Convention, in seeking ways and means towards a more perfect union, was intent upon a justice from which all local bias was screened out. This is manifest in keeping the way clear for lower federal courts; in the insistence that the judges of the highest tribunal be diffused; in the early focus of thought upon the Senate to settle disputes between the states. If a justice, untainted by advantage or prejudice, was to be had, the agency must be so "universal" as to rise above any interest which had a stake in the result. The logic applied to the distribution of jurisdiction, drove to the conclusion

[54] It is not without interest to note that in the words of the Constitution no trace remains of the two deliberate acts which disputes over jurisdiction and territory were brought under the judicial power of the United States.

that, where state was pitted against state or against citizens other than its own, the Supreme Court was the appointed forum.

In the original Randolph Resolutions, there is no provision for the original jurisdiction which eventually emerged. The inferior tribunals, within their appointed sphere, were "to hear and determine in the first instance and the supreme tribunal was to hear and determine in the dernier resort."[55] In this draft, the inferior courts were to be established by the Constitution;[56] the residuum of disputes to which a state might be a party, was still thought of in political and diplomatic terms; the idea of using the federal authority to coerce a state was openly entertained. It was set down that the National Legislature "ought to be empowered" to "call forth the force of the Union against any member of the Union failing to fulfil its duty under the articles thereof."[57] In the Committee of the whole House the clause was on two successive days subjected to debate; and, although the setting up of lower tribunals was left to the discretion of the National Legislature, no distinction was set down between original and appellate jurisdiction.[58] There was as yet no provision for original jurisdiction; but causes to which a state might be a party had not yet been specifically brought within the judicial power.[59] Although at this point the debate touched off by the introduction of the Patterson plan

[55] Farrand I, 21-22, Resolution IX.
[56] The proposal, however, of "one or more supreme tribunals" makes it evident that the views of the Virginia delegation had not yet come to rest. A little later "one or more" was struck out by the Committee of the whole House. Farrand I, 116.
[57] Farrand I, 21. Resolution VI.
[58] Farrand I, 211, 226-7; Report of the Committee of the Whole House as reported by Madison, Resolutions XI-XIII, Farrand I, 236-237.
[59] The orbit of the National Judiciary was, as in the original Randolph resolution, to comprehend "questions which involve the national peace and harmony."

caused a few days of delay, the Randolph Resolution as amended was reported back to the Convention.[60] And as the resolution, tentatively accepted by the Convention, went to the Committee on Detail, there was still no provision for original jurisdiction[61]

In the first existing draft of the Committee on Detail, the clause follows closely the form in which it was referred from the Convention.[62] The first reference to original jurisdiction appears in the Fourth Draft. It reads, "The jurisdiction of the supreme tribunal shall extend . . . 3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony . . . in disputes between citizens of different states." And a marginal note adds, "in disputes between a State and a Citizen or Citizens of another State." The entry continues, "But this supreme jurisdiction shall be appellate only, except in . . . those instances in which the legislature shall make it original . . . "[63] In the Ninth Draft,[64] in almost identical language the jurisdiction of the "Supreme (National) Court . . . shall extend . . . to controversies . . . between a State and a Citizen or Citizens of another State.[65] It is here provided, for the first time, that in cases in

[60] Farrand I, 244-245; the Randolph Plan rereported, *Madison*, Farrand I, 322.
[61] Farrand II, 95, 97.
[62] That the jurisdiction of the national Judiciary shall extend to Cases arising under the laws passed by the General Legislature, and to such other questions as involve the national Peace and Harmony. Farrand II, 133.
[63] This draft is in the handwriting of Randolph with amendation by Rutledge, Chairman of the Committee. Farrand II, 146-7.
[64] In Draft Seven is a clause which serves as a gloss on the text later adopted to indicate what was passing in the minds of the Committee. It extends the "authority" of the Judiciary to all cases "which may arise on any Act for regulating Trade or collecting Revenue, *or on any Law of Nations, or General Commercial or Marine Laws.*" (Italics in the original.) The document is in Wilson's handwriting.
[65] The document is in Wilson's handwriting, with emendations by Rutledge. Farrand II, 172-3.

which a State shall be a party, this jurisdiction shall be original.[66] And in this form, save for changes in punctuation and capitalization, these provisions reached the floor of the Convention.[67]

There was a bit of referring and rereferring by the Convention to the Committee of Detail, a little tinkering with verbiage, an occasional flurry of debate. In the end the clause granting original jurisdiction where a state was a party was, without qualification, passed in the affirmative.[68] As accepted by the Convention and referred to the Committee of Style and Arrangement, the provisions under Section 2 of Article XI provided: "The judicial power shall extend to all cases both in law and equity arising under this Constitution and the laws of the United States . . . to controversies between a state and *citizens* of another state," and "In cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction."[69] Again the work of the Committee of Style and Arrangement, aside from renumbering Article XI as Article III, did no more than give its own unique touch to capitalization and punctuation.[70]

The tenor of the speeches and writings which attended the ratification of the Constitution puts the intent of the framers beyond doubt. Luther Martin, of Maryland, who had left for his home without tarry-

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[66] It is not without significance that this same Ninth Draft contains elaborate provisions for the settlement of disputes between states in respect to jurisdiction and territory.

[67] *Madison*, Farrand II, 186-7. Exception is made of those which regard jurisdiction or territory. Farrand II, 170, 173.

[68] *Journal*, Farrand II, 425.

[69] Text as set down from the motions passed by the Convention, Farrand II, 576.

[70] Farrand II, 600, 601. And again, only with a restoration of capitals and a substitution of;—s for periods, the same provisions emerged in the writing engrossed on parchment. Farrand II, 661.

ing to sign the document, made the original jurisdiction of the Supreme Court a principal point of attack. It was to him not in accord with the fitness of things that cases were "in the first instance" to be tried by that tribunal, "however inconvenient to the parties and however trifling the subject of dispute."[71] But Gouverneur Morris, who "knew the jealousies of the states," was persuaded that it was "the independence of this department" which promised to save the country from civil war.[72] And Ezra Stiles, President of Yale College, in a document where hearsay is made authentic by being attested by Abraham Baldwin who was there as a delegate from Georgia, recorded for posterity "the expediency and necessity of a supreme judiciary tribunal of universal jurisdiction—in controversies of a legal nature between States."[73] Strife amongst states, or between a state and those who were not its citizens, was no longer to be left to conflict, to be settled—or to remain unsettled—by diplomacy, political action, war. It was reduced to questions of law, and brought under the judicial power of the United States.[74]

This account of how the process of the controversies to which a state is a party were brought within the judicial power of the United States and the original

[71] *Genuine Information*, delivered to the Maryland Legislature, Nov. 29, 1787. Farrand III, 220.

[72] In the United States Senate, Farrand III, 393. The motion of finding an orderly channel for a dispute which might lead to open hostitlity or even to war—was much in the minds of the Framers.

[73] *Diary*, December 21, 1787, Farrand III, 169.

[74] " . . . the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments . . . and . . . owing its official existence to the Union . . . will never be likely to feel any bias inauspicious to the principles on which it is founded." The Federalist, No. 80.

jurisdiction of the Supreme Court speaks for itself. The breach in the national economy caused by the separation from Great Britain had to be healed. In the years immediately preceding the Convention "a state of undeclared hostility" existed among the several states. Disputes were rife between states, their interests and their citizens. It was a concern with trade and commerce which led to the meeting at Philadelphia. There a great step towards a more perfect union was taken by the creation of a national government possessed of all the power essential to the regulation of commerce—and of the money economy—among the several states and with foreign nations. The area of conflict being thus narrowed, a means had to be contrived for the peaceful settlement of disputes in the diminished area of controversy which was left.

The debates on the judicial power reveal the gradual crystallization of opinion. After views, at first quite divergent, had been brought together, it was agreed that federal jurisdiction should extend, among other things, to all cases which involved "the peace and harmony of the union." The discussion, in the several committees and in the Convention, was concerned with spelling out the detail of this principle. As respects commercial matters, it was desired to avoid the old system of obstruction and retaliation. The task was to find an orderly process for dealing with what had theretofore been left to separate, contractual, or hostile action. It is natural that to many members at first the Senate seemed to be the appropriate agency. It was at one time given authority in connection with a procedure for settling interstate disputes that were concerned with jurisdiction and territory. Meanwhile other disputes, including those of an economic and in-

dustrial character, were brought under the judicial power. It was at last apparent that, in respect to adjudication, there was no difference in kind between the two classes of suits. Resort to diplomacy was accordingly replaced in both instances by provision for exercise of the judicial power. In respect to a controversy to which a state is a party, the jurisdiction of this Court comprehends all remaining disputes of the kind which formerly had prompted recourse to political, contractual or diplomatic action.

III.

No rule of convenience can be invoked to deny a right to original jurisdiction which derives from the Constitution.

It may be argued that, if this Court grants the motion for leave to file the amended bill of complaint, the door of its original jurisdiction will be thrown wide open. It is true that with the growth of the country, the volume of work has constantly increased; and both Congress by its Acts, and the Supreme Court, by its Rules, has sought to reduce this burden to a human load. The right of appeal must to a large extent be left to the judgment of the Court. And, even in respect to original jurisdiction, this Court has—and should have—such discretion as the provisions of a Constitution intended to meet the changing circumstances of life allow.

It is, however, submitted that the rule of convenience, however essential it may be to the overall work of this Court, does not apply here. It is the contention of the State of Georgia that this cause of action does not lie upon the fringe but at the very heart of

the grant of original jurisdiction. It represents a right accorded the State when it surrendered to the general government the right of political and diplomatic action against other States or their citizens. A long series of opinions of this Court has reiterated this right to original suit. If, in its sovereign capactiy and in behalf of its people as an organized community, a State can sue to guard its boundaries, insure its access to the flow of rivers, insure protection to orchards and crops from noxious fumes from over the State line, surely it can sue to secure the opportunity of turning its natural wealth to account. If a State can sue to insure to its people access to the natural gas of a neighbor State, surely it can sue to see that the hand of paralysis is not laid upon its own sources of welfare. But after all, it is justice and not convenience which dictates access to law.

As to what cases to which a State is a party, this Court should hear in the first instance and to what should begin in the lower courts, it is not for the State of Georgia to say. That issue is for the Supreme Court within the zone of tolerance accorded by the Constitution.

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No. 10 — Original

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE STATE OF GEORGIA, PLAINTIFF

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

ON RULE TO SHOW CAUSE WHY AMENDED BILL OF COMPLAINT SHOULD NOT BE FILED

BRIEF FOR THE UNITED STATES AMICUS CURIAE AS TO JURISDICTION



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In the Supreme Court of the United States

OCTOBER TERM, 1944

NO. — ORIGINAL

THE STATE OF GEORGIA, PLAINTIFF

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

ON RULE TO SHOW CAUSE WHY AMENDED BILL OF COMPLAINT SHOULD NOT BE FILED

BRIEF FOR THE UNITED STATES AMICUS CURIAE AS TO JURISDICTION

In the present proceeding, the State of Georgia is seeking leave to file a suit against nineteen railroads charging a conspiracy to establish and maintain freight rates which are alleged to be injurious and harmful to the State and to the people of Georgia. On November 6, 1944, this Court granted a rule to show cause why the State should not be permitted to file its amended complaint.

This brief is filed by the United States *amicus curiae* in support of the proposition that this suit is within the original jurisdiction of the Court and the appropriate exercise thereof. The

brief is addressed to two questions: (1) whether the amended complaint presents a justiciable controversy within the original jurisdiction of the Court; and (2) whether the Interstate Commerce Act sanctions the conspiracy alleged or precludes the maintenance of suit for injunctive relief.

I

NATURE OF THE CONSPIRACY CHARGED

The wrong against which the State of Georgia seeks relief is an alleged conspiracy among defendant railroads that has collusively fixed and maintained freight rates which have injured the State. The means and instrumentalities through which the conspiracy operates are set forth with particularity in the complaint (pp. 14–21). The complaint describes the hierarchy of original and "appellate" private rate-fixing bodies through which a rate proposed by an individual railroad must proceed before it may be filed with the Interstate Commerce Commission for the account of such railroad. This control extends to interterritorial rates and no railroad can charge joint through rates without the approval of this private rate-fixing machinery created by the defendants.

For rate-making purposes the United States has been divided into several zones or territories, in each of which certain of such private rate-fixing organizations function. The southern

states east of the Mississippi river, including the State of Georgia, constitute what is known as Southern Territory. In addition to rate-fixing organizations established in Southern Territory, defendants have also established joint conferences and other private machinery for fixing rates between points which are not located within a single rate-making territory but which are located in different rate-making territories. Those organizations and other private machinery, established and dominated by the conspiracy, fix interterritorial rates in such manner as to accomplish the purposes of the conspiracy.

The complaint further alleges that the defendant railroads, with lines wholly or principally in the southern part of the United States, generally are dominated and coerced by the defendant railroads in the northern part of the United States and, as a consequence, even when the defendant railroads operating in the South so desire, they cannot initiate and publish joint through-rates between Georgia and the North when the northern carriers by concerted action refuse to join in such rates.

Such are the major characteristics of the conspiracy detailed in the complaint.

The State of Georgia alleges that the effect of the conspiracy has been to injure it as an owner and operator of numerous institutions which are consignees and shippers of goods, and as owner of

a railroad; and also to injure it as *parens patriae* in that the result of the conspiracy has been:

(a) to deny to many of Georgia's products equal access with those of other States to the national market;

(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

(d) to hold the Georgia economy in a state of arrested development.

II

THE AMENDED BILL OF COMPLAINT PRESENTS A CASE OR CONTROVERSY WITHIN THE ORIGINAL JURISDICTION OF THIS COURT

As has been stated, Georgia relies on a twofold interest in seeking relief. That interest is similar to the dual interest which sustained the right of the plaintiff states in *Pennsylvania* v. *West Virginia,* 262 U. S. 553. The latter case has been appropriately described by Mr. Justice Jackson in *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 632–3, as one in which West Virginia had "legislated a priority in its entire

production in favor of its own inhabitants. That was frustrated by an injunction from this Court." There Pennsylvania and Ohio sued to enjoin the enforcement of a West Virginia statute which would have curtailed the flow of natural gas moving out of West Virginia into Pennsylvania and Ohio, by giving priority to the requirements of West Virginia users. The Court there pointed out (pp. 591, 592) that the complainant states were suing

> to protect a two-fold interest—one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected.
>
> * * * * *
>
> The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. *This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law.* [Italics supplied.]

There are not present here the questions which called forth dissent in that case: the legislative character of the acts to be enjoined; prematurity; want of necessary parties defendant; and the complexity of the appropriate relief.[1]

Apart from the problems just mentioned which led to dissent in the *Pennsylvania* case, and which are not present here, the soundness of the approach to the question of jurisdiction in that case, equally applicable here, is shown by the historic background of Article III. It is unnecessary to recount the commercial rivalries, trade barriers, recriminations and aggressions which prevailed among the states prior to the Constitution. During that period, the states were forced to rely for protection upon diplomatic measures, and, if need be, upon belligerency. In surrendering those powers, the states were given, among other forms of protection, the right of access to this Court in cases between states and between a state and citizens of another state. The history of this provision of Article III in the Constitutional Convention has been succinctly described in *Missouri* v. *Illinois and Sanitary District of Chicago,* 180 U. S. 208, 219–224. Under the Pinckney Plan, all disputes and controversies between states were to be decided by

[1] Indeed, injunctive relief in the present case is a prerequisite to effective and proper administrative action under the Interstate Commerce Act, as we undertake to show *infra*, pp. 17–31.

the Senate, and this view prevailed in some of the draft reports of the Committee of Detail.[2] Even as subsequently reported by John Rutledge for the Committee of Detail, the Senate still retained jurisdiction over controversies and disputes between the states involving "jurisdiction or territory."[3] The ninth of the Randolph Resolutions had provided that the jurisdiction of the national judiciary should extend to cases involving the "national peace and harmony," and this view was accepted by the Committee of the Whole and by the Convention.[4] The Committee of Detail proceeded to spell out the cases which would affect the "national peace and harmony," among them disputes between the states and a citizen of another state.[5] The grant of judicial power was completed when controversies over territories and jurisdiction were withdrawn from the authority of the Senate and their exemption from the jurisdiction of the judiciary was deleted.[6] It is true that other provisions of the Constitution were also designed to afford protection against trade barriers, notably the authority of Congress over commerce among the states, the prohibition of import or export duties by a state without the consent of Congress, the

[2] Farrand, Records of the Federal Convention, II, 160, 161.
[3] *Id.*, II, 170.
[4] *Id.*, I; 224, 238; II, 39.
[5] *Id.*, II, 173.
[6] *Id.*, II, 461, 660.

prohibition of tonnage duties by the states, the prohibition of preferences by any regulation of commerce or revenue to the ports of one state over those of another, and the prohibition of duties in one state upon vessels bound to or from another. But the right of judicial redress constituted an affirmative means by which a state was enabled, in disputes of a justiciable character, to avoid the effects of restraints which had proved intolerable prior to the Constitution. This was recognized in the opinion of Chief Justice White in *Virginia* v. *West Virginia,* 246 U. S. 565, 599:

> * * * it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress *and the judicial power as to States created,* joined with the prohibitions placed upon the States, all combined to unite the authority to decide with the power to enforce—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And, while it may not materially add to the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with the practice which prevailed during the colonial period in the Privy Council, the original jurisdiction as conferred by the

> Constitution on this court embraced not only controversies between States but between private individuals and a State—a power which, following its recognition in *Chisholm* v. *Georgia,* 2 Dall. 419, was withdrawn by the adoption of the Eleventh Amendment. The fact that in the Convention, so far as the published debates disclose, the provisions which we are considering were adopted without debate, it may be inferred, resulted from the necessity of their enactment, as shown by the experience of the colonies and by the spectre of turmoil, if not war, which, as we have seen, had so recently arisen from the disputes between the States, a danger against the recurrence of which there was a common purpose efficiently to provide. [Italics supplied.]

Decisions of this Court clearly recognize that, quite apart from a State's standing to assert grievances based upon its own property rights and pecuniary interest, a State may bring suit on behalf of the public in its quasi-sovereign capacity as *parens patriae. E. g., Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *Missouri* v. *Illinois and Sanitary District of Chicago,* 180 U. S. 208, 241; *New York* v. *New Jersey,* 256 U. S. 296; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *North Dakota* v. *Minnesota,* 263 U. S. 365, 374. In those cases the injuries sustained by the plaintiff states were much less serious than those which it is alleged

have been inflicted upon the State of Georgia by the conspiracy against which relief is sought.

In *Georgia* v. *Tennessee Copper Co., supra,* the tortious conduct consisted of injuries to the State and its inhabitants caused by the discharge of noxious gas resulting from the operations of the plants of the defendant copper companies. These sulphurous fumes, harmful to vegetation, if not to health as well, were carried across the state line from Tennessee into Georgia, and caused widespread damage there. Economic detriment resulted from the destruction of forests, orchards, and crops in Georgia. This Court held that, quite apart from any infringement of the private rights of individual citizens, and quite apart from any damage to the state's own property interests,[7] the State of Georgia was entitled to obtain relief in its distinct and independent capacity as the representative of the public interest and of the welfare of the body politic as a whole. The Court said, speaking through Mr. Justice Holmes (206 U. S. at 237, 238):

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[7] According to Mr. Justice Holmes, the alleged damage to the State as a private owner was "merely a makeweight." 206 U. S. at 237.

In *Missouri* v. *Holland*, 252 U. S. 416, 431, Mr. Justice Holmes, speaking for the Court, said: "The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State."

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests had led to the gullying of its roads.

* * * * *

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of per-

> sons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.

The holding in the *Copper Company* case is closely in point when applied to Georgia's present suit. It is true that the defendants here are engaged in operating railroad properties rather than copper-mining properties; that their operations extend over many states, whereas the copper companies were both located in Tennessee; and that the defendants here have acted concertedly, as alleged conspirators, rather than as independent tort-feasors. But these distinctions are immaterial. The wrongfulness of tortious conduct does not depend upon the names, addresses, or occupations of the defendants, or upon the instrumentality used to effectuate the injury, or upon the technical name given to the offense committed. The gist of the State's cause of action (to-wit, substantial economic detriments to the State, proximately caused by the wrongful acts of the defendants) is the same in both cases.

In *Missouri* v. *Illinois and Sanitary District of Chicago,* this Court said (180 U. S. at 241):

> An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State.

But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.

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In *New York* v. *New Jersey*, 256 U. S. 296, the State of New York was held entitled to maintain a bill in equity to prevent the State of New Jersey from impairing the health, comfort, and prosperity of the people of New York and from menacing the value of their property by authorizing the discharge of sewage into New York Bay, which threatened commerce and navigation as well as the fish and oysters subsisting in the waters. In the current proceeding, as in the *Missouri* and *New York* cases, the injuries suffered by specific individuals are no measure of the harm done to the State as a whole. If a state may appropriately sue to restrain physical acts which impair the productivity of resources lying underneath rivers or on the shores, it would seem that it may with propriety sue for redress in a situation involving damage to the economic productivity of the State as a whole.

There are not present here objections to the recognition of jurisdiction which have been pointed out and applied in certain other cases brought by States in this Court. The wrong alleged is one susceptible of judicial redress in accordance with accepted concepts of equity jurisdiction. See *In re Debs*, 158 U. S. 564, 584; *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 367; *McCarter* v. *Firemen's Insurance Co.*, 73 Atl. 80 (N. J.); Chafee, *Equitable Relief Against Torts*, 34 Harv. L. Rev. 388, 395 *et seq.* (1921); Wood, *Law of Nuisance* (1875), p. 61. The question involved is not political

in character. Compare *Georgia* v. *Stanton,* 6 Wall. 50. The case is a civil and not a criminal proceeding. Compare *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 297–300. The state is the real party in interest, and not merely a nominal plaintiff or collection agency lending its name to enforce the claims of individuals. Compare *South Dakota* v. *North Carolina,* 192 U. S. 286, 310–12; *New Hampshire* v. *Louisiana,* 108 U. S. 76, 89; *Oklahoma* v. *A., T. & S. F. Ry. Co.,* 220 U. S. 277; *North Dakota* v. *Minnesota,* 263 U. S. 365, 376; *Oklahoma* v. *Cook,* 304 U. S. 387.[8]

Finally, it should be emphasized that the State is not seeking, nor could it seek as *parens patriae,* to challenge the validity of a federal law or regulation. The protection of citizens against the operation of federal laws is not a function of the States. This was forcefully put in *Massachusetts* v. *Mellon,* 262 U. S. 447, 485–486:

> * * * But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some cir-

[8] In *Oklahoma* v. *A., T. & S. F. Ry. Co.,* 220 U. S. 277, cited in the text, the wrong primarily complained of was a violation by the defendants of a term of federal grant (which, however, had ceased to be applicable on admission of Oklahoma to the Union) deemed to have been imposed for the benefit of individual inhabitants.

> cumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois,* 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

See also *Florida* v. *Mellon,* 273 U. S. 12, 18; Chafee, *Equitable Relief Against Torts,* 34 Harv. L. Rev. 388, 395.

The importance of the interests involved makes the case an appropriate one for the exercise of the jurisdiction which exists. Cf. *Ex parte Peru,* 318 U. S. 578, 586. Since the state is more than a nominal plaintiff, and the claim presented is not a commonly recurring one, there is no real likelihood that the exercise of jurisdiction will lead to a burdensome increase in the litigation instituted in this Court. Cf. *Massachusetts* v. *Missouri,* 308 U. S. 1, 19. The injunctive relief sought does not present problems of undue complexity from the standpoint of the efficient performance of the Court's functions. *Ibid.* The Court is not called upon to decide questions of the fairness or reasonableness of rates, as shown more fully *infra,* pp. 17–31. It is called upon only to restrain what is alleged to be an unlawful conspiracy.

III

THE ANTITRUST ACTS SUPPORT, AND THE INTERSTATE COMMERCE ACT DOES NOT PRECLUDE, THE INJUNCTIVE RELIEF SOUGHT

The Sherman Antitrust Act requires that railroad rates be noncollusive; the Interstate Commerce Act provides for a commission with power to rectify such rates, competitively made, as are unreasonable, discriminatory, or otherwise violative of the Interstate Commerce Act. This Court has held that the Sherman Act applies to railroads. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 341; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505, 565, 570, 577; *Northern Securities Co.* v. *United States* 193 U. S. 197, 327; *United States* v. *Terminal Railroad Association of St. Louis,* 224 U. S. 383, 394, 409; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61, 85; *United States* v. *Southern Pacific Co.,* 259 U. S. 214, 229–231. See *United States* v. *South-Eastern Underwriters,* 322 U. S. 533, 559.

In *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 79, this Court held that "the [Interstate Commerce] Commission has no power to enforce the Sherman Act as such."

This Court has also held that price-fixing agreements between competitors are *per se* illegal under the Sherman Act irrespective of the reasonableness of the prices fixed. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (citing

with approval the *Trans-Missouri* case, 166 U. S. 290); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436. Thus, charges that the defendant railroads act collusively in the initiation of rates or that they make agreements to prevent individual railroads from initiating lower rates involve violation of the Sherman Antitrust Act.

The legislative history of the Sherman Antitrust Act and subsequent acts of Congress support the view that conspiracies of carriers to fix rates are prohibited even though the rates are not beyond the limits of reasonable and non-discriminatory rates under the Interstate Commerce Act. The Bland Amendment to the Sherman Antitrust bill contained an express provision declaring unlawful contracts or agreements to prevent competition "in transportation of persons or property from one State or Territory into another." (21 Cong. Rec. 4099.) This amendment, which passed the House, was amended in the Senate by adding the words "so that the rates of such transportation may be raised above what is just and reasonable." (21 Cong. Rec. 4753.) The House rejected the Senate Amendment on the ground that it would legalize combinations detrimental to the public interest. (21 Cong. Rec. 5950, 5961, 5981.) The bill was then referred to conference and the conferees reported it without the Bland Amendment. (21 Cong. Rec. 6208.) There was general

agreement that the Sherman Act as finally passed was broad enough to include the subject matter of the Bland Amendment. (21 Cong. Rec. 6208, 6314.)

Congress has, on two occasions since the passage of the Sherman Act, overwhelmingly defeated proposals specifically to exempt rate-fixing combinations of the character involved in this proceeding from the antitrust laws. See 51 Cong. Rec. 9582 (in connection with the passage of the Mann-Elkins Act of 1910); and 51 Cong. Rec. 16264, 16344 and S. Rep. 698, 63d Cong., 2d Sess. p. 46 (in connection with the passage of the Clayton Act).

Proposals designed to legalize rate-fixing combinations in the transportation field were again introduced in both houses of Congress in 1943 (see Hearings before Senate Committee on Interstate Commerce on S. 942, Regulation of Rate Bureaus, 78th Cong., 1st Sess.; H. R. 2720, 78th Cong., 1st Sess.), but did not become law.

Thus it appears that Congress has repeatedly refused to immunize such rate-making conspiracies from the prohibitions of the Sherman Antitrust Act.[9]

[9] Certificate No. 44, issued March 20, 1943 by the Chairman of the War Production Board (8 F. R. 3804–3805, March 27, 1943) under Section 12 of the Act of June 11, 1942 entitled "an act to mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes," affords no basis for the proposition that Congress has legalized rate-fixing combinations in the transportation field. It is a truism of the law of conspiracy

Nothing in the original Interstate Commerce Act, or any amendment thereto, sanctions or condones rate-fixing combinations in the transportation field. That increased powers have been given the Interstate Commerce Commission since 1887 is a matter of public record, but none of such powers relate to regulation of rate-fixing combinations.[10]

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that legal means can be employed in furtherance of an illegal conspiracy and may be employed for an illegal purpose. Therefore, even though the certificate were construed to legalize temporarily one of the means used to implement the conspiracy, *i. e.*, rate bureaus or associations, this fact would not serve to legalize an over-all conspiracy which not only directs the use of this means but antedates the alleged grant of temporary legality. Certificate No. 44 has no retroactive validity, nor does it sanction the illegality of the use of the means. Further, it is clear that the acts complained of by the State of Georgia are not covered by the Certificate. For example, the complaint charges (p. 16) that the individual railroads have been prevented from filing lower rates, and the Certificate is expressly inapplicable to any acts of coercion in connection with individual rate making. (Rule 8 of *Regulations for Rate Conferences*, which are a part of Certificate No. 44.)

[10] While Section 5 of the Interstate Commerce Act, as amended, permits the Interstate Commerce Commission to approve certain transactions relating to acquisitions, mergers, and consolidations of carriers, which are thereupon relieved from the operation of the antitrust laws insofar as may be necessary to enable them to carry into effect the transaction so approved, it is plain that nothing in Section 5 can be construed as removing rate-fixing combinations from the prohibitions contained in the antitrust laws. Under the rule of *expressio unius* and the strict construction of exemptions, it is obvious that Congress did not intend to immunize any other activities of carriers than those specified in Section 5 from the operation of the antitrust laws.

In the absence of any statutory basis for rate-making combinations, proponents of such combinations assert that the antitrust laws, insofar as applicable to such activities, have been repealed by implication. In *United States* v. *Borden,* 308 U. S. 188 this Court rejected a similar contention, stating:

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal "must be clear and manifest.". . . It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States,* 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy. * * *
>
> The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated

by official action in a prescribed manner. (pp. 198–199)

Similarly, it is clear that the Sherman Act applies to the regulated transportation industry. Regulated industries are not *per se* exempt from the Sherman Act. The regulatory statute must provide for exemption in specific terms, and those terms must be followed, before immunity can be obtained from the prohibitions of the Sherman Act. This Court said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226, that "Congress had specified the precise manner and method of securing immunity. None other would suffice." Rate-fixing combinations are, however, admittedly not subject to regulation under the Interstate Commerce Act, and therefore their agreements, transactions, and activities are not particular transactions which may be "regulated by official action in a prescribed manner."

Moreover, it is the duty of every common carrier to initiate its own rates (*Arizona Grocery Co.* v. *Atchison, Topeka, and Santa Fe Railroad*, 284 U. S. 370, 384). The Interstate Commerce Act imposes certain requirements as to rates (*e. g.*, that rates must not be unreasonable or discriminatory), and it is the obligation of each individual carrier to comply with such requirements of law. The fact that each carrier's rates must comply with the requirements of the Act does not tend in the slightest degree to prove that such carriers may lawfully combine in order to

agree upon the rates which each shall charge. Nor does the fact that the Commission is empowered to determine whether a carrier's rates comply with the requirements of the Act prove that combinations of carriers may lawfully determine such matters in place of the Commission. The Commission is without power to delegate its authority to make such determinations to any private organization or group of carriers.

The contention that the State of Georgia is barred from seeking relief in this Court against a conspiracy of carriers because the Interstate Commerce Commission is given jurisdiction to determine whether rates are unjust, unreasonable, or discriminatory is obviously a *non sequitur*. This is shown by the provisions of the Interstate Commerce Act itself. That Act does not provide within itself the remedies for correction of all the evils in rate-making which might constitute a violation of the Sherman Act. For example, the Commission lacks the power to grant relief if carriers illegally combine to fix rates which are within the "zone of reasonableness." *United States* v. *C., M., St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935).[11] Within that zone, the Commission is unable to furnish any remedy, even if rates are raised or fixed by concerted action of carriers as the result of a

[11] The Commission is also powerless if rates so fixed do not transcend the proper sphere for "managerial judgment" (*Rayon from Bemberg and Nashville*, 182 I. C. C. 119, 124);

combination or conspiracy. When rates are raised by private agreement among carriers from the lower level of reasonableness at which they are merely sufficient to compensate the carrier, to the upper level of reasonableness at which they exact the maximum, the Commission has no authority to protect shippers or the public by forcing the rates back down. In such a situation, the relevant law against conspiracies and restraints of trade provides the only means of relief.

It follows that the proviso of Section 16 of the Clayton Act, 15 U. S. C. sec. 26, does not require denial of injunctive relief to the State of Georgia. That proviso forbids such relief (except when suit is brought by the United States) "against any common carrier * * * in respect of any matter subject to the regulation,

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if rates so fixed, though arbitrarily different for diverse localities, are not prejudicial under the Interstate Commerce Act because they are not maintained by the same carrier or carriers (*Central R. R. Co.* v. *United States*, 257 U. S. 247, 259); if rates so fixed, though prejudicial, are justified as necessary to meet competition (*Texas and Pacific Railway Co.* v. *United Stctes*, 289 U. S. 627, 633); and, if deviations from the long-and-short-haul rule are justified by competitive or other factors (*Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, 168 U. S. 144; *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, 219–20; as to the effect of the amendment of June 18, 1910, see *Intermountain Rate Cases*, 234 U. S. 476). In such cases there is no remedy under the Interstate Commerce Act.

supervision, or other jurisdiction of the Interstate Commerce Commission." The proviso is inapplicable, since the Interstate Commerce Act gives the Commission no jurisdiction over rate-making combinations of carriers, to suspend or cancel rates which do not violate the Interstate Commerce Act, or to enforce the Sherman Act.

Finally and most important, the Commission cannot preserve private initiative in rate making. When a single carrier sees the opportunity by lowering rates to increase its volume of traffic, it has a right under the law to take such action without any veto by a combination of carriers with which it is presumed to be in competition. The allegations of the complaint disclose a combination which substitutes for the freedom of action which is indispensable to the development of low cost transportation in the public interest, the restrictions of group action.

Decisions of this Court denying relief to shippers, warehousemen, and carriers in other circumstances fit into the pattern of accommodation of the Sherman Antitrust Act and the Interstate Commerce Act described above.

Cases such as *North Dakota* v. *Chicago & Northwestern Railway Company,* 257 U. S. 485, and *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, were simply suits to set aside orders of the Interstate Commerce Commission. Accordingly, this Court held that such suits could

not be brought otherwise than in accordance with the statutory provisions relating to review of orders of the Interstate Commerce Commission. In the case at bar the State of Georgia is not seeking review of any order of the Interstate Commerce Commission, but is seeking relief in an area where the Commission wholly lacks jurisdiction.

In *Keogh* v. *C. & N. W. Railway Co.,* 260 U. S. 156, a private shipper sought to recover from a combination of carriers triple damages under Section 7 of the Sherman Act. The shipper had proceeded before the Interstate Commerce Commission for reparation. The Commission found the rates fixed to be reasonable and nondiscriminatory. The Court in denying relief under the Sherman Act stated:

> If a shipper could recover under § 7 of the Anti Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.

It is clear that what was there involved was an effort to collect triple damages arising out of a particular rate, measured by the difference between the rates established by a combination and the rates which would have been in effect but for the combination. No question of injunctive relief against the conspiracy was involved. The

injunctive relief sought by the State of Georgia in the case at bar could not possibly operate to bring about rebates or the lack of uniform treatment as to which the Court in that case expressed concern.

Terminal Warehouse Co. v. *Pennsylvania Railroad Co.*, 297 U. S. 500, was a treble-damage suit. To that extent it falls within the principle of the *Keogh* case discussed above. Insofar as the opinion goes beyond this issue it merely illustrates the distinction which should be drawn between the respective areas allocated to the Interstate Commerce Act and the antitrust laws. For the exact wrong complained of in the Sherman Act suit, the complainant had secured a cease and desist order from the Interstate Commerce Commission, and in the exercise of its discretion the Commission had denied reparation. Speaking of the Interstate Commerce Act, the Court said, "For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced" (p. 514). It is just such a wrong for which the State here seeks redress—a wrong not comprehended by the Interstate Commerce Act and not remediable by any action which the Interstate Commerce Commission might take. Discussing plaintiff's claim under the

antitrust laws in the *Terminal* case, Mr. Justice Cardozo, speaking for the Court, pointed out that no violation of the antitrust laws had been proved by plaintiff (pp. 509–510, 511). The Court expressly stated, however, that its holding was not to be regarded as an intimation that never in any circumstances could a carrier become a party to a conspiracy violating the antitrust laws, and gave examples of such violations (pp. 515–516).

In *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis,* 288 U. S. 469, where Section 16 of the Clayton Act was held to prohibit the granting of an injunction, the Court said of that section (pp. 475–6):

> * * * Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. Here the relief prayed is that performance of the contract be enjoined. Performance necessarily involves the continued designation in the filed tariffs of the Columbia Terminal Company's places of business as the "off track" stations specified in the contract, and the continued exclusive employment of that company to render the stipulated service, both matters within the jurisdiction of the Commission. True, a contract may precede and have existence

> apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission.

From the foregoing it is clear that the relief sought in that case would have required the Court to enjoin the continuance of certain tariff provisions, and the continuance of certain transportation service, both matters within the jurisdiction of the Commission.

The distinction between that situation and the circumstances existing in the case at bar is clear. The State of Georgia is not seeking any injunction against the continuance of any tariff provisions; nor is it seeking an injunction against the cancellation of any tariff provisions. It seeks merely that the rate-fixing combination and conspiracy among the carriers be enjoined; so that whatever tariffs the individual carriers, in performance of their duty under the Interstate Commerce Act, may continue in effect or super-

sede by new tariffs may be tariffs established under competitive conditions and free from the coercive or collusive influences of the unlawful combination and conspiracy in violation of the antitrust laws.

The notable contrast between the present suit and *United States Navigation Company* v. *Cunard Steamship Company,* 284 U. S. 474, further illustrates the inapplicability of the proviso in Section 16 of the Clayton Act to the complaint of the State of Georgia. The Navigation Company, operating steamships between New York and certain foreign ports, alleged that the Cunard Company and other respondents had entered into a combination which sought to drive the Navigation Company out of the trade. As a coercive measure, they entered into an agreement to offer low contract rates to shippers who would ship exclusively on their lines. The Shipping Board, under the Shipping Act, had express authority to disapprove, modify, or cancel such an agreement.

But the conspiracy alleged in the present case cannot be stricken down by the Interstate Commerce Commission, because the Commission is wholly without regulatory jurisdiction over it, nor has the Commission power to pass upon the conduct constituting the conspiracy. Cf. 284 U. S. at 485. Not only does the Commission lack authority to prevent violations of the Sherman

Act, but the Interstate Commerce Act possesses *no* authority to "disapprove, modify or cancel" the allegedly illegal arrangement. Therefore, insofar as the proviso in Section 16 of the Clayton Act represents a legislative formulation of the primary jurisdiction rule, to which it was analogized in the *Cunard* case, it is no bar to the present suit.

It is clear from the foregoing discussion that the pertinent decisions of this Court afford no support to the contention that the conspiracy charged is sanctioned by the Interstate Commerce Act or that the Court lacks authority to grant adequate relief to the State of Georgia. Here is involved no attempt to secure damages which would amount to rebates, or interfere with the policy of the Interstate Commerce Act that the determination of the reasonableness of rates be uniform; no attempt to set aside any order of the Interstate Commerce Commission; and no attempt to interfere with or circumvent the primary jurisdiction of that Commission.

The conclusion seems inescapable that adequate relief cannot be had by resort to any administrative agency. The wrong that has been done to the State of Georgia results from the conspiracy, and so long as that conspiracy exists the State of Georgia will continue to suffer. The conspiracy is the cause of the injury inflicted upon the State and no relief can be had until that conspiracy is uprooted.

CONCLUSION

For the foregoing reasons, it is submitted that the State of Georgia be granted leave to file its Amended Bill of Complaint invoking the original jurisdiction of this Court.

Respectfully submitted.

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DEC 29
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 10 Orig.

THE STATE OF GEORGIA,
Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Defendants.

BRIEF ON BEHALF OF SEABOARD AIR LINE RAILWAY COMPANY UPON ITS RETURN TO RULE TO SHOW CAUSE.

W. R. C. COCKE,
Attorney for Seaboard Air Line Railway Company.

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BRIEF ON BEHALF OF SEABOARD AIR LINE RAILWAY COMPANY UPON ITS RETURN TO RULE TO SHOW CAUSE.

STATEMENT OF FACTS.

The question presented by the Return of Seaboard Air Line Railway Company to the Rule to Show Cause is whether this Court can entertain original jurisdiction of the proposed suit of the State of Georgia under Section 2 of Article 3 of the Constitution when Seaboard Air Line Railway Company, one of the defendants named in the Amended Bill of Complaint, is a citizen of Georgia.

The Return avers the facts to show that the Railway Company, as a consolidated corporation existing under the laws of Georgia, and also under the laws of other Southern States, including Virginia, is by reason of its corporate status in Georgia, a citizen of that State. That being so, it is not suable by Georgia in this Court, even though it is also a corporation, and therefore a citizen, of Virginia and other states. Under the decisions of this Court if original jurisdiction fails as to Seaboard Air Line Railway Company as one of the defendants, the jurisdiction of the entire suit is defeated. *State of California* v. *Southern Pacific Co.*, 157 U. S. 229, 257, 39 L. Ed. 683; *State of New Mexico* v. *Lane*, 243 U. S. 52, 58, 61 L. Ed. 588; *Louisiana* v. *Cummins*, 314 U. S. 577, 86 L. Ed. 466.

The Return of Seaboard Air Line Railway Company to the Rule to Show Cause explains that Section 7 of the Amended Bill of Complaint of the State of Georgia sought to be filed in this Court names as one of the defendants "Seaboard Air Line Railway Company, L. R. Powell, Jr. and Henry W. Anderson, Receivers, a *resident* of the State of Virginia" (italics supplied), and the Rule to Show Cause is addressed to "Seaboard Air Line Railway Company, L. R. Powell, Jr. and Henry W. Anderson, Receivers." The Return further states that Seaboard Air Line Railway Company is now and for many years past has been a consolidated corporation created and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Florida, and under the laws of each of said states the Company is a corporation of said State and a citizen thereof within the meaning of the Constitution and laws of the said several States,

the Constitution of the United States and the laws made pursuant thereto and the decisions of this Court construing the said laws. L. R. Powell, Jr. and Henry W. Anderson, as Receivers, are not named as separate defendants but their names as Receivers are apparently added after the name of Seaboard Air Line Railway Company as matter of description only. The separate citizenships of Powell and Anderson are not set forth in the Bill nor are they named as separate defendants thereto.

The properties of Seaboard Air Line Railway Company have been in the hands of Receivers since December 23, 1930, under decrees of the District Courts of the United States for the Eastern District of Virginia and the Southern District of Florida, respectively, but Seaboard Air Line Railway Company continues to exist as a corporate entity under the laws of the states of its creation, having its Board of Directors elected by its stockholders and officers elected by such Board and having capacity to sue and be sued.

No leave has been sought or obtained from either of the receivership courts to sue the Receivers in this suit and the Amended Bill of Complaint is not of such a character as to dispense with the necessity of such leave by virtue of the provisions of Section 66 of the Federal Judicial Code or of any other law even if complainant should seek to make them parties to this suit. Section 66, Judicial Code (U.S.C.A., Section 125), provides:

> "*Suits against receiver.*—Every receiver or manager of any property appointed by any court of the United States may be sued in respect of

> any act or transaction of his in carrying on the business with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

It was never the purpose of this section to permit a suit of this character against a receiver without previous leave of the court of appointment. *Ex Parte Baldwin*, 291 U. S. 610, 78 L. Ed. 1020; *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 76 Fed. (2d) 1002, cert. den. 295 U. S. 760, 79 L. Ed. 1702; *Field* v. *Kansas City Refining Co.*, 296 Fed. 800, 9 Fed. (2d) 213 (C.C.A. 8th). In the present state of the record, however, this question is not in issue because Seaboard Air Line Railway Company, not the Receivers, is the defendant in the Amended Bill of Complaint. Moreover, as the Return shows, the receivership did not occur until 1930. While the Amended Bill of Conplaint states no date of the initiation of the alleged illegal rate structure, it is assumed that it can be judicially noticed that the matters complained of must have their origin long prior to 1930. So that, even if the charges in the Bill have any validity, they relate to events in which the Seaboard Company was one of the actors prior to the receivership. It can not be assumed, therefore, that the naming of Seaboard Air Line Railway Company, rather than the Receivers, as defendant was not done advisedly by counsel for the State of Georgia.

If, as the Return to the Rule asserts, the Company is a corporation of the State of Georgia and there-

fore a citizen of that State, this Court cannot take jurisdiction. *State of California* v. *Southern Pacific Co.; State of New Mexico* v. *Lane; Louisiana* v. *Cummins, supra.* The purpose of this brief is to demonstrate that Seaboard Air Line Railway Company is in fact a corporation of the State of Georgia and the argument will be confined to that point. The Return of the Seaboard Air Line Railway Company adopts and makes a part of its Return the Return filed by the Atlantic Coast Line Railroad Company and the other Southern defendants. As that Return deals elaborately with all questions relating to the jurisdiction of this Court to entertain the Amended Bill of Complaint, the arguments addressed to those questions will not be repeated here.

THE CORPORATE HISTORY OF SEABOARD AIR LINE RAILWAY COMPANY.

The Affidavit of L. B. Plummer annexed to the Return and commencing on page 5 deals briefly with four successive consolidations of various railroad companies eventuating in the formation of four successive companies known as Seaboard Nos. 1, 2, 3 and 4. The several Articles of Agreement of Merger and Consolidation pursuant to which these companies were created beginning in 1901 and ending in 1915 and changes in the capital structure in 1929 are annexed to the affidavit of Mr. Plummer as Exhibits A, B, C and D. Upon the facts shown in the affidavit and in the exhibits it is clear that the present Seaboard Company has always treated itself, and been treated by the duly constituted authority of Georgia invested with the power to pass

on its status, as a corporation existing under and by virtue of the laws of Georgia.

In summary, these consolidations were accomplished as follows:

Seaboard No. 1 was created under special acts of the States of Virginia and North Carolina by the consolidation of two railroad companies, one of each of those two States, having the identical name of "The Richmond, Petersburg and Carolina Railroad Company." The name of this consolidated company was changed to "Seaboard Air Line Railway."

By Articles of Agreement of Merger and Consolidation effective November 7, 1901, Seaboard Air Line Railway (Seaboard No. 1) consolidated with eight other separate railroad companies to form a continuous line throughout the States of Virginia, North Carolina, South Carolina and Georgia, forming a new consolidated corporation, Seaboard No. 2, which was created by, and thereafter existed under, the laws of Georgia. Some of these companies were corporations of one or more of the States above named. Three of them, The Georgia, Carolina and Northern Railway Company, The Seaboard Air Line Belt Railroad Company, and The South Bound Railroad Company, were corporations of Georgia and of other States.

By Articles of Agreement of Merger and Consolidation dated June 27, 1903, Seaboard No. 2 consolidated with Florida Central and Peninsular Railroad Company, a corporation of Florida and Georgia, to form Seaboard No. 3, which was likewise created by, and thereafter existed under, the laws of Georgia.

By Articles of Agreement of Merger and Consolidation dated October 11, 1915, Seaboard Air Line Railway Company (Seaboard No. 3) consolidated with Carolina, Atlantic & Western Railway, a corporation of North Carolina and South Carolina, to form Seaboard Air Line Railway Company (Seaboard No. 4), which is the present corporation, also created and existing under the laws of Georgia.

As shown in the exhibits to the affidavit of Mr. Plummer, and also in his affidavit at page 12, the Articles of Agreement of Merger and Consolidation which effected the organization, respectively, of Seaboard No. 2, Seaboard No. 3 and Seaboard No. 4, were filed in the offices of the Secretaries of State of Virginia, North Carolina, South Carolina, Georgia and Florida. The Articles of Agreement of Merger and Consolidation effective November 7, 1901 (Exhibit A to Mr. Plummer's affidavit) are shown at pages 17 to 55, inclusive. On page 54 appears the Certificate of the Secretary of State of Georgia.

The Articles of Agreement of Merger and Consolidation of June 27, 1903 (Exhibit B), shown at pages 56 to 76, inclusive, recite that Seaboard Air Line Railway (Seaboard No. 3)

> "is a corporation duly created and organized under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama."

The Certificate of the Secretary of State of the State of Georgia, appearing at page 75, refers to the Articles as "forming the Seaboard Air Line Railway, a corporation created by and existing under the laws of Virginia, North Carolina and other states, as therein mentioned."

The Articles of Agreement of Merger and Consolidation of October 11, 1915, forming Seaboard No. 4 and appearing as Exhibit C at pages 77 to 119, inclusive, refer to Seaboard Air Line Railway Company as "a consolidated corporation organized and existing under the laws of the State of Virginia and other states." They were filed in the office of the Secretary of State of Georgia on November 17, 1915, as appears from the Certificate of the Secretary on pages 108 and 109.

As shown by Exhibit D to the affidavit of Mr. Plummer, pages 125 to 130, inclusive, Seaboard Air Line Railway Company in 1929 amended its charter to provide for certain changes in the amount and number of its shares of common and preferred stock and change from par value of $100.00 per share to shares without nominal or par value. This exhibit is a Certificate of the Secretary of State of the State of Georgia describing Seaboard Air Line Railway Company as "a consolidated corporation created and existing under the laws of the States of Virginia, Georgia and other states." The Certificate recites, (pp. 129-130) that

> "The State of Georgia, acting by and through its Secretary of State, does hereby (insofar as the Secretary of State may be authorized by law in the premises and to the full extent of any power and authority hereunto enabling him) amend the charter of said Seaboard Air Line Railway Company in the respects hereinabove set forth and as prayed in its said petition or application for amendment."

The affidavit of Mr. Plummer also sets forth, at pages 13 and 14, Sections 2591 and 2597 of Park's Annotated Code of Georgia, as they were in effect without amendment through the year 1915. These

same sections were in effect in the same form throughout 1929. See Michie's Georgia Code, 1926, Section 2591 and 2597. The first of these sections provides that any railroad company shall have the power to make contracts with any railroad company which has constructed any railroad within the state or any other state that will enable said companies to merge their stocks or to consolidate with any such company within or without this state. The second of these sections provides, *inter alia*, that any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies or corporations organized under the laws of this state and any other states with one or more companies or corporations organized under the laws of any other state or under the laws of this and of other states, may issue its bonds and stock as provided for in this Article, etc. Copies of these sections and of the other sections of the Georgia Code, hereinafter referred to, are shown in the Appendix to this brief.

Section 2178 of the same Code (Section 2596, Michie's Georgia Code of 1926) permitting amendments to the charter of the railroad company, provided for the filing of a petition with the Secretary of State setting forth particularly in what manner it is desired to amend such charter, and when such petition is filed the Secretary of State shall issue to said company under the Great Seal of the State a certificate setting forth the *manner in which said charter is amended.* (Italics supplied). It contains the significant provision that

> "Any railroad company that has been already incorporated, whether by act of the General As-

sembly * * * or under the provisions of the general railroad law of the State, and whether organized or not, is hereby declared to be a legal and subsisting corporation under the laws of Georgia and may amend its charter * * *."

Accordingly, there would appear to be no doubt that the existing company, Seaboard Air Line Railway Company, as in the case of its predecessor companies, in fact received charter powers from and came into existence as a Georgia corporation and has so consistently treated itself, and been so treated by the state authorities of Georgia. We can find no decision of the Supreme Court of Georgia directly passing upon the status as a Georgia corporation of a company formed by consolidations such as those that occurred in the case of the Seaboard.

That the 1915 Consolidation, as well as the two previous consolidations, effected the creation of a new Seaboard Company as a Georgia corporation seems inescapable. Sections 2591, 2596 and 2597 of Park's Annotated Code of Georgia, 1914, quoted in the appendix to this brief, relate expressly to railroad consolidations and it is clear that each of the successive consolidations which created Seaboard Nos. 2, 3 and 4 included steps expressly intended to conform to the provisions of these sections. The Articles of November 7, 1901 (Return, pp. 18, et seq.) refer to the formation of the several links of the consolidating companies "into a continuous line of railroad for the passage of cars without break or interruption or necessity for exchange or transfer of freight or passengers." This language is substantially identical with that contained in Section 2597 permitting consolidations:

> "Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other state, or of the United States, whose railroad within or without this state shall connect with or form a continuous line with the railroad of the company incorporated under this law."

Likewise these Articles contain the express recital (Return, p. 24) that none of the consolidating railroads "is a parallel or competing line, but the same are all so connected and united as to form together a continuous line and system of railroads." This language recognizes the prohibition of Section 2591 "that no railroad shall purchase a competing line."

The Articles provided for the consolidation of the capital stock, franchises, railroads, estates and properties of the several companies, including those then existing separately as Georgia corporations, viz.: Georgia, Carolina and Northern Railroad Company, Seaboard Air Line Belt Railroad Company and The South Bound Railroad Company. The Articles also provided for exchanging the capital stock of the constituent companies into the capital stock of the consolidated company (Return, p. 30) likewise as permitted by Section 2597 in the following language:

> "Any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies or corporations organized under the laws of this state, or under the laws of this state and any other states, with one or more companies or corporations organized under

> the laws of any other state, or under the laws of this and other states, to issue its bonds and stocks as provided in this article in such amounts as they may deem necessary for the purpose of paying or exchanging the same or for retiring any bonds or stocks heretofore issued by either of said companies."

Article XI (Return, p. 36) expressly provided for filing of counterparts of the Articles with "the proper officers in the States of Virginia, North Carolina and Georgia" and they were filed with the Secretary of State of Georgia.

The Articles of 1903 creating Seaboard No. 3 (Return, pp. 57, et seq.) are so similar in all essential respects as to require no separate discussion. The Articles of 1915 (Return, pp. 78, et seq.) consolidated Seaboard Air Line Railway (Seaboard No. 3) with Carolina, Atlantic and Western Railway into the presently existing Seaboard Air Line Railway Company and provided for the issuance of stocks and bonds. There are no especially significant provisions so far as the Georgia statutes are concerned in these Articles differing from those of 1903. Article Twelve provided for the execution of seven *counterparts* "to facilitate the filing and record of these Articles," and while filing in Georgia was not expressly provided for, it was obviously contemplated and filing was actually made in Georgia on November 17, 1915, as evidenced by the certificate by the Secretary of State (Return, pp. 108-109). Other counterparts were filed with the Secretaries of Virginia, North Carolina, South Carolina, Georgia and Florida.

As previously pointed out, when the Seaboard Company amended its charter in 1929 to change its stock structure it obtained a certificate from the Secretary of the State of Georgia permitting the amendment of the charter of Seaboard Air Line Railway Company "a consolidated corporation created and existing under the laws of the States of Virginia, Georgia and other states." (Return, pp. 125, et seq.).

In view of the foregoing facts and of the provisions of the Georgia law it is difficult to conceive what else could have been done to complete and assure the identity of the company as a corporation of Georgia.

ARGUMENT.

The corporate status of the Seaboard Company has not been passed upon by the Georgia Courts. It was considered in the District Court in Florida in *Royal Palm Soap Co.* v. *Seaboard Air Line Ry. Co.*, 296 Fed. 448 (C.C.A. 5th), in which it was held upon demurrer to a plea that on the facts stated in the plea the Seaboard was not a corporation of Florida. Apart from the fact that the case was not presented upon full evidence as to the corporate status, the decision is in conflict with the decisions of this Court hereafter cited.

An elaborate review of the numerous decisions of this Court dealing with the multiple nature of railroad consolidations which began more than a hundred years ago, would throw little direct light upon the question here presented. A concise and interesting history of the broad outlines of the decisions appears in The Yale Law Journal, Vol. 46, p. 1370, under the title "Multiple Incorporation as a Form of Railroad Organization."

As the problem of status of consolidated corporations was really created by the extensions and unions of numerous small railroads as industry in this country expanded, and was a wholly new one in the law, the decisions disclose the difficulties and contradictions amid which the courts endeavored to apply the rules as to corporate birth and life to the fundamental anomaly of organisms deriving their existence and powers from the separate and distinct sovereignties of two or more states.

The decisions have established, however, certain well defined principles, which are pertinent here, as for

example the distinction between the effects of mergers and the effects of consolidations. In a merger the dominant company swallows its constituents but remains the same company. In the case of a consolidation a new company is created but retains the privileges and franchises and succeeds to the obligations of the several companies which are parties to the consolidation. *Helvering* v. *Metropolitan Edison Co.*, 306 U. S. 522, 529, 83 L. Ed. 957, 964.

It is clear from the affidavit and exhibits annexed to the Return that the present Seaboard Company (Seaboard No. 4) was newly created in 1915 and is a corporation by consolidation rather than by merger, although the Articles of Agreement of the year 1915 (Exhibit C) are labelled as those of "Merger and Consolidation." *Seaboard Air Line Railway Co.* v. *United States*, 67 Ct. of Claims 160.

The decisions also clearly establish that a consolidated corporation created under the laws of two or more states continues to exist as a corporation of each of those states.

Another well established principle is that statutes, such as that of Georgia, providing for the consolidation of corporations *are to be treated as acts of incorporation. Clearwater* v. *Meredith*, 1 Wall., 25, 17 L. Ed. 604; *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Shields* v. *Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Maine Central R. R. Co.* v. *Maine*, 96 U. S. 499, 24 L. Ed. 836; *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359, 25 L. Ed. 185.

The Georgia statute set forth in the appendix to this brief clearly contemplates consolidations of railroad companies, both those originally created under the

laws of Georgia and those created under the laws of other states.

Still another principle is that a corporation existing under the laws of a state is to be treated as a citizen of that state where it sues or is sued in a court in that state.

The decision of this Court in *Patch* v. *Wabash R. Co.*, 207 U. S. 277, 52 L. Ed. 204, is directly in point upon the principle here involved. There the railroad company was a corporation organized and existing under the laws of Illinois, Ohio and three other states by the consolidation of five corporations that had previously existed under the laws of those states. The precise question presented was whether in a suit against the railroad by a citizen and resident of Illinois the railroad was also a citizen of Illinois, thereby preventing removal from a State to a Federal Court. Holding that the railroad was a citizen of Illinois, this Court said:

> "Therefore the question is raised how a corporation or corporations thus organized shall be regarded for the purposes of a suit like this. No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation, are needed for an answer. The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same state, and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere. The assent of the state to such incorporation elsewhere, supposing it to have been given,—a matter upon which we express no opinion—cannot be presumed to have intended or to import

such a change. This seems to be the opinion of the Supreme Court of Illinois, as it certainly has been shown to be that of this court. *Chicago & Northwestern Ry. Co.* v. *Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Muller* v. *Dows*, 94 U. S. 444, 24 L. Ed. 207; *Memphis & Charleston R. R. Co.* v. *Alabama*, 107 U. S. 581, 2 S. Ct. 432, 27 L. Ed. 518; *Quincy Railroad Bridge Co.* v. *County of Adams*, 88 Ill. 615; *Winn* v. *Wabash R. Co.*, (C. C.) 118 F. 55. What would be the law in case of a suit brought in Illinois upon a cause of action which arose in Ohio is a question that may be left on one side, as also may be the decisions in cases where a corporation originally created in one state afterwards becomes compulsorily a corporation of another state for some purposes in order to extend its powers. *Southern Ry. Co.* v. *Allison*, 190 U. S. 326, 23 S. Ct. 713, 47 L. Ed. 1078; *St. Louis & San Francisco Ry. Co.* v. *James*, 161 U. S. 545, 16 S. Ct. 621, 40 L. Ed. 802. In the case at bar the incorporations must be taken to have been substantially simultaneous and free. See *Memphis & Charleston R. R. Co.* v. *Alabama*, *Supra*, (107 U. S. 581, 2 S. Ct. 432, 27 L. Ed. 518). If any distinction were to be made it hardly could be adverse to the jurisdiction of Illinois, in view of the requirements of its Constitution and statutes, that a majority of the directors should be residents of Illinois, and that the corporation should keep a general office in that state. We are of the opinion that the defendant must be regarded in this suit as a citizen of Illinois, and therefore as having had no right to remove. It follows that the cause should be remanded to the state court."

An able discussion of the principle is also found in the opinion of the Circuit Court of Appeals for the Fourth Circuit by Judge Soper in *Town of Bethel* v.

Atlantic Coast Line R Co., 81 Fed. (2d) 60, cert. den. 298 U. S. 682, 80 L. Ed. 1402, in which the facts, elaborately detailed, as to the various consolidations creating the Atlantic Coast Line Railroad Company are strikingly analogous with those presented on the Return of the Seaboard Company. Holding that the successive consolidations of numerous railroads of North Carolina and other Southern states into the Atlantic Coast Line Railroad Company created it a corporation of North Carolina and not a corporation existing solely under the laws of Virginia by a process of merger, the court held that the railroad company could not sue the Town of Bethel in a Federal Court in North Carolina because of lack of diversity of citizenship.

Morawetz on Private Corporations, Sections 1000 and 1001, contains this clear definition:

> "A consolidation of several corporations into one involves the formation of a new corporation out of the united shareholders of the old. Companies originally chartered by different states may be thus united into a single corporation, by virtue of legislation passed in each of the states. In such case the new company becomes invested with all the rights and duties of a corporation in each state, but the franchises of the company in each state are derived from the legislation of that state alone. A corporation formed by consolidation of several companies under the laws of different states must, while in either state, be treated as a citizen of that state alone in determining the jurisdiction of the Circuit Courts of the United States. And such company will generally be considered in each state as a corporation created or chartered by that state, within the purview of its legislative enactments."

In *Chicago & Northwestern Ry. Co.* v. *Whitton*, 13 Wall. (80 U. S.) 270, 20 L. Ed. 571, the railway company was sued in a state court of Wisconsin. Claiming that he was a resident and citizen of Illinois, plaintiff later sought to remove the case from the state court to the United States Circuit Court of Wisconsin. The removal was resisted by the railway company upon the ground that it was a corporation of Michigan as well as of Wisconsin and that the status as an Illinois corporation defeated the jurisdiction based on diversity of citizenship. Upholding the decision of the Circuit Court that for the purposes of the suit the railway company must be treated as a citizen of Wisconsin, this Court said:

> "The defendant is a corporation and as such a citizen of Wisconsin by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued it can only be brought into a court as a citizen of that state whatever its status or citizenship may be elsewhere."

See also *Muller* v. *Dows*, 94 U. S. 444, 24 L. Ed. 207.

If a corporation existing under the laws of one state although existing as well under the laws of another state is to be treated as a citizen of the particular state in which it sues or is sued, it would seem to follow inexorably that when the State of Georgia seeks to sue one of its own corporations, it can not be permitted to ignore the Georgia status because the Seaboard Company is also a corporation of Virginia and other states. The state can not attribute all the crimes sought to be charged in the Bill of Complaint to the Seaboard

Company in its sole capacity as a Virginia corporation. Perhaps a single isolated act of negligence, for example, occurring in Virginia, might be considered as attributable to the Virginia corporation. But it does not lie in the mouth of the State of Georgia to say that the entire participation of the Seaboard Company in the Southern freight rate structure and in the conspiracies charged in the Bill can be laid at the door of the Virginia status. Can the corporation as a Virginia citizen be alone enjoined while the Georgia citizen is not? Yet, both can not be enjoined unless in both capacities they are treated as parties to the suit.

In this Court Seaboard Air Line Railway Company must be sued, if it is suable, as the corporation having the multiple citizenships which are its attributes. One of those citizenships is that of Georgia, regardless of its status elsewhere.

As pointed out at page 68 of the opinion in *Town of Bethel* v. *Atlantic Coast Line R. Co.*, *supra*, in some instances plaintiffs in diversity of citizenship cases have attempted to establish diversity by asserting that the plaintiff is a citizen of the state in which the suit is brought and that the defendant is sued in its capacity as a citizen of another one of the states of incorporation. To quote from that opinion

> "* * * this device failed, since it was held that the corporation must be considered as a corporation of the state in which the suit is brought. See the interesting opinion of Judge Lowell in *Goodwin* v. *New York, N. H. & H. R. Co.* (C.C.), 124 F. 258. See also, *Missouri Pacific Ry. Co.* v. *Meeh* (C.C.A. 8), 69 F. 753, 30 L.R.A. 250;

Goodwin v. *Boston & Maine R. R.* (C.C.), 127 F. 986; *Petersborough Railroad* v. *Boston & Maine R. R.* (C.C.A.), 239 F. 97; *Goeffory* v. *New York, N. H. & H. R. Co.* (D.C.), 13 F. (2d) 947."

Clearly there can be no difference in principle between a case where a plaintiff seeks to single out for jurisdictional purposes a citizenship of the defendant corporation other than the state of suit and an attempt by the State of Georgia to ignore the Georgia status of the Seaboard Company in this Court and seek to confer jurisdiction by claiming that the Seaboard is sued only as a corporation of Virginia.

Respectfully submitted,

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Line Railway Company.

APPENDIX.

Section 2591. (Sec. 2173). *Contracts to connect, merge, or consolidate with, or purchase, etc., other companies.*—Said railroad company shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this state or any other state, that will enable said company to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this state, or to lease or purchase the property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest: Provided, that no railroad shall purchase a competing line of railroad, or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this state; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law. Acts 1892, p. 49.

Section 2596. (Sec. 2178.) *Privileges granted to railroad companies already incorporated.*—Any railroad company that has been already incorporated, whether by act of the General Assembly incorporating the same by name or under the provisions of the general railroad law of the state, and whether organized or not, is hereby declared to be a legal and subsisting corporation under the laws of Georgia, and may amend its charter either by adopting the provisions of this article or by extending the time of expiration of its original charter for a period of fifty years, and when it so amends its charter it may retain its original organiza-

tion and the same amount of capital stock provided for in its original charter, and any other powers and privileges, except exemption from taxation, granted in its original charter, which may not be in conflict with this Article or any other act relating to the powers and duties of railroad companies, and such amendments shall be without prejudice to any of its prior rights or contracts; and the provisions of this Article may also be adopted by any person or persons now owning or operating a railroad in this state, without prejudice to to such organization as they may have already effected, and without prejudice to their existing contracts and obligations. Whenever any railroad company desires to amend its charter, or any person or persons desire to adopt the provisions of this Article as above provided, it or they shall file a petition with the Secretary of State, setting forth particularly in what manner it is desired to amend or adopt the provisions of this Article. When such petition is filed, the Secretary of State shall issue to said company or persons, under the great seal of the state, a certificate setting forth the manner in which said charter is amended, if the petition be for amendment; or if the petition be to adopt the provisions of this Article, then a certificate setting forth that said persons are a body corporate with all the powers, duties, and liabilities of this Article. Before said certificate shall issue, said petitioner or petitioners shall pay to the treasurer of the state the sum of fifty dollars. Acts 1892, p. 50.

Section 2597. (Sec. 2179.) *Sale, etc., to, or consolition with, other companies.*—Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign, or transfer its

stock, property, and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other state or of the United States, whose railroad within or without this state shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this Article may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other state or the United States, whose railroad within or without this state shall connect with or form a continuous line or system with the railroad of such company incorporated under this law, upon such terms as may be agreed upon. And it shall be lawful for any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies, or corporations, organized under the laws of this state, or under the laws of this state and any other states, with one or more companies or corporations organized under the laws of any other state, or under the laws of this and other states, to issue its bonds and stock as provided for in this Article, in such amounts as they may deem necessary for the purpose of paying or exchanging the same or for retiring any bonds or stocks theretofore issued by either of the said companies, or corporations, so merged, purchased, or consolidated, or for any other purpose, and to the amount authorized by the laws of the state under which either of said companies, or corporations, so consolidated was organized, and to secure the same,

in case of bonds, by mortgages or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this state: Provided, that no railroad company shall make any contract under the provisions of this section with any other railroad company which is a competing line, that is calculated to defeat or lessen competition in this state or to encourage monopoly. Acts 1892, p. 51.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER ..10.. ORIGINAL

THE STATE OF GEORGIA,

Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

MEMORANDUM CONCERNING CERTAIN RELEVANT PROVISIONS OF THE INTERSTATE COMMERCE ACT

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MEMORANDUM CONCERNING CERTAIN RELEVANT PROVISIONS OF THE INTERSTATE COMMERCE ACT

It is conceded by the State of Georgia and in the Brief Filed on Behalf of the United States that Georgia is not entitled to an injunction in this cause if the matters of which the State complains are subject "to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission" (Clayton Act, Sec. 16; 15 U. S. C. §26).

Upon the argument, it was suggested that while the Interstate Commerce Commission has jurisdiction over rates it has no jurisdiction over the agreement or conspiracy which the State of Georgia alleges has been entered into by the railroads in violation of the antitrust laws.

The attention of this court is directed to the following provisions of the Interstate Commerce Act which suggest that the Commission has been given clear and explicit authority to consider, pass upon and enter orders concerning the precise type of agreement or conspiracy complained of by the State of Georgia.

(1) The declaration of policy prefixed to the Interstate Commerce Act by the Transportation Act of 1940 announces that it is "the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as * * * to encourage the establishment and maintenance of reasonable charges for transportation services, *without* * * * *unfair or destructive competitive practices* * * *" and enjoins the Commission to administer and enforce all of the provisions of the Interstate Commerce Act "with a view to carrying out the above declaration of policy * * *." (49 U. S. C., italics supplied.)

It seems clear that an agreement among competing carriers to establish rates becomes an "unfair or destructive competitive practice" whenever it destroys or eliminates the kind of competition which the Interstate Commerce Act sought to preserve. Georgia specifically alleges that the carriers entered into such an agreement.

(2) Section 1(6) of the Act directs the carriers to

> "*establish, observe, and enforce* just and reasonable * * * regulations and *practices affecting* classifications, *rates or tariffs* * * * and every unjust and unreasonable classification, regulation, and practice is

> prohibited and declared to be unlawful." (49 U. S. C. Sec. 1[6], italics supplied.)

An agreement or conspiracy among competing carriers to establish non-competitive and illegal rates through the use of a system of rate bureaus seems clearly a practice "affecting * * * rates" within the meaning of this section.

(3) Section 15(1) of the Interstate Commerce Act, so far as material, provides:

> "That whenever * * * the Commission shall be of opinion * * * that any individual or joint classification, regulation, or practice whatsoever * * * is or will be unjust or unreasonable * * * or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what individual or joint classification, regulation, or practice is or will be just, fair and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist * * *" (49 U. S. C. 15[1]).

* * *

It is respectfully suggested that the provisions of the Interstate Commerce Act quoted above give to the Interstate Commerce Commission jurisdiction over an agreement or a conspiracy among competing carriers to establish rates. This becomes abundantly clear when the provisions of the Act quoted herein are read in the light of the policy which the Act is designed to carry out. Thus the Commission has jurisdiction over the very matter of which Georgia complains.

The Commission possesses this jurisdiction not because it has jurisdiction to enforce the antitrust laws but because the agreement constitutes a practice affecting rates.

Respectfully submitted,

GEORGE S. LEISURE,
RALSTONE R. IRVINE,
ROBERT W. PURCELL,
Attorneys for The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company.

JAMES V. HAYES,
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of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1944.

Original Number. 10....

THE STATE OF GEORGIA, *Complainant,*

versus

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

REPLY OF THE STATE OF GEORGIA TO SUPPLEMENTAL MEMORANDUM OF CHESAPEAKE AND OHIO RAILWAY COMPANY.

ELLIS ARNALL,
Governor of Georgia.

T. GRADY HEAD,
Attorney General of Georgia.

MARSHALL L. ALLISON,
Assistant Attorney General of Georgia.

CLAUDE SHAW,
Assistant Attorney General of Georgia.

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.

PRESS OF BYRON S ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1944.

Original Number.....

THE STATE OF GEORGIA, *Complainant,*

versus

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

REPLY OF THE STATE OF GEORGIA TO SUPPLEMENTAL MEMORANDUM OF CHESAPEAKE AND OHIO RAILWAY COMPANY.

On February 6, 1945, it came to the attention of the State of Georgia, purely fortuitously and by chance, that the Chesapeake & Ohio Railway Company had, several weeks before, submitted to the Supreme Court a supplemental brief, entitled "Memorandum Concerning Certain Relevant Provisions of the Interstate Commerce Act."

No copy of this document was ever served upon the State of Georgia, nor did the Chesapeake & Ohio Railway Company notify the State of Georgia that it had obtained leave of court to file, or had filed, such a brief.

The State of Georgia believes that the filing of such a document, without notice to or service upon the parties to the case, constitutes a failure to observe the orderly standards of procedure and professional decorum which should

be expected of litigants in this Court. The manifest discourtesy and unfairness of this conduct on the part of the railroad is of a piece with the flimsy character of the arguments advanced in the railroad's supplemental brief. Nevertheless, the State of Georgia submits that if the belated and *ex parte* statements contained in that supplemental brief are received or considered by this Court, then the State of Georgia should be permitted to bring to the attention of the Court the following comments upon the contentions set forth in the supplemental brief referred to.

In that brief the attention of the Court is directed to certain provisions of the Interstate Commerce Act which, it is said, "suggest that the Commission has been given clear and explicit authority to consider, pass upon and enter orders concerning the precise type of agreement or conspiracy complained of by the State of Georgia."

The passages referred to are:

(1) The declaration of policy in the Transportation Act of 1940 regarding encouragement of the "establishment and maintenance of reasonable charges for transportation service, without . . . unfair or destructive competitive practices" and directing the Commission to administer the act with a view to carrying out the transportation policy so declared.*

(2) Section 1(6) of the Interstate Commerce Act, which provides:

> It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for

* 49 U. S. C., note preceding section 1.

transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.†

(3) Section 15(1), of the Act, which provides:

That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transporta-

† 49 U. S. C. 1(6).

> tion other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.*

Examination of the full text of these passages discloses that they do not support the verbal sophistry upon which the Chesapeake & Ohio Railway Company has undertaken to base its argument.

With respect to the declaration of policy prefixed to the Transportation Act of 1940, it is plain that such a declaration does not have the effect of conferring any substantive jurisdiction upon the Interstate Commerce Commission. That this declaration of a national transportation policy is intended only as a guide for the administration and enforcement of the substantive provisions of the Interstate Commerce Act is clearly indicated by the last sentence of the declaration. In such circumstances, it is completely fallacious to urge that the conspiracy alleged by the State of Georgia in this case, even if it were assumed to be an "unfair or destructive competitive practice," becomes, by virtue of the Congressional declaration of a national transportation policy, a "matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission," within the meaning of the proviso to Section 16 of the Clayton Act.

Moreover, even if the language of the declaration of policy were deemed to confer substantive power on the Commission, it is clear that the conspiracy which is the basis of the State of Georgia's complaint does not fall within the category of "unfair or destructive competitive practices" condemned by that declaration. Obviously what the words "unfair or destructive competitive practices" refer to is the reduction of rates by an individual carrier to a point where it is operating at a loss, or the re-

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* 49 U. S. C. 15(1).

duction of rates by such a carrier for the purpose of driving a competitor out of business. In other words, these words apply to so-called "ruinous" competition, and seek to mitigate the ferocity of the competitive struggle, rather than to intensify it. Indeed these words are ordinarily invoked by price-fixing combinations in the transportation field as an ostensible justification for curtailing competition. It is astonishing, as well as absurd, to see them now relied upon as a prohibition against conspiracies to restrict competition. They obviously apply to the individualistic conduct of ruthless competitors, rather than to the collective action of a combination or conspiracy of carriers, engaged in price-fixing and elimination of all competition whatever with respect to rates, such as the State of Georgia here complains of. The words obviously refer to practices engaged in by individual carriers, rather than a wholesale conspiracy such as is involved in this case. Furthermore, the conspiracy herein involved does not fall within the category of ruinously competitive practices or unfair methods of competition against which the admonitions of the Congressional declaration of policy are primarily directed.

For these reasons it is clear that the passage quoted from the Congressional declaration of a national transportation policy supplies no support for the inference that the rate conspiracy involved in this case has been made subject to the jurisdiction of the Interstate Commerce Commission.

The argument is also made by the Chesapeake & Ohio Railway Co. that a conspiracy by carriers in restraint of trade is a practice affecting rates, and hence falls within the Commission's jurisdiction. The railway company argues that the Commission possesses this jurisdiction not because it has jurisdiction to enforce the antitrust laws but because the unlawful agreement or conspiracy constitutes a practice affecting rates.

The unsoundness of this argument is obvious. It is simply one more manifestation of the desire of the defendant carriers to construe the State of Georgia's case as a rate

litigation within the Commission's jurisdiction, rather than what it really is, an original proceeding in this Court, authorized by the Constitution itself, seeking the interposition of this Court as a court of equity to prevent the continuance of an unlawful conspiracy in restraint of trade injuring the public economy of the State.

It is plain that a railroad "practice" within the meaning of the provisions of the Interstate Commerce Act to which the Chesapeake & Ohio refers, is something quite different from the type of wrongful conduct which constitutes the conspiracy of which the State of Georgia complains.

The term "practices" in the Interstate Commerce Act is a term of art. As shown by the context in which it is used, it refers to those elements affecting the value of service rendered by a carrier which are not expressed numerically or verbally in a tariff as rates or rules or classifications. The rule *noscitur a sociis* applies. The term "practice," as well as "classification" and "regulation," are merely incidents of a rate, fare, or charge which serve to determine the amount, availability, or elasticity of the value of the whole service rendered. *Stopping of Cars in Transit to Complete Loading*, 36 I. C. C. 130.

This conclusion is supported not only by the language of the Act, but by that of the railroads as well. Thus in the the Articles of Association of the Southern Freight Association, it is set forth in Article I that the "jurisdiction" of the Association includes

> "rate adjustments, general rules, regulations *and practices* in connection with traffic:
>
> "(a) Passing between St. Louis and points intermediate on membership lines, and points south of the south bank of the Ohio River.
>
> "(b) To and from Chesapeake and Ohio Railway stations west of Gauley, W. Va., including Gauley, and including its Lexington and Big Sandy branches, and to and from the territory of the

Norfolk and Western Railway, Kenova, W. Va., to Portsmouth, Ohio, inclusive." (Italics supplied)

Clearly, under the rule of *ejusdem generis* the word "practices" refers to an element of the value or scope of the service furnished under a particular rate.

From the foregoing it appears that a "practice" within the meaning of the provisions of the Interstate Commerce Act referred to embraces elements which affect the amount or value of the service furnished by a carrier under a particular rate. The privilege of transit for milling, or of stopping cars for partial loading or unloading, are good illustrations of the meaning of the term.*

In any event it is clear that the Commission's jurisdiction over improper "practices" extends only to action by carriers which violates the Interstate Commerce Act. Obviously it does not include action by carriers which violates the antitrust laws or other prohibitions against restraints of trade. It is clear from Section 15(1) that the Commission's power to prescribe rates, regulations, and practices is confined to cases where those established by the carriers are found to be unjust or unreasonable or unjustly discrim-

* The narrow meaning of the term is shown by decisions that not everything that a carrier may do is to be regarded as a "practice." Relations between a carrier and its employees, or between carriers themselves as to divisions of rates, are not included, but discrimination with respect to interchange of traffic or absorption of switching charges, to the detriment of shippers, is within the meaning of the term. Likewise, privileges of storing or warehousing constitute a "practice." *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, 228-9; *Baltimore & Ohio Railroad Company* v. *United States*, 277 U. S. 291; *Missouri Pacific Railway Company* v. *Norwood*, 283 U. S. 249, 257; *Manufacturers Assn. of York, Pa.* v. *Penn. R. R. Co.*, 107 I. C. C. 219, 231-2; *Northern Pacific Railway Company* v. *United States*, 41 F. Supp. 439, 443; *Northern Pacific Railway Company* v. *United States*, 316 U. S. 346; *Baltimore & Ohio Railroad Company* v. *United States*, 305 U. S. 507, 524. In other words, any action appears to be a "practice" if it affects the value or scope of the service received by a shipper in return for the rate paid.

inatory or unduly preferential or prejudicial or otherwise in violation of part I of the Interstate Commerce Act. These are merely the same evils which are prohibited by Sections 2 and 3 of the Act, which the defendant carriers sought to emphasize in their previous briefs.

As the State of Georgia pointed out in its brief and argument, however, the controversy before this Court is not a rate discrimination case falling within the Commission's jurisdiction. The carrier's belated reference to "practices affecting rates" is merely a subsidiary ingredient of such a rate controversy, and since the greater includes the less, our previous demonstration that the case before this Court is not a rate litigation is controlling, notwithstanding this last minute effort of the Chesapeake and Ohio Railway to grasp at a straw.

The conspiracy of which the State of Georgia complains is a conspiracy the effects of which take place outside of and prior to the realm of functioning of the Interstate Commerce Commission. The complaint charges that the conspirators deter and prevent individual railroads from initiating rates. A railroad is required to obtain the consent of its competitors before establishing a rate. Under the circumstances, it is clear that the conspiracy becomes operative before there is anything before the Commission upon which it may act. In many instances the success of the conspiracy will consist in the very fact that a carrier has been prevented from filing a new lower rate with the Commission. In such a case there is nothing which puts into play the Commission's machinery.*

---

* Upon the face of the documents filed with the Commission, there is no evidence of the wrongful restraint to which the individual carriers have been subjected. The system of private government which obliges a carrier not to initiate rates without the formal consent of the private bureaucracy set up by the railroad industry leaves no public record. Insofar as the published tariffs upon which the Commission's deliberation is based are concerned, no irregularity appears.

But that in such a case there has been a violation of the laws prohibiting restraint of trade is evident. Such a violation is a matter over which the Commission has no jurisdiction, and claims none. Indeed the Commission has expressly disclaimed any such authority, and this Court has also held that it is not the Commission's task to prevent conspiracies. For the Commission to attempt such a task would be to exercise power beyond its special competence.

Injunctive relief, obtainable through exercise of the judicial power, affords the appropriate remedy; and the Constitution provides that this Court is the appointed forum wherein the State of Georgia may obtain that remedy.

Respectfully submitted,

ELLIS ARNALL,
Governor of Georgia.

T. GRADY HEAD,
Attorney General of Georgia.

MARSHALL L. ALLISON,
Assistant Attorney General of Georgia.

CLAUDE SHAW,
Assistant Attorney General of Georgia.

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.

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Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER 11, 10 ORIGINAL

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT; AND AMENDED BILL OF COMPLAINT

THE STATE OF GEORGIA,
BY:
ELLIS ARNALL,
Governor of Georgia,
T. GRADY HEAD,
Attorney General of Georgia,
MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia



Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER..... ORIGINAL

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND AMENDED COMPLAINT

Comes now the State of Georgia, by Ellis Arnall, Governor of Georgia; T. Grady Head, Attorney General of Georgia; Marshall L. Allison, Claude Shaw, Assistant Attorneys General of Georgia; and Edgar Watkins, Deputy Assistant Attorney General of Georgia, and moves the Court for leave to file an amended complaint invoking the original jurisdiction of this Court against The Pennsylvania Railroad Company and others. Attached to this motion are a brief thereon and the said complaint as amended.

Defendants have heretofore been notified of the previous motion herein by mailing to the president of each defendant

carrier a full copy thereof. In like manner notice has been given the defendants of this motion and the amended complaint attached hereto.

Respectfully submitted,

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,

CLAUDE SHAW,
Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for the State of Georgia.

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER..... ORIGINAL

THE STATE OF GEORGIA,
Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,
Defendants.

NOTICE OF HEARING

Please take notice that on the second day of October, 1944, or as soon thereafter as counsel can be heard, the motion of complainant for leave to file its bill of complaint in the above entitled cause as here amended will be submitted to the Supreme Court of the United States.

THE STATE OF GEORGIA,
BY:

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,

CLAUDE SHAW,
Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for Complainant.

Supreme Court of the United States

OCTOBER TERM, 1944

ORIGINAL CALENDAR NUMBER.....

THE STATE OF GEORGIA,

Complainant,

VERSUS

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

BILL OF COMPLAINT AMENDED AND SUBSTITUTED FOR ORIGINAL

Now comes the State of Georgia, by Ellis Arnall, Governor of Georgia; T. Grady Head, Attorney General of Georgia; Marshall L. Allison and Claude Shaw, Assistant Attorneys General of Georgia; and Edgar Watkins, Deputy Assistant Attorney General of Georgia, duly authorized, and brings this action against the defendants hereinafter named, before the Supreme Court of the United States, sitting as a court of equity with original jurisdiction, and complains and alleges as follows:

1. This complaint, and the several counts thereof, is instituted against the defendants under the authority of Article 3, Section 2, Clauses 1 and 2, of the Constitution of the United States. This Court has original jurisdiction of this cause by virtue of said provisions of the Constitution. This complaint, together with each of its several counts, is grounded in the common law prohibition against conspiracy,

in the common law against torts, and in the Antitrust Laws of the United States.

2. The plaintiff is the State of Georgia, one of the original States of the Union, which brings this suit pursuant to the written order to the Attorney General by the Governor of Georgia as authorized by the laws of the State of Georgia. The State of Georgia brings this amended complaint, in four separate, different, and distinct counts, and it sues in a different capacity in respect to each of said counts.

(A) **First Count**: The State of Georgia sues in its capacity as a sovereign to safeguard the performance of the obligations of government with which as a State of the Union it is charged.

(B) **Second Count**: The State of Georgia sues in its capacity as a quasi-sovereign or as agent and protector of its people against a continuing wrong done to the people of Georgia as an organized community in their lives, liberties, and estates.

(C) **Third Count**: The State of Georgia sues in its capacity as a proprietor, against wrongs suffered by, and damage done to, the State as the owner of a railroad, as the owner and operator of various institutions maintained by the State, all of which makes necessary the purchase by the State of Georgia of certain merchandise and materials which are transported by defendants into this State to be used by the State of Georgia itself.

(D) **Fourth Count**: The State of Georgia sues in its capacity as protector, and in behalf of, a large general class of its citizens, who by necessity are required to ship over the defendant railroads and have been damaged by the acts of which complaint is made herein.

All of the above counts are brought jointly and severally for the purpose of protecting the sovereignty of the State, the interests of its people, and the rights of its citizens from irreparable injury from certain continuing and threatened

acts on the part of defendants, all of which are in conflict with the rights of the sovereign State of Georgia, the people of Georgia as an organized community, the proprietary interests of the State, and a large general class of its citizens who are directly affected thereby, all of which rights enjoy the protection of the Constitution of the United States.

THE GRIEVANCES OF THE STATE OF GEORGIA

3. **First Count:** The State of Georgia, suing in its capacity as a sovereign, is charged with the government of its citizens, the maintenance of law and order within its domain, and the promotion of the general welfare of its people.

(a) The very purpose for which it exists, as set forth in the PREAMBLE TO THE STATE CONSTITUTION, is "to perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to posterity the enjoyment of liberty."

(b) In executing such a mandate the State of Georgia, like any other State of the Union, must from time to time formulate, revise, and administer policies designed to foster its agriculture, promote its manufacture, encourage its commerce, advance the progress of its useful arts, bring into use its wealth and natural resources, secure to its people opportunity, full employment, and an advancing standard of living, shape the pattern of its State economy towards a more abundant life, and link its industrial system into a truly national economy.

(c) It must, likewise, maintain law and order; protect its citizens in their lives, liberties, properties, and estates; establish conditions which make for reasonable financial security; keep open the doors of business opportunity; and, in general, in a modern society, discharge on behalf of its people all those obligations which are comprehended within the police power and other powers reserved to the State of

Georgia by the Tenth Amendment to the Constitution of the United States.

The State of Georgia is hindered and harassed in the discharge of these powers, rights, and obligations of sovereignty by a conspiracy of persons of other States, in violation of the common law against conspiracy, and in violation of the antitrust laws of the United States, all as recited herein in Sections 9 to 16 inclusive. The defendants, a group of common carriers, have conspired to establish and to maintain freight rates which are unjust, unfair, and harmful to the State and the people of Georgia. The rates as a result of the conspiracy are so fixed as

(a) to deny to many of Georgia's products equal access with those of other States to the national market;

(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

(d) to hold the Georgia economy in a state of arrested development.

So long as this unlawful conspiracy endures, a barrier exists between the measures taken by the State of Georgia to promote its agriculture, industry, and commerce, and to shape the pattern of its State economy, and the objectives they are intended to reach; and the State of Georgia is impeded and distrained in the lawful exercise of its police power. In Count One of this complaint the State of Georgia brings this action for the maintenance of its right to discharge its obligations and sovereignty.

4. **Second Count:** The State of Georgia sues in this Count in its quasi-sovereign capacity or as agent and protector of the people of Georgia. It brings suit, as representative of the public, on behalf of the people of Georgia as an organized community, who have been harmed in their interests and impeded in their development by a conspiracy of persons in other States, in violation of the Antitrust Laws of the United States, and in violation of the common law prohibition of torts as well as in violation of the common law against conspiracy. The people of Georgia as an organized society, with a changing population, constantly carries on. Into this community individuals come by birth or immigration, and out of it individuals pass by death or emigration. Its prosperity is a matter of solicitude to the State of Georgia, one of whose great obligations is to safeguard and promote its general welfare.

The State of Georgia, as plaintiff, asserts that the people of Georgia, as an organized entity, have the right to enjoy the conditions of prosperity, and to share equally with other States in the opportunities which the progress of the nation brings. Yet, the people of Georgia as an organic entity have over the years been harmed in their liberties, properties, and estates by the conspiracy mentioned in Section 3 above and recited in detail in Sections 9 through 16 below. Because of this conspiracy, which is made manifest in freight rates, originated in collusion and perpetuated by private bodies acting without the sanction of legal authority, markets have been put beyond the reach of Georgia citizens and corporations. Because of the lack of national markets caused by the conspiracy of defendants which manifests itself in unfair and prejudicial freight rates to Georgia and its citizens, crops have not been grown, factories have not been built, funds have not been invested, employment has not been created, resources have not been exploited, and the State economy, geared to the national economy, has not been developed as otherwise it would have been.

It is impossible to say how great this retardation has been as the result of this conspiracy. The wrong done transcends that experienced by individuals. For as men, firms, and corporations have come and gone, the conspiracy has continued over the decades. Each year opportunities have had to be foregone, which, were it not for the conspiracy herein recited, would have been available. And since opportunities have been continually lost, and once lost are never recovered, the State economy has year by year become less adequate than otherwise it would have been to the needs of the people. The State of Georgia sues on behalf of a people, whose composition changes, but which as an organized society endures. It may be that the harm done to the people as an organized community cannot be reduced to the precise terms of dollars and cents; it does not follow that, for lack of a standard of exact measurement, no wrong has been done.

The people of Georgia have further been injured and distrained by the conspiracy of the common carriers, enumerated in Sections 9 through 16 below, which has resulted in a preference to the seaports of other States over those of Georgia. There are located in the State of Georgia the ports of Savannah and Brunswick, which are of such size and character as to permit vessels to enter and transport commodities in interstate and foreign commerce thereto and therefrom. Defendants, by their rates and practices, give preference and advantage in rates on domestic traffic to and from the North Atlantic ports of Baltimore, Philadelphia, New York, Boston, and other related ports over the ports of Savannah and Brunswick, to the injury and prejudice of the sovereign State of Georgia and to the citizens therein. Illustrative of this, on shipments from Alton, Illinois, in Official territory as hereinafter defined, to Baltimore, Maryland, the first class rate is $1.68 per one hundred pounds, while to Savannah, Georgia, six miles less in distance, the rate is $2.39.

5. **Third Count:** The State of Georgia in this Count sues in its proprietary capacity. It asserts and claims a direct interest in the controversy and states that only the power of this Honorable Court can redress its wrongs suffered as a result of the acts of the defendants and save the State of Georgia from irreparable injury. The direct interest of the State of Georgia in this controversy is as follows:

(a) The State of Georgia has built, and owns and operates, State Hospitals, experimental farms, penal and educational institutions, various public administration buildings and plants, and constructs roads and bridges, and for these it has bought and sold, and buys and sells, commodities shipped from or to Georgia, to or from other States, including, among others, asphalt, agricultural implements, automobiles and trucks, canned goods, cement, hardware, road and heavy duty machinery, motor oils, greases, paints, tires, truck parts, drugs, textiles, dry goods and groceries. As to those state-owned institutions and operations, the State of Georgia has paid and now pays the extortionate and illegal freight rates, fixed by the defendants for the transportation of said commodities to the State's irreparable damage. Rates on some of these commodities, which are typical of the rate relationship under which Georgia suffers, are shown in Exhibit 1 attached hereto and made part hereof. These rates show the higher rates actually paid by the State of Georgia on these commodities which are necessary to, and used or sold by, said State institutions. Illustrative of the damages suffered by the State of Georgia as a result of excessive and illegal freight rates, is a shipment from Bucyrus, Ohio, to East Point, Georgia, under date of May 22, 1944, in which the State of Georgia paid the freight on two road graders purchased by and shipped to the State at the freight rate of 79¢ per 100 pounds of weight. The weight of these machines was 4,800 pounds and at the rate of 79¢ per 100 pounds charged by the defendants, the freight amounted to $379.20, which amount was paid by the State of Georgia. The Official rate for trans-

porting the same road graders a like distance in Official territory was and is 56¢ per 100 pounds. At the Official rate the State of Georgia would have paid the sum of $268.80 rather than the sum of $379.20. The damage to the State of Georgia, complained of herein, is both direct and consequential, and no remedy at law save a plea to this Court is adequate to protect the State against such damages.

(b) The State of Georgia owns the Western and Atlantic Railroad, with a line extending between Atlanta, Georgia, and Chattanooga, Tennessee. This road is now under lease which terminates December 27, 1969, to the Nashville, Chattanooga and St. Louis Railway. The rate system, which is a result of the conspiracy on the part of the defendants named herein, complaint against which is here made, has lessened, and will continue to lessen, the establishment of industries on said line, lessened the amount of freight handled, and decreased the rental and the sales value of said railroad, to the irreparable injury and damage of complainant.

. 6. **Fourth Count**: The State of Georgia in this Fourth Count, sues on behalf of a general class of its citizens made up largely of farmers, manufacturers, merchants, and shippers, who, in the payment of extortionate charges for freight carriage, have suffered the impact of the conspiracy, and who, because of it, have been injured in being denied the opportunity to expand their businesses and thereby enhance the general welfare of all the citizens of the State. The original jurisdiction of this Honorable Court is here being invoked by the State of Georgia as parens patriae, trustee, guardian, or representative of all or a considerable portion of its citizens who have suffered pecuniary damage by reason of the conspiracy complained of, and through railroad rates, imposed and maintained through said conspiracy, in violation of the common law against torts, the common law against conspiracy, and in violation of the Antitrust laws of the United States.

The incidence and effect of this conspiracy as stated in all four counts herein has been continuous and cumulative.

THE DEFENDANTS

7. Complainant shows that all of the defendants are identical in each of the Four Counts enumerated in this amended bill. The defendants are: The Pennsylvania Railroad Company, a resident of the State of Pennsylvania; The Baltimore and Ohio Railroad Company, a resident of the State of Maryland; Chicago and Eastern Illinois Railroad Company, a resident of the State of Indiana; Chicago, Indianapolis and Louisville Railway Company, L. F. De Ramus and Holman D. Pettibone, Trustees, a resident of the State of Indiana; The Chesapeake and Ohio Railway Company, a resident of the States of Virginia and West Virginia; Erie Railroad Company, a resident of the State of New York; The New York Central Railroad Company, a resident of the States of New York, Ohio, Illinois, Indiana, Pennsylvania, and Michigan; The New York, Chicago and St. Louis Railroad Company, a resident of the States of New York, Ohio, Illinois, Pennsylvania and Indiana; Norfolk and Western Railway Company, a resident of the State of Virginia; Richmond, Fredericksburg and Potomac Railroad Company, a resident of the State of Virginia; Wabash Railroad Company, a resident of the State of Ohio; and Western Maryland Railway Company, a resident of the States of Maryland and Pennsylvania. The greater part of the transportation service of the above named defendants is within Official Classification territory as hereinafter defined. For convenience, these are hereinafter called "Northern defendants." Complainant further makes defendants Atlantic Coast Line Railroad Company, a resident of the State of Virginia; Carolina, Clinchfield and Ohio Railway, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, lessees, a resident of the State of Virginia; Illinois Central Railroad Company, a resident of the State of Illinois; Gulf, Mobile and Ohio Rail-

road Company, a resident of the States of Alabama, Missi
sippi and Tennessee; Louisville and Nashville Railroa
Company, a resident of the State of Kentucky; The Nash
ville, Chattanooga and St. Louis Railway, a resident of th
State of Tennessee; Seaboard Air Line Railway Company
L. R. Powell, Jr., and Henry W. Anderson, Receivers,
resident of the State of Virginia; and Southern Railwa
Company, a resident of the State of Virginia. These las
named defendants operate principally in Southern terr
tory as hereinafter defined, although the Illinois Centra
Railroad Company, the Louisville and Nashville Railroa
Company, and the Southern Railway Company, have line
extending into Official territory.

8. "Official territory" as used herein, originally an
broadly meant that part of the United States north of th
Ohio and Potomac Rivers, and east of the Mississipp
River, and the west boundary of the State of Illinois, an
for convenience is hereinafter called "North." Defendant
have enlarged this territory by including therein points o
the Ohio River, from Cairo, Illinois, to Kenova, West Vi
ginia, thence easterly via the main line of the Norfolk an
Western Railway Company through Bluefield, West Vi
ginia, and Walton, Virginia, to Roanoke, Virginia; thenc
via the main line of the Virginian Railway to Norfolk, Vi
ginia. "Southern territory," hereinafter called "South,
is that part of the United States east of the Mississipp
River and south of Official territory.

THE CONSPIRACY

The conspiracy complained of in these sections, particu
larly Sections 9 through 16, applies with equal force to a
Four Counts enumerated in this bill of complaint.

9. All of the defendants have, using therefor some sixt
rate bureaus, committees, conferences, associations, an
other private rate fixing agencies (See Exhibit 2 attache
hereto and made a part hereof, and reference theret
prayed), entered into and engaged in unlawful and wrong

ful contracts, combinations, agreements and conspiracies in restraint of trade and commerce among the several States, and have monopolized a substantial part of such trade and commerce, and have fixed and established by concerted action and collusion arbitrary and noncompetitive rates and charges for transportation of freight by railroad in said trade and commerce, and have so fixed the rates and charges on transportation to and from the State of Georgia as to prefer the ports of other States over the ports of Georgia, and have thus, and by their rates and practices, so unlawfully and wrongfully fixed and established, exacted from the State of Georgia as owner of State institutions, and from shippers in Georgia who are under the sovereign protection of said State, charges for transporting commodities, which charges are unjust, unreasonable, arbitrary, noncompetitive and favorable to localities, ports, and shippers outside of Georgia, and to the disadvantage, harm, hurt, prejudice, and injury of the State of Georgia, its ports, and shippers therein who ship commodities in commerce among the several States.

10. All defendants, conspiring, combining, confederating, and agreeing jointly, using therefor the agencies named in Exhibit 2, here again referred to and made part hereof, have adopted and do adopt arbitrary and non-competitive rates and charges for transportation of commodities among the several States that have been and are collected by each rail carrier engaged in such commerce. Any proposal to change the rates and charges for transportation in such commerce, must be considered and acted on by some of such agencies, with power in the highest thereof finally to decide whether such proposal shall be accepted or rejected. No line can change joint through rates without the approval of the private rate-fixing agencies created by defendants. The effect of this conspiracy is unjustly and oppressively to increase and augment the said rates and charges, and to counteract the effect of competition on the facilities and rates of transportation, and to establish and maintain arbi-

trary and non-competitive rates, and to prevent any one of said defendants from reducing such arbitrary and non-competitive rates, and thereby to exact and collect great sums of money from the State of Georgia and the people of Georgia in commerce among the several States.

Defendants by such conspiracy have put into effect and kept in force upon their several lines of railroad the arbitrary and non-competitive rules and regulations, rates and charges for moving, carrying, and transporting freight fixed and established collusively by the defendants, and have declined and refused to establish and maintain on their railroads rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freight over the same, and such other elements as should be considered by each particular railroad in establishing its tariff rates; and the people of Georgia and the State of Georgia have been compelled to and are still compelled to pay the arbitrary and non-competitive rates of freight and submit to the arbitrary rules and regulations established and maintained collusively by the defendants, and have been, for more than ten years, and still are, deprived of the benefits that might be expected to flow from competition between said several lines of transportation and communication, and have been and are deprived of cheaper rates that would flow from competition among the defendants; and said defendants have monopolized and restrained, hindered, injured and retarded said interstate trade, traffic, and commerce, including the transportation of freight to and from the State of Georgia, by means and through the instrumentality of such conspiracy, and the agencies named in said Exhibit 2.

11. In furtherance of the conspiracy the defendants by concerted action have established and utilized, and now utilize, numerous rate bureaus, conferences, committees, associations, and other private means and rate-fixing agencies as shown in Exhibit 2. For this purpose the United States is divided into several zones and territories, in each

of which certain of such private rate-fixing agencies and other concerted means function. Defendants have also established joint conferences and other private machinery for fixing rates between points which are not located within the territory of a single rate association, but which are located in different rate-making territories. Such rates are commonly called interterritorial rates. The Southern States east of the Mississippi River, including the State of Georgia, constitute what is known as Southern Territory, hereinbefore described. In Southern Territory the principal rate-fixing organization of defendants is the Southern Freight Association, with headquarters at Atlanta, Georgia. The Southern Freight Association is an unincorporated, voluntary association composed of railroads operating in Southern Territory and utilized by all the defendants. It maintains the Southern Freight Tariff Bureau and the New Orleans Freight Tariff Bureau as publishing agents which publish in tariff form the rates agreed upon by the rate committees of the Southern Freight Association. When any member carrier in the Southern Freight Association desires to inaugurate a new rate or a change in existing rates, a proposal is submitted to the Southern Freight Association, addressed to the Chairman thereof. Copies must be furnished in sufficient number for distribution to member lines. The Chairman may himself initiate proposals. Proposals are circulated to member lines, bearing a notification that unless objections thereto are received within fifteen days of the date of submittal, it shall be assumed that there is no objection thereto. The original of every proposal filed by any member carrier, and every objection made by a member carrier to the proposal, must bear the personal signature of a traffic officer of the rank of Assistant General Freight Agent, or higher, otherwise it shall not be considered. A Standing Rate Committee, composed of four members elected by unanimous vote of the Executive Committee of the Southern Freight Association, by majority vote makes recommendations with respect to proposals submitted. If

the Standing Rate Committee makes a recommendation approving a proposal, and if objection has not been made by member carriers the proposal is approved and published in tariff form. If objection is made by three member carriers (an objection by the Standing Rate Committee having the same weight as an objection by a member carrier), the proposal is considered by the General Freight Committee of the Association. The General Freight Committee is composed of traffic officers of member carriers having the rank of Assistant General Freight Agent, or higher, and designated by the Chief Traffic Officer of such carriers.

The Chairman of the Southern Freight Association, or any member carrier thereof, may appeal to the Executive Committee of the Association from the recommendation of the General Freight Committee for or against any proposal. The Executive Committee of the Association is composed of the chief traffic officers of the member carriers. The Chairman of the Southern Freight Association or any member carrier may appeal from the action of the Executive Committee to the Traffic Executive Association—Southern Territory. That organization is composed of the chief traffic officers of the principal railroads of the southern region of the United States, and supervises and coordinates the affairs of the Southern Freight Association, Southern Passenger Association, and Southern Classification Committee. The Southern Passenger Association supervises the fixing of passenger fares among the railroads of the association. The Southern Classification Committee fixes classification ratings on traffic of the railroads within the Southern Territory, and acts with the Consolidated Classification Committee in fixing classification ratings on joint traffic which the southern railroads and railroads of other freight territories transport. The Chairman or a member carrier may appeal to the Southeastern Presidents' Conference from the action of the Traffic Executive Association—Southern Territory. Proposals dealing with coal and coke are not considered by the Standing Rate Committee or by the

General Freight Committee, but are considered by a committee of the Southern Freight Association known as the Coal and Coke Committee. This Committee consists of representatives of eight coal originating railroad lines. The action of the Coal and Coke Committee may be appealed by the Chairman or a member carrier to the Executive Committee of the Association.

The above-described procedure is employed both in connection with rates applicable between points located in Southern Territory and in connection with rates between a point located in Southern Territory and a point located in another territory. In connection with interterritorial rates, however, a similar procedure is pursued simultaneously for consideration of the proposal by the rate bureaus, conferences, committees, associations, or other private rate-fixing organizations handling rate matters in the other territory or territories affected by the proposal. Before an interterritorial rate is published, it must obtain the approval of the private rate-fixing organizations of all the territories involved. In the event these organizations do not reach an identical recommendation, the proposal is considered by an organization known as the Joint Conference of Contact Committees. This organization is composed of representatives of the rate associations of various territories. The Southern Freight Association is represented on the Joint Conference of Contact Committees by its Contact-Fourth Section Committee. There are seven territories represented on the Joint Conference of Contact Committees, to-wit: Trunk Line, Illinois Freight Association, Southwestern, Western Trunk Line, New England, and Central Freight Association territories, each of said territories having one vote.

Through this intricate private rate-fixing machinery which is not sanctioned by the Interstate Commerce Act and is prohibited by the Antitrust Acts, rates within, to and

from the State of Georgia and the South, are effectively controlled by the defendants herein.

12. The monopolistic practices hereinbefore described, participated in by defendants, were intended to be and were, and are, effective in giving manufacturers, sellers, and other shippers in the North an advantage over manufacturers, shippers, sellers, and buyers in the State of Georgia, to the prejudice, disadvantage and damage of Georgia and the Georgia citizens who use, and in many cases must use, the facilities of defendants. Such illegal acts, concerted action, and practices participated in and made possible by the illegal acts of the defendants, burden and continue to burden commerce among the several States, by preventing, lessening, and burdening, trade, industry, and manufacturing in Georgia, to the injury and damage of the State of Georgia and its citizens. The result of such illegal acts of the defendants has been and continues to be a restraint on the development of Georgia by preventing the State and the citizens thereof from fully and freely utilizing their natural resources. Defendants by their illegal acts have participated and continue to participate in injury and damage to plaintiff and the citizens thereof, and lay a burden on commerce from and to Georgia to and from points in other States.

13. The Southern defendants, with lines wholly or principally in the South, generally are dominated and coerced by the Northern defendants, and therefore, even when the Southern defendants desire, they cannot publish joint-through rates between Georgia and the North when the northern carriers refuse to join in such rates.

14. The defendants, by reason of the joint actions and agreements aforesaid, have the power to, and do, fix rates and charges for transportation of some commodities in commerce among the several States, between points in the North and points in Georgia, which are approximately 39 per cent higher than the rates and charges for transporta-

tion of like commodities for like distances between points in the North.

15. The cost of transportation in the South is possibly less, and certainly no more, than in the North; but the defendants, by virtue of their illegal combination, make rates on the principle that charges for transportation should be determined by considering what the traffic will bear.

16. Illustrations of the unlawfulness of the practices and rates of defendants appear from an exhibit attached hereto and made part hereof, in the form of a table, marked Exhibit 3. This exhibit shows rates between Georgia points and points in the North and in Official territory, for substantially the same distances, and although limited to a few items is illustrative of the general situation, and reference thereto is prayed.

THE SUPREME COURT THE CONSTITUTIONAL FORUM

17. If the conspiracy to hinder the State of Georgia in the exercise of its powers of sovereignty, to injure the people of Georgia and to impede their development, and to wrong the State as a proprietor and its individual citizens as shippers were local, the State of Georgia invoking its own legal process would be able to protect itself. It could invoke its own constitutional prohibition against monopolies as contained in Art. IV, Sec. II, Par. IV of the State Constitution; go into its own courts, secure relief, and put an end to the conduct of which it complains. But, in respect to the matters in issue here, the parties defendant are not citizens of Georgia, or within the jurisdiction of its courts; the conduct in question occurs within the domain of commerce among the several States; the conspiracy continues to be executed out of the reach of the State's own legal process.

18. To the State of Georgia no administrative remedy is open. The complaint alleges actions which constitute a common law tort, are contrary to the common law against conspiracy, and violate the antitrust laws. The tort is committed and the conspiracy operates in a domain which lies beyond the authority of any administrative agency. The Interstate Commerce Commission, to which specified duties in respect to the regulation of railroads have been delegated, has been entrusted with no jurisdiction over a conspiracy to restrain trade and commerce among the several States. The Interstate Commerce Act confers upon the Commission no power to afford relief from a conspiracy among common carriers; nor does it exempt such a rate-fixing conspiracy as is recited here from the operation of the Antitrust Laws of the United States, which prohibits every contract, combination, and conspiracy in restraint of trade.

Nor is it a schedule of rates, or a series thereof, which is the basic objective of the causes of action set forth above. The schedules of rates are mere manifestations of a conspiracy in restraint of trade which has operated, and continues to operate, to the harm, injury, and detriment of the State and the citizens of Georgia. No administrative proceeding directed against a particular schedule of rates would afford relief to the State of Georgia so long as the defendants remained free to promulgate rates by collusive agreement. Until the conspiracy is ended, the corrosion of new schedules, established by the collusive power of the defendant carriers acting in concert, would frustrate any action sought to be taken by administrative process to redress the grievances from which the State of Georgia suffers.

19. The issues presented here constitute a justiciable question. The action is against a conspiracy among private parties, operating without legal warrant, imposing wrongs on the State and the citizens of Georgia, and existing in

violation of the common law against tort, the common law against conspiracy, and the Antitrust Laws of the United States. The conspiracy organized years ago and in continuous operation is manifest, among other things, in freight rates which are prejudicial to the interests of the State and the citizens of Georgia. There is in the federal statutes no legal recognition of collective or collusive action for the fixing of railroad rates. It is not a specific rate structure which the State of Georgia attacks but a continuing situation, created and maintained by a conspiracy of carriers. Relief is sought in this Court against a conspiracy which imposes unjust and unreasonable charges for transportation; impedes and distrains the State of Georgia in the exercise of its sovereignty in developing its resources, encouraging its industry and commerce, insuring adequate employment of its citizens, protecting its people by the exercise of its police power, and gearing its economy to the national economy; and injures and hinders citizens, as individuals and as a people. The law entrusts controversies of this character to the Courts of the United States, which are open to the United States, to a State of the Union, or to any individual, natural or corporate, which can show itself harmed or distrained by a conspiracy affecting commerce among the several States. The causes of action herein set forth are of a justiciable, not an administrative, character.

20. For an action of the kind which the State of Georgia seeks to bring, the Supreme Court of the United States is the constitutional forum. As a suit between a State and the citizens of other States, this case falls squarely within the jurisdiction of this Court. That forum is appointed, whatever be the legal grounds of the cause of action; whether an Act of Congress, the laws of a State, or the common law. The source of the jurisdiction of this Court is not an Act of Congress, but the Constitution itself. And since the right here to sue is conferred by the Constitution, it is not subject to abridgement or denial. The Framers of

the Constitution anticipated situations in which a wrong might be done to a State by a conspiracy of citizens of other States. In respect to exactly such a situation the State of Georgia appeals to this Court in behalf of its sovereignty, the exercise of its police power, the opportunity to discharge its obligations to the people of Georgia, and the protection of its own proprietary rights and those of its citizens.

DAMAGES AND INJURIES SUSTAINED BY COMPLAINANT

21. **First Count:** *Suit by the State of Georgia in its sovereign capacity.* It is impossible accurately to calculate the damages in dollars and cents which the State of Georgia and its citizens have suffered as a direct and proximate result of the illegal acts of the defendants complained of herein. The State of Georgia has suffered damages which would run into the millions of dollars, or in fact, in an amount which would be beyond the power of these defendants to pay. The State of Georgia respectfully requests this Honorable Court to grant token damages in an amount which seems proper to the Court and in order to vindicate the position of the State in this controversy. The State claims for and on behalf of the general public of the State token damages in such amount as may be fixed by this Court, which amount the State of Georgia submits should not be less than five million dollars.

Second Count: *Suit by the State of Georgia as a quasi-sovereign.* It is likewise impossible accurately to calculate the damage done to the people of Georgia over the decades as an organized community as a direct result of the acts of the defendants complained of herein. The State, as representative of the public, has an interest in preventing a conspiracy among the defendants which manifests itself in unjust freight rates against the people of this State as an organized community. It is respectfully requested that the Court award the State of Georgia token damages as a rep-

resentative of the people—as a quasi-sovereign—in an amount which the State of Georgia submits should not be less than five million dollars.

Third Count: *Suit by the State of Georgia in its proprietary capacity.* The State of Georgia suing in its proprietary capacity as a shipper of goods and commodities has been damaged by the unlawful rates and practices herein described in a sum to-wit, $250,000.00 during the past ten years next preceding the filing of this complaint. Under the common law the State is entitled to the sum of $250,000.00 as damages, while under the provisions of the antitrust laws the State is entitled to a judgment three times that amount, or $750,000.00.

Fourth Count: *Suit by the State of Georgia as protector of a general class of its citizens.* The State suing in its capacity as protector and in behalf of a particular general class of its citizens who have been damaged by the acts of which complaint is made herein, alleges that not less than two million dollars annually has been exacted of shippers, farmers, merchants, and manufacturers, for the use of which complainant asks damages in treble thereof, and shows that as a result of the illegal acts herein complained of, defendants have further damaged the State of Georgia and the citizens thereof, by preventing trade and the use and development of commerce among the several States, that is, between Georgia and northern and eastern States.

PRAYER FOR RELIEF

22. In consideration whereof, the complainant respectfully prays:

(a) That this amended bill of complaint be filed as an amendment to and substitute for the original bill of complaint.

(b) That complainant be granted a writ of subpoena to be directed to the aforenamed defendants and each of them, thereby commanding them and every one of them at a certain day and under a certain penalty therein to be specified,

personally to be and appear in this Honorable Court, and then and there to answer to all and singular the premises, and to stand to perform and abide such order, judgment, and decree therein as to this Honorable Court shall seem agreeable to law, equity, and good conscience.

(c) That the defendants, and all officers, directors, agents, employees, representatives, and all persons, corporations, and associations, acting or claiming to act on behalf of any of the aforesaid defendants, be perpetually enjoined from engaging in, continuing, or reviving any of the aforesaid violations of law, and from engaging in or participating in any agreements, practices, contracts, relationships, arrangements or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving, or renewing any of the aforesaid violations of law, and from conspiring and confederating in the establishment of rates and charges to be exacted from the State of Georgia and the citizens thereof for transportation in commerce among the several States.

(d) That the contracts, agreements, understandings, arrangements, combinations, and conspiracies in restraint of trade and commerce, as hereinabove described, and the aforesaid monopolizing of a substantial part of said trade and commerce, be adjudged and decreed to be unlawful, as a tortious, wrongful, violation of complainant's rights under the common law, and as a violation of the Antitrust Laws of the United States.

(e) That this Court adjudge and decree that the defendants have combined and conspired to restrain trade and commerce, and have monopolized a substantial part of said trade and commerce, in violation of the common law prohibitions against torts and against conspiracies in restraint of trade and monopolizing, and in violation of the Antitrust Laws of the United States.

(f) That the complainant have judgment against the defendants in the sum of five million dollars as token damages under Count One of this complaint and in the sum of five

million dollars as token damages under Count Two of this complaint.

(g) That the complainant have judgment against the defendants in the sum of $250,000.00 as damages under Count Three in respect of the injury done to the State of Georgia in its proprietary capacity; and that the complainant have judgment, in accordance with Section 7 of the Sherman Antitrust Act, for three times said amount, to-wit $750,000.00.

(h) That complainant have judgment against the defendants for damages under Count Four in respect of the wrongs sustained by its individual citizens.

(i) That this Court grant such relief as is necessary and proper permanently to safeguard and secure the sovereignty of the State of Georgia, the rights of its people, and the interests of its citizens against continuation or repetition of the wrongs and injuries inflicted upon them by the conspiracy against which complaint is made.

(j) That this Court enter such orders and take such steps as may be appropriate to the speedy trial and adjudi-

cation of this cause upon its merits in accordance with due process of law.

(k) That the complainant have such other, further, and different relief as the nature of the case may require and the Court may deem just and proper.

(l) That the complainant recover its taxable costs.

THE STATE OF GEORGIA,

BY:

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,

CLAUDE SHAW,
Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for Complainant.

VERIFICATION

UNITED STATES OF AMERICA
STATE OF GEORGIA
COUNTY OF FULTON

ss.

T. GRADY HEAD, being first duly sworn, according to law, deposes and says that he is Attorney General for the State of Georgia; that he has read the foregoing amended bill of complaint; that the facts contained in said amended bill of complaint, which are within his own knowledge, are true and correct and that the facts averred upon information received from others are based upon information received from reliable sources and which facts he believes are true, and that as such Attorney General of the State of Georgia, he is duly authorized to pray leave to file, and file, the said amended bill of complaint.

T. GRADY HEAD

Attorney General
of the State of Georgia.

Subscribed and sworn to before me by T. Grady Head, this 15th day of September, 1944.

MAUD SAUNDERS

Notary Public, Georgia,
State at Large.

My commission expires the 31st day
of October, 1945.

RATES ON HEATERS, TANK CARS, CARLOAD
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rate	Official Basis
Chicago, Ill.	Atlanta, Ga. (East Point)	729	84	61

RATES ON CANNED, PRESERVED OR PREPARED FOODSTUFFS, C.L.
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rate	Official Basis
Ridgely, Md.	Athens, Ga.	(a) 713	68	46
Baltimore, Md.	Athens, Ga.	625	65	43
Deerfield, N. J.	Athens, Ga.	(b) 806	71	49
Newark, N. J.	Athens, Ga.	(c) 968	79	54
Greenwood, Ind.	Athens, Ga.	(d) 632	67	43
Cumberland, Wisc.	Athens, Ga.	1177	92	61
Newport, Tenn.	Athens, Ga.	282	33	29

(a)—Grouped with Philadelphia, Pa., distance shown is from that point.
(b)—Grouped with New York, N. Y., distance shown is from that point.
(c)—Grouped with Syracuse, N. Y., distance shown is from that point.
(d)—Grouped with Indianapolis, Ind., distance shown is from that point.

RATES ON EMPTY TIN CANS, CARLOAD,
MINIMUM WEIGHT 30,000 LBS.
(Rates in Cents per 100 Pounds)

FROM:	TO:	Miles	Rate	Official Basis
Tampa, Fla.	Atlanta, Ga.	477	68	48
Tampa, Fla.	Athens, Ga.	494	69	49
Baltimore, Md.	Atlanta, Ga.	684	78	60

RATES ON AUTOMOBILES, CARLOAD
(Rates in Cents per 100 Pounds)
TO: Atlanta, Ga.

		Passenger Automobiles RATE			*Freight Automobiles* RATE		
		Truck			Truck		
FROM:	Miles	Normal Basis	Competitive Basis	Official Basis	Normal Basis	Competitive Basis	Official Basis
Detroit, Mich.	729	211	196	153	179	121	130
Flint, Mich.	775	219	196	157	186	124	133

RATES ON PAINTS, STAINS OR VARNISHES, NOIBN., CARLOAD
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rate	Official Basis
Cleveland, O.	Atlanta, Ga.	714	83	53

RATES ON AGRICULTURAL IMPLEMENTS, VIZ: DISC H
GRAIN DRILLS, C.L.
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Ra
Auburn, N. Y.	Atlanta, Ga.	1010	8
Richmond, Ind.	Atlanta, Ga.	540	6

RATES ON TRACTORS, STEAM OR INTERNAL COMBUST
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Ra
W. Allis, Wis.	Atlanta, Ga. (East Point) (b)	812	8
Rock Island, Ill.	Atlanta, Ga.	786	8

(b)—Grouped with Milwaukee, Wis., distance shown is from that

RATES ON TRACTORS AND MOWERS COMBINED, OTHE
LAWN, WITH CUTTER BARS ATTACHED, CARLOA
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rat
LaCrosse, Wis.	Atlanta, Ga. (East Point)	960	99
Moline, Ill.	Atlanta, Ga. (a)	786	87

(a)—Grouped with Rock Island, Ill.—Distance shown is for that

RATES ON GRADERS AND TRACTORS, COMBINED, CAR
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rate
Bucyrus, O.	Atlanta, Ga. (East Point)	638	79
Indianapolis, Ind.	Atlanta, Ga. (East Point)	559	75

RATES ON BLADES, OR CUTTING EDGES, GRADER OR SCR
C.L. AND L.C.L.
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rates		O
			CL	LCL	CL
Bucyrus, O.	Atlanta, Ga. (East Point)	638	61	79	44

RATES ON TIRES, PNEUMATIC, CARLOAD
(Rates are in Cents per 100 Pounds)

FROM:	TO:	Miles	Rate
Akron, O.	Atlanta, Ga.	716	(a) 96

(a)—Applies on minimum weight 20,000 pounds. Rate of 84c applies o
mum weight 30,000 pounds.

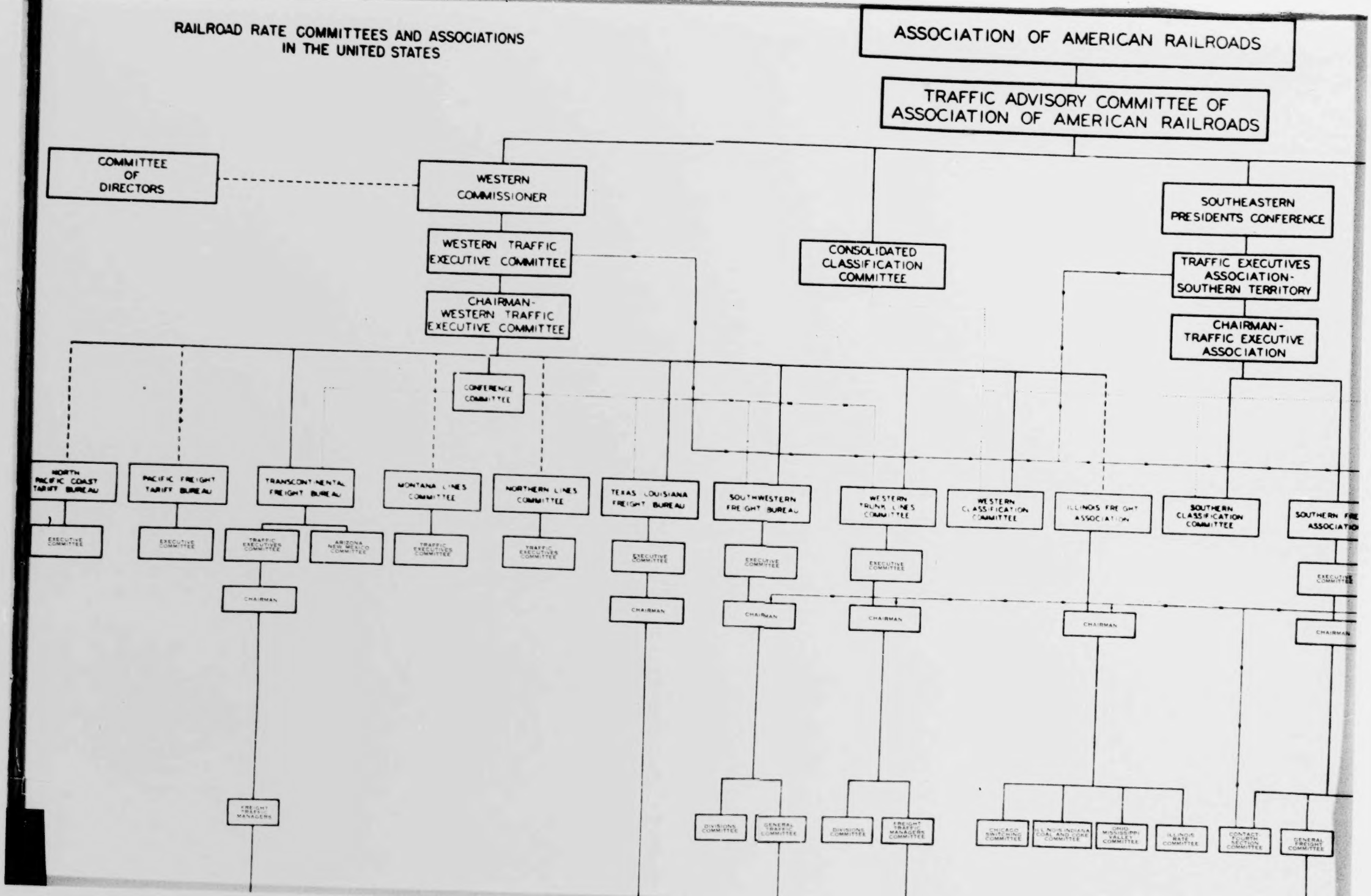
RATES ON MANUFACTURED IRON AND STEEL ARTICLES, LESS CARLOAD, APPLICABLE ON INTERSTATE TRAFFIC FOR DISTANCES SHOWN (NOTE)

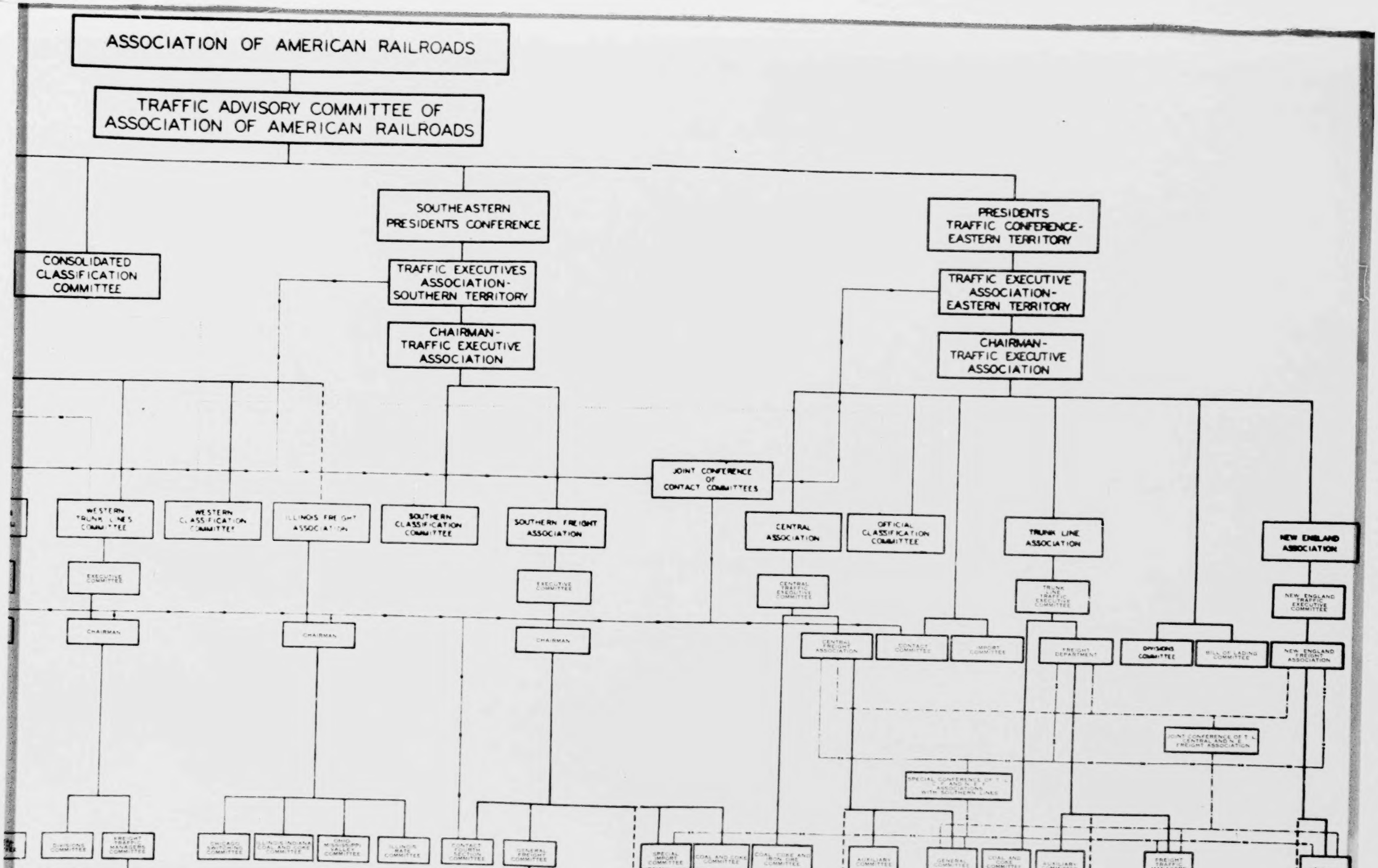
(Rates are in Cents per 100 Pounds)

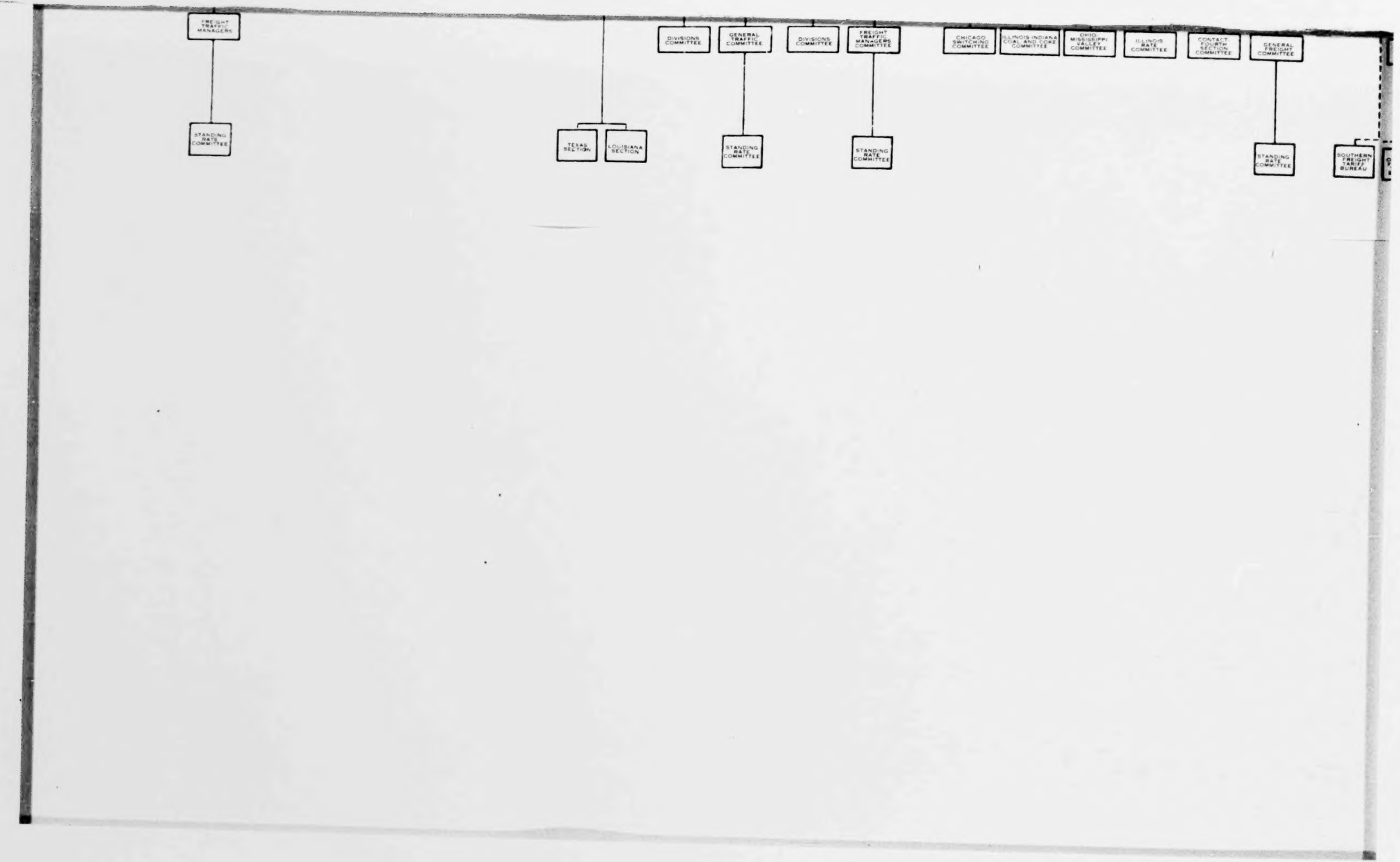
	Southern Territory	*Official Territory*
50 Miles	23	19
100 Miles	32	25
150 Miles	38	29
200 Miles	45	32
250 Miles	50	36
300 Miles	54	38
350 Miles	59	41
400 Miles	62	44
450 Miles	66	47
500 Miles	69	49

NOTE—Rates applicable on Georgia intrastate traffic approximate Official territory level for single line hauls. But interstate rates control price of purchases by the State of Georgia, as iron and steel purchased in less carload quantities is sold on Birmingham, Ala., with freight added.

RAILROAD RATE COMMITTEES AND ASSOCIATIONS IN THE UNITED STATES




ASSOCIATION OF AMERICAN RAILROADS
TRAFFIC ADVISORY COMMITTEE OF ASSOCIATION OF AMERICAN RAILROADS
CONSOLIDATED CLASSIFICATION COMMITTEE
SOUTHEASTERN PRESIDENTS CONFERENCE
TRAFFIC EXECUTIVES ASSOCIATION-SOUTHERN TERRITORY
CHAIRMAN-TRAFFIC EXECUTIVE ASSOCIATION
PRESIDENTS TRAFFIC CONFERENCE-EASTERN TERRITORY
TRAFFIC EXECUTIVE ASSOCIATION-EASTERN TERRITORY
CHAIRMAN-TRAFFIC EXECUTIVE ASSOCIATION
JOINT CONFERENCE OF CONTACT COMMITTEES
WESTERN TRUNK LINES COMMITTEE
WESTERN CLASSIFICATION COMMITTEE
ILLINOIS FREIGHT ASSOCIATION
SOUTHERN CLASSIFICATION COMMITTEE
SOUTHERN FREIGHT ASSOCIATION
CENTRAL ASSOCIATION
OFFICIAL CLASSIFICATION COMMITTEE
TRUNK LINE ASSOCIATION
NEW ENGLAND ASSOCIATION
EXECUTIVE COMMITTEE
CHAIRMAN
CENTRAL TRAFFIC EXECUTIVE COMMITTEE
TRUNK LINE TRAFFIC EXECUTIVE COMMITTEE
NEW ENGLAND TRAFFIC EXECUTIVE COMMITTEE
CENTRAL FREIGHT ASSOCIATION
CONTACT COMMITTEE
IMPORT COMMITTEE
FREIGHT DEPARTMENT
DIVISIONS COMMITTEE
BILL OF LADING COMMITTEE
NEW ENGLAND FREIGHT ASSOCIATION
JOINT CONFERENCE OF T.T. CENTRAL AND N.E. FREIGHT ASSOCIATION
SPECIAL CONFERENCE OF T.T. CENTRAL AND N.E. ASSOCIATIONS WITH SOUTHERN LINES
CHICAGO-SOUTHERN COMMITTEE
OHIO-INDIANA COAL AND COKE COMMITTEE
OHIO-MISSISSIPPI VALLEY COMMITTEE
ILLINOIS RATE COMMITTEE
CONTACT FOURTH SECTION COMMITTEE
GENERAL FREIGHT COMMITTEE
SPECIAL IMPORT COMMITTEE
COAL AND COKE COMMITTEE
AUXILIARY COMMITTEE
GENERAL COMMITTEE
COAL AND COKE COMMITTEE
AUXILIARY COMMITTEE
FREIGHT TRAFFIC COMMITTEE


FREIGHT TRAFFIC MANAGERS
STANDING RATE COMMITTEE
TEXAS SECTION
LOUISIANA SECTION
DIVISIONS COMMITTEE
GENERAL TRAFFIC COMMITTEE
STANDING RATE COMMITTEE
DIVISIONS COMMITTEE
FREIGHT TRAFFIC MANAGERS COMMITTEE
STANDING RATE COMMITTEE
CHICAGO SWITCHING COMMITTEE
ILLINOIS-INDIANA COAL AND COKE COMMITTEE
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ILLINOIS RATE COMMITTEE
CONTACT FOURTH SECTION COMMITTEE
GENERAL FREIGHT COMMITTEE
STANDING RATE COMMITTEE
SOUTHERN FREIGHT TARIFF BUREAU

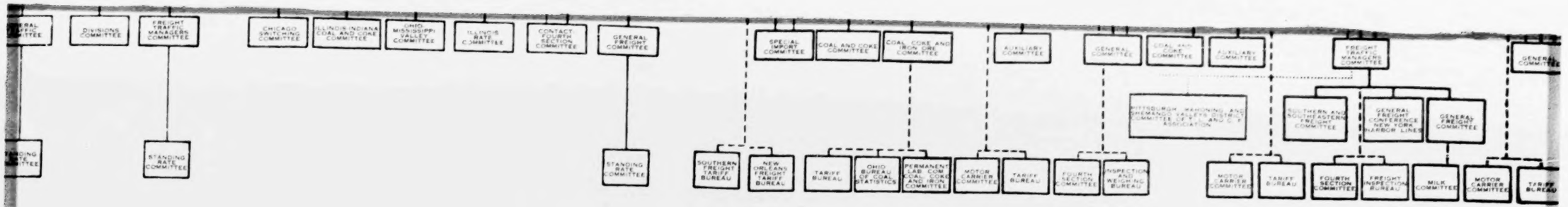

DIVISIONS COMMITTEE
FREIGHT TRAFFIC MANAGERS COMMITTEE
CHICAGO SWITCHING COMMITTEE
ILLINOIS-INDIANA COAL AND COKE COMMITTEE
OHIO MISSISSIPPI VALLEY COMMITTEE
ILLINOIS RATE COMMITTEE
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COAL AND COKE COMMITTEE
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COAL AND COKE COMMITTEE
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FREIGHT TRAFFIC MANAGERS COMMITTEE
SOUTHERN AND SOUTHEASTERN FREIGHT COMMITTEE
GENERAL FREIGHT CONFERENCE NEW YORK HARBOR LINES
GENERAL FREIGHT COMMITTEE
SOUTHERN FREIGHT TARIFF BUREAU
NEW ORLEANS FREIGHT TARIFF BUREAU
TARIFF BUREAU
OHIO BUREAU OF COAL STATISTICS
PERMANENT LAB. CON. COAL COKE AND IRON COMMITTEE
MOTOR CARRIER COMMITTEE
TARIFF BUREAU
FOURTH SECTION COMMITTEE
INSPECTION AND WEIGHING BUREAU
MOTOR CARRIER COMMITTEE
TARIFF BUREAU
FOURTH SECTION COMMITTEE
FREIGHT INSPECTION BUREAU
MILK COMMITTEE
MOTOR CARRIER COMMITTEE

EXHIBIT 2

PRESENT RATES IN CENTS PER 100 POUNDS

WINE, CARLOAD
Minimum Weight 40,000 Lbs.

	FROM Atlanta, Ga.		New York, N. Y.	
	Miles	Rates	Miles	Rates
To: Grand Rapids, Michigan	772	86	772	68

LEAD PIPE, CARLOAD

To: Grand Rapids, Michigan	772	76	776	54

WORK CLOTHING, LESS CARLOAD,

	FROM Macon, Ga.		Philadelphia, Pa.	
	Miles	Rates	Miles	Rates
To: Chicago, Illinois	817	156	814	112

WORK CLOTHING, LESS CARLOAD,

	FROM Chicago, Ill.		Atlanta, Ga.		Macon, Ga.	
	Miles	Rates	Miles	Rates	Miles	Rates
To: Hopkinsville, Kentucky	369	84	362	106	...	...
To: Jackson, Tennessee	478	104	...	...	464	118

SHOES, CARLOAD,

	FROM Atlanta, Ga.		Endicott, N. Y.		Boston, Mass.	
	Miles	Rates	Miles	Rates	Miles	Rates
To: Chicago, Illinois	728	116	696	99	977	117

CANNED VEGETABLES, CARLOAD,

	FROM Griffin, Ga.		Baltimore, Md.	
	Miles	Rates	Miles	Rates
To: Chicago, Illinois	772	62	767	47

	FROM Milledgeville, Ga.		Baltimore, Md.	
	Miles	Rates	Miles	Rates
To: Winston-Salem, N. C.	359	49	360	42

DRUGS, CARLOAD

	FROM Atlanta, Ga.		Philadelphia, Pa.	
	Miles	Rates	Miles	Rates
To: Lima, Ohio	601	87	618	54
Madison, Wisconsin			854	227

PRESENT RATES IN CENTS PER 100 POUNDS
COMPARISON OF FIRST CLASS RATES FROM A SOUTHERN AND AN OFFICIAL TERRITORY ORIGIN TO A DESTINATION IN THE LATTER TERRITORY EQUI-DISTANT FROM THE TWO ORIGINS, AND THE DIFFERENCES IN SUCH FIRST
EXHIBIT 3—Page 2.

FROM	TO	MILES	FIRST CLASS RATES
Atlanta, Georgia	Chicago, Illinois	731	210
Newark, New Jersey	Fort Wayne, Indiana	727	152
	Difference		58
Atlanta, Georgia	Chicago, Illinois	731	210
Danville, Illinois	Washington, D. C.	733	151
	Difference		59
Atlanta, Georgia	Chicago, Illinois	731	210
New York, N. Y.	Fort Wayne, Indiana	734	152
	Difference		58
Atlanta, Georgia	Youngstown, Ohio	769	213
Manchester, Mass.	Columbus, Ohio	769	152
	Difference		61
Macon, Georgia	Chicago, Illinois	819	223
Trenton, New Jersey	Danville, Illinois	819	163
	Difference		60
Atlanta, Georgia	Chicago, Illinois	854	227
Milwaukee, Wis.	Jersey City, New Jersey	844	167
	Difference		60
Augusta, Georgia	Rockford, Illinois	961	243
Watertown, Wis.	Petersburg, Virginia	964	173
	Difference		70

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 10, Original.

THE STATE OF GEORGIA, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., Defendants.

PETITION OF TEN NORTHERN DEFENDANTS FOR REHEARING.

JOHN DICKINSON,
Counsel for The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, L. P. DeRamus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company.

Of Counsel:
ANTHONY P. DONADIO,
K. L. RICHMOND,
B. G. STACKHOUSE,
W. T. PIERSON,
THOMAS P. HEALY,
D. LYNCH YOUNGER,
E. RANDOLPH WILLIAMS,
JOSEPH A. MCCLAIN, JR.,
PAUL S. PARSONS.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, ORIGINAL.

The State of Georgia, Complainant,

v.

The Pennsylvania Railroad Company, et al., Defendants.

PETITION OF TEN NORTHERN DEFENDANTS FOR REHEARING.

And now come The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, L. F. DeRamus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company, defendants in the above entitled cause, being ten of the twelve defendants referred to in the complaint herein as the "northern defendants," and respectfully petition this Court for a rehearing of the said cause.

In support of their petition, these defendants refer to and join in the petition for rehearing simultaneously filed by the eight "southern defendants" herein, and

these defendants adopt as their own the reasons and arguments set forth in said petition of said "southern defendants," in support of the request for rehearing, as if said reasons and arguments were fully set forth in this petition and made a part hereof; and for and on the basis of said reasons and arguments these defendants respectfully urge that a rehearing be granted and that this Court reconsider its decision of March 26, 1945, herein and deny the plaintiff's motion for leave to file its complaint or its amended complaint.

JOHN DICKINSON,
Counsel for The Pennsylvania Railroad Company, The Baltimore & Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, L. F. DeRamus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, Norfolk & Western Railway Company, Richmond, Fredericksburg & Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company.

Of Counsel:
ANTHONY P. DONADIO,
K. L. RICHMOND,
B. G. STACKHOUSE,
W. T. PIERSON,
THOMAS P. HEALY,
D. LYNCH YOUNGER,
E. RANDOLPH WILLIAMS,
JOSEPH A. MCCLAIN, JR.,
PAUL S. PARSONS.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

JOHN DICKINSON, Counsel for above-named Northern Defendants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 12, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

PETITION FOR REHEARING BY THE EIGHT "SOUTHERN DEFENDANTS."

ATLANTIC COAST LINE RAILROAD COMPANY,
By THOMAS W. DAVIS, *Attorney*.
CAROLINA, CLINCHFIELD AND OHIO RAILWAY,
ATLANTIC COAST LINE RAILROAD COMPANY
and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Lessees*,
By THOMAS W. DAVIS,
J. J. MCLAUGHLIN, *Attorneys*.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By J. H. MCCHORD, *Attorney*.
ILLINOIS CENTRAL RAILROAD COMPANY,
By VERNON W. FOSTER, ELMER A. SMITH,
Attorneys.
GULF, MOBILE AND OHIO RAILROAD COMPANY,
By J. N. FLOWERS, *Attorney*.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
By WILLIAM H. SWIGGART, *Attorney*.
SEABOARD AIR LINE RAILWAY COMPANY,
By W. R. C. COCKE, *Attorney*.
SOUTHERN RAILWAY COMPANY,
By S. R. PRINCE, SIDNEY S. ALDERMAN,
Attorneys.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

PETITION FOR REHEARING BY THE EIGHT "SOUTHERN DEFENDANTS."

To the Honorable, the Supreme Court of the United States:

Come now the eight "southern defendants" and present this their petition for a rehearing of the motion of the State of Georgia for leave to file its amended bill of complaint and of the returns of these defendants to the rule to show cause why such leave should not be granted, and for a reconsideration of this Court's opinion and order of March 26, 1945, granting the motion for leave to file the amended complaint and, in support thereof, respectfully show:

I.

THESE DEFENDANTS HAVE NOT HAD AN ADEQUATE OPPORTUNITY TO PRESENT THEIR VIEWS AS TO THE JURISDICTION OF THIS COURT TO ENTERTAIN GEORGIA'S AMENDED COMPLAINT ON THE VERY NARROW ISSUE WHICH NOW REMAINS TENDERED

The posture of the case tendered by the amended bill has been completely altered and transformed since these defendants filed their returns to the rule to show cause: *first*, by admissions and concessions in the briefs filed by Georgia and by the United States (as *amicus*); *second*, by admissions by Georgia on the oral argument on January 2, 1945; and, *third*, by holdings by the Court in its opinion of March 26, 1945, in which it fully sustained most of the legal contentions to which our returns to the rule to show cause and our oral argument were addressed, so that only a very narrow issue remains tendered, as to which we have not had an adequate opportunity to present our views, either by oral argument or brief.

Counsel for these defendants had only thirty-five minutes for oral argument. That time had to be used in the effort to present the major legal contentions presented in our returns to the rule. Most of those the Court sustains. Counsel could not prevision the extent to which the tendered case would be further whittled down by counsel for Georgia in his argument, which followed ours, and by the subsequent opinion of the Court. The result is that these defendants have not had an adequate opportunity to present their views as to the want of jurisdiction of this Court to hear what remains to be put in issue. We think nothing remains sufficient to constitute an issue or a case with which this Court as a court of equity can deal by injunction or as to which it can grant any equitable relief against any threatened injury of which Georgia still complains. And we respectfully request an opportunity to present our views as to this by brief and oral argument upon a rehearing.

Propositions to which our returns to the rule to show cause and our oral argument were addressed, but now in effect conceded by Georgia and approved by the Court in its opinion, include the following:

1. Georgia cannot sue one of its own citizens in the original jurisdiction of this Court.

2. Georgia's original bill of complaint could not have been entertained here because:

(a) It sought recovery of rate damages at law without prior resort to the Interstate Commerce Commission, in violation of the rule of *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156.

(b) It sought injunction by this Court reducing and fixing interstate rates subject to the jurisdiction of the Commission, in violation of the *proviso* of Section 16 of the Clayton Act.

(c) It sought in an original case here, in effect, to review, annul, or set aside an order or orders of the Commission, in violation of the provisions of the Judicial Code conferring exclusive jurisdiction of such review upon district courts of three judges.

3. In so far as Georgia's amended bill might be construed as including any of the above-listed objects and purposes of the first bill, it also could not be entertained here for the same reasons.

4. "The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened * * *." (Script opinion, p. 3).

5. "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. * * * The reasoning and precedent of that case apply with full force here" (*id.*, p. 9).

6. "*Central Transfer Co.* v. *Terminal R. Assoc., supra* [288 U. S. 469, 473-475], indicates that if Georgia in the present proceeding sought to set aside the rates of the defendants, leave to file would have to be denied" (*id.*, p. 10).

7. The Court adheres to the decisions in *Central Transfer Co.* v. *Terminal R. Assoc.*, 288 U. S. 469, 473-475, and

Terminal Warehouse Co. v. *Pennsylvania R. Co.*, 297 U. S. 500, 513 (*id.*, pp. 10-11). (We had argued that it should adhere to those decisions.)

8. The Interstate Commerce Act provides for agreement of carriers in the establishment of joint rates (*id.*, p. 12).

9. "It is true that the injury to Georgia is not in the existence of the combination *per se* but in the rates which are fixed by the combination" (*id.*, pp. 14-15).

10. "Moreover, *Massachusetts* v. *Mellon* [262 U. S. 447] and *Florida* v. *Mellon* [273 U. S. 12], *supra*, make plain that the United States not the State represents the citizens as *parens patriae* in their relations to the federal government" (*id.*, p. 4).

11. This Court, in the exercise of a sound discretion, will deny leave to file even where original jurisdiction exists, in order to protect itself from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States. *Massachusetts* v. *Missouri*, 308 U. S. 1, 19. (*id.*, pp. 17-20).

All the foregoing contentions to which our returns and our oral argument were addressed are sustained by the Court. The Court reads out of the amended complaint the whole cause of action for damages at law. The Court entertains it only as a suit in equity for injunction against threatened future injury to Georgia and her citizens.

But by further construction, and in view of the above-listed holdings, the Court severely narrows the amended complaint and the suit tendered, even in its remaining guise as tendering an equity suit for injunction. The Court accordingly construes the amended complaint as not attacking rates (*id.*, p. 14), as not seeking "to undercut or impair the primary jurisdiction of the Commission over rates" (*id.*, p. 14), as not seeking "an uprooting of established rates," as not asking the Court to enjoin "what the Commission might later approve or condone," as not asking the Court "to trench on the domain of the Commission" or to render any decree which might "have that effect" (*id.*, p. 15).

As to what is left to be enjoined, if proved, the Court silhouettes and underlines two words: "discrimination" and "coercion" (*id.*, pp. 2-3, 13, 14, 16). Apparently the Court decides to entertain the amended complaint in order to enjoin and "put an end to discriminatory and coercive practices" in rate making, if such practices be proved (*id.*, p. 14).

II.

ON THE AMENDED COMPLAINT AS THUS NARROWED, THE COURT AS A COURT OF EQUITY CAN ENTER NO INJUNCTIVE DECREE WHICH WOULD BE EFFECTIVE. ANY DECREE ENTERED WOULD NECESSARILY EITHER: (1) BE SO GENERAL AS TO VIOLATE THE MOST ELEMENTARY PRINCIPLES OF JUSTICE, OR (2) DIRECTLY INVADE THE EXCLUSIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, OR (3) DIRECTLY INVADE THE CONSTITUTIONAL POWERS OF THE CONGRESS BY PRESCRIBING A NEW, LEGISLATIVE RULE OF CIVIL CONDUCT FOR THE FUTURE WHICH CONGRESS ITSELF HAS NOT SEEN FIT TO PRESCRIBE.

But no "discrimination" injurious to Georgia, her ports or citizens, is charged except in the charges that interstate rates on file with the Interstate Commerce Commission are discriminatory. And the Court holds that it is within the exclusive, primary jurisdiction of the Commission to determine whether such rates are discriminatory and to remove such discrimination, if it exists, and that it is not within the original jurisdiction of this Court to "trench" on that jurisdiction of the Commission.

Where is there any charge of "coercion" in the amended bill, as the Court construes it? Only in the charge that the northern carrier defendants have generally dominated and

coerced the southern carrier defendants *in the fixing of joint through rates* (*id.*, p. 3).

There is no charge that any of the defendants has coerced Georgia or her citizens. Georgia has no interest in any supposed coercion of one carrier by another except in so far as such coercion is charged and proved to have resulted in interstate rates discriminatory against Georgia.

The charges both of coercion and of discrimination—and the more generalized charges of "conspiracy" are only restatements in another form of the charges of coercion and discrimination—are entirely confined to the fixing of interstate rates subject to the jurisdiction of the Commission, which rates the Court concedes it cannot reach by injunction in this proceeding.

And the Court holds that "the injury to Georgia is not in the existence of the combination *per se* but in the rates which are fixed by the combination" (*id.*, p. 15).

All charges of illegal violation of the anti-trust laws are confined and tied to the rates fixed and agreed to. All charges of injury or threatened injury to Georgia, her citizens and ports are confined and tied to the rates. The rates are tied to tariffs on file with and subject to the exclusive jurisdiction of the Commission. And the Court also holds that its injunction cannot reach or affect in any way those rates and tariffs; yet they are the only things which could threaten injury to Georgia.

For the reasons so fully stated in the dissenting opinion, we respectfully submit that nothing is left of the case sought to be tendered which can fall within the jurisdiction of this Court as a court of equity or with which it can deal effectively, and at the same time lawfully and constitutionally, by injunction.

But the Court says that if the alleged conspiracy to fix discriminatory rates by coercive methods and practices is proved by evidence, it can enjoin the coercion, it can enjoin the combination to discriminate against Georgia, it can by injunction restore "that degree of competition envisaged

Congress when it enacted the Interstate Commerce Act" by
., p. 16). And the Court seems to say that it can do that (*id*
hout affecting the rates, which alone are alleged to in-
wit e Georgia, and without encroaching on the jurisdiction
jud the Commission.

of The Court certainly cannot by injunction restore "that
gree of competition envisaged by Congress when it en-
dea ed the Interstate Commerce Act," without telling these
act endants in its injunction what that degree of competition
def without telling us what acts we may do as falling within
is, t degree of competition and what acts we must not do as
tha ling without that required area of competition. And it
fal s certain as anything can be in an uncertain world that
is Court cannot do that without telling these defendants
the its injunction decree what they may do and what they
in y not do in "the establishment and maintenance of rea-
ma able charges for transportation services, without unjust
sou criminations, undue preferences or advantages, *or un-*
dis *r or destructive competitive practices;* * * *." Trans-
fai rtation Act of 1940, c. 722, 54 Stat. 898, sec. 1.
pol Yet it is entirely clear that the Court cannot tell us that
wi hout trenching upon the jurisdiction of the Interstate
Co mmerce Commission. The National Transportation Policy
is committed to the Commission, not to this Court, to b
"a dministered and enforced" in the first instance. Only
the Commission can tell us what rates are or are not "dis-
cri minatory" against a State or a region. Only the Com-
mi ssion can tell us when rates are or are not established and
ma intained "without unjust discriminations, undue pref-
ere nces or advantages, or unfair or destructive competitive
pra actices; * * *."

This Court cannot write an injunction telling us what we
can or cannot do in the future in the matter of agreeing
upon and fixing joint through rates, without directly trench-
ing upon the admittedly exclusive jurisdiction of the Com-
mission. The Court, by its contemplated injunction, would
assume necessarily the function of the Interstate Commerce

Commission and would police permanently for the long future the rate-making practices of these carriers, by contempt proceedings, whenever Georgia or anybody else should complain that "coercion" had been used in the fixing of rates or that the rates were "discriminatory" in violation of this Court's injunction.

With great respect we submit that this Court has never issued such an injunction, and there is no precedent for such an injunction, to protect a plaintiff against an alleged threatened injury by the very thing which the Court admits it has no jurisdiction or power to reach by injunction and the only thing which it is alleged threatens injury; that is, in this case, "discriminatory rates."

Moreover, the Court cannot write an injunction telling us what we can or cannot do in the future in the matter of agreeing upon and fixing joint through rates, without rendering a declaratory judgment—such as this Court has always held it has no original jurisdiction to enter[1]—and making a legislative declaration as to what is the prescribed area of competition required and what is the forbidden area of "unfair or destructive competitive practices," a declaration which the Congress has not seen fit to make but has left to the administration and enforcement of the Interstate Commerce Commission in the carrying out of the National Transportation Policy. But to do that would be for the Court to make a legislative declaration of what is to be the law for the future, when the Constitution commits the legislative powers to Congress.

But the Court's opinion leaves an inescapable and insoluble dilemma. If the Court entertains the complaint and issues an injunction, either its injunction must tell the defendants what they may do and what they may not do in the future in agreeing upon or refusing to agree upon rates, in which case the Court will exercise the function of the Interstate Commerce Commission and of the Congress, or

[1] See *Alabama* v. *Arizona*, 291 U. S. 286, 291, and cases cited.

the Court will issue a purely general and abstract injunction, merely enjoining and restraining these defendants permanently from conspiring and using coercion to discriminate against Georgia in the fixing of interstate rates, without in any further way telling us what we can do, or what we cannot do. That, we submit, with great deference but with earnest conviction of our legal and constitutional rights, would not be an equity decree or injunction at all, but would be a decree which would violate the first principles of justice. It would put these defendants under permanent threat of contempt proceedings while leaving them absolutely helpless to know or to have their counsel advise them what they can do or cannot do to be free of contempt.

Mr. Justice Holmes said for the Court in *Swift & Co.* v. *United States*, 196 U. S. 375, 396, that " • • • we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law." (Referring to the Sherman Act.)

And in *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404, this Court said that an injunction of such a general character as that "would be violative of the most elementary principles of justice."

Unless it enters such a general injunction as would violate the most elementary principles of justice, any injunction the Court might enter here would necessarily "trench" directly upon the jurisdiction of the Congress and of the Interstate Commerce Commission. And the Court cannot constitutionally or lawfully do either. Hence it can enter no injunction which could effectively deal with what is left of the charges of the amended complaint.

If the amended complaint be entertained, presumably the Court would appoint a special master to take evidence, after issue is joined on what is left of the charges. What would the special master try?

Certainly he would not retry Docket No. 28300, the Class Rate Investigation, or Docket No. 28310, the Consolidated Freight Classification case, to determine whether the attacked rates are or are not discriminatory, because the Court concedes that it does not have jurisdiction to do that, and the Court's special master cannot have jurisdiction which the Court itself does not have.

Yet, under the Court's opinion, a finding of rate discrimination is essential to support an injunction.

We think the Court has not sufficiently contemplated what would be the nature and effect of the injunction sought by the amended complaint as now left by the Court's opinion of March 26, 1945, and what proof would be essential to its issuance.

Presumably the Court would undertake, without trenching upon the jurisdiction of the Interstate Commerce Commission and without affecting, fixing, changing or enjoining rates or tariffs, to enjoin and restrain the "northern defendants" from coercing the "southern defendants" in the fixing of rates, and to enjoin all the defendants from conspiring or combining to discriminate against Georgia, its ports and citizens, in the interstate rates fixed, and to make such injunction permanent.

How would that give any remedy to Georgia? It is only the rates themselves which Georgia claims are injurious or threaten injury. And the Court disclaims jurisdiction to enjoin the rates.

How could the defendants obey such an injunction? It would be impossible for us to know what we could do or could not do. It would be impossible to know what rates we could fix and agree to without being in contempt of this Court. Would we ask the Interstate Commerce Commission, or this Court's special master, or the Marshal? Or would we file with the Court a bill for advice every time we are faced with agreeing or refusing to agree upon a joint through rate? If so, the Court is going to make itself a permanent administrative agency to regulate rate mak-

ing. If not, then we are going to have to act at our constant peril of contempt in carrying out the mandatory duties which Congress has put upon us to establish reasonable through rates, routes, and classifications. Section I (4), Interstate Commerce Act.

Assume the issuance of such an injunction as the opinion of this Court contemplates. Then assume that the traffic officers of one or all of the southern carriers propose a particular reduced joint through rate for the benefit of a shipper or shippers in Georgia. Then suppose the northern carriers think the rate is too low and refuse to agree to it. Would that be "coercion"? We would not know. We could not know. We would have to ask the Court. If we asked the Court and the Court thought the action of the northern defendants "coercive," would the Court order them to agree to the proposed rate?

If it did, then the Court would not merely be regulating the rate. It would be directly fixing the rate. It would be the plainest possible invasion of the Commission's jurisdiction.

The big question inescapably involved in Georgia's motion for leave to file and in the decision of the Court of March 26, 1945, is whether interstate rates of rail carriers are to be given uniform regulation by the Interstate Commerce Commission under the mandate of the Interstate Commerce Act, or whether there is to be substituted for such uniform regulation a piecemeal regulation by Sherman Act injunctions, by this Court in original suits by States, and by federal district courts all over the United States, in suits by shippers dissatisfied with the method of regulation provided by the Interstate Commerce Act, whenever such State or such shipper sees fit to charge coercion and collusion to make discriminatory rates. We submit there is no sound answer to the final paragraph of the minority opinion, as follows:

> "The reasoning of the Court is not and cannot be restricted to this case. If Georgia may prosecute the pres-

ent suit, every shipper or consignee of freight who asserts injury by a conspiracy respecting railroad rates in violation of the anti trust laws, may maintain a like suit in a district court. The prosecution of such suits cannot fail to bring chaos into the field of interstate rate making. The entry of decrees for the plaintiffs could only mean the breakdown of the unified system of fixing rates by Commission action, which Congress has ordained by the Interstate Commerce Act. It was the purpose of § 16 of the Clayton Act to preclude such a breakdown. Its purpose can and should be effected by the refusal of this Court to entertain the proposed suit."

We submit that no case is tendered which this Court as a court of equity can accept or with which it can deal by injunction. Any injunction entered would either be so general and vague as to violate the first principles of justice or would be unconstitutional as invading the legislative powers of Congress and illegal as invading the jurisdiction of the Interstate Commerce Commission.

III.

GEORGIA HAS NO STANDING TO BRING THIS SUIT ON BEHALF OF HER CITIZENS, BECAUSE AS TO ALL MATTERS NOW INVOLVED THE UNITED STATES, NOT THE STATE OF GEORGIA, IS PARENS PATRIAE.

The Court concedes that *Massachusetts* v. *Mellon* and *Florida* v. *Mellon*, *supra*, "make plain that the United States not the State represents the citizens as *parens patriae* in their relations to the federal government."

The Court undertakes, however, to distinguish the present case from those cases and to take it out of that doctrine by saying (*id.*, p. 4):

> "* * * This is not a suit like those in *Massachusetts* v. *Mellon*, and *Florida* v. *Mellon*, *supra*, where a State sought to protect her citizens from the operation of

federal statutes. Here Georgia asserts rights based on the anti-trust laws."

That is, so far as we can find, the first time this Court has ever suggested that relations of citizens to the federal government exist only where the citizens are attacking and seeking relief from federal laws and not where citizens are relying upon federal laws and basing causes of action upon them. We respectfully submit that such proposition cannot be supported by either logic or authority.

A clear distinction is to be drawn between a case where a State is suing as an individual "person" for damages to it by reason of an alleged violation of the anti-trust laws (*Georgia* v. *Evans*, 316 U. S. 159) and a case where the State is seeking to stand as *parens patriae* for citizens of the United States, who also happen to be its citizens, in the vindication of federal rights under federal laws.

The Court here treats Georgia's complaint of injury to it as proprietor merely as a "makeweight," as was done in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. It really entertains the present suit as one on behalf of citizens of the United States, who also happen to be citizens of Georgia, for the assertion of alleged rights under federal laws, but as to which Georgia undertakes to represent those citizens of the United States in the guise of their *parens patriae*.

We submit that such a suit inescapably involves and is grounded upon those citizens' "relations to the federal government," and that the United States, in those relations, is the sole *parens patriae*. There cannot be divided sovereignty in such relations, the United States to act as *parens patriae* when it sees fit to act, or Georgia to act as *parens patriae* when the United States does not see fit so to act, or when the Department of Justice sees fit to support the right of Georgia so to act, for some such reason as that the United States cannot maintain an action in the original jurisdiction of this Court, whereas it is conceived that Georgia can.

That would mean that under our system of dual sovereignty the outstandingly important question as to which sovereign, Federal or State, has the right to represent citizens as *parens patriae* would depend not upon law but upon the personal decision of a particular Attorney General. That would be typical government by men and not by law.

No such doctrine can be drawn from *Massachusetts* v. *Mellon* and *Florida* v. *Mellon*. It is true that in each of those cases the plaintiff State was seeking as *parens patriae* for its citizens to attack and enjoin enforcement of a federal statute. But the holding of the Court that the United States, not the State, was the proper and exclusive *parens patriae* was based not on the fact that the suits *attacked* federal statutes but on the fact that relations of citizens to the federal government were involved. Such relations were involved because federal statutes and their effect upon citizens of the United States were involved.

In *Massachusetts* v. *Mellon*, 262 U. S. 447, 485-486, the Court said:

> "* * * But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

The point thus sustained by this Court was well made by the Government (262 U. S. at 450) as follows:

> "It is possible that a State might appeal to the federal courts in cases in which the rights of its citizens

> *as citizens of the State* were involved; but such rights are not involved in this case. A State certainly may not appeal to the federal courts in cases in which it is seeking to represent the *federal* rights of any number of its citizens. *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277; *Oklahoma* v. *Gulf, C. & S. F. Ry. Co.*, 220 U. S. 290, 301. And even if a State might appear in a representative capacity under such circumstances, it would not then have the right to invoke the original jurisdiction of this Court."

Certainly it cannot be gainsaid that when citizens of the United States sue to vindicate rights conferred upon them by the anti-trust laws of the United States, they are not suing to vindicate rights belonging to them *as citizens of a State*, but are suing to vindicate federal rights held by them *as citizens of the United States*.

Certain it is, as the Government contended and as the Court held in *Massachusetts* v. *Mellon*, that if any sovereignty is to stand to represent them as to such *federal* rights, it is the United States, not the State, which is their *parens patriae* with respect to such federal rights.

And it is further clear, as the Government contended in *Massachusetts* v. *Mellon*, that even if a State could stand as *parens patriae* for citizens in the vindication of their *federal* rights, it would not have the right to invoke the original jurisdiction of this Court, because it would be representing a *federal* right, not a *state* right, and Article III, Sec. 2, of the Constitution confers original jurisdiction upon this Court as to a suit by a State against citizens of other States only to vindicate a state right.

So clear was all this that when the Government, in *Florida* v. *Mellon*, 273 U. S. 12, argued the point that the State of Florida could not bring that suit as *parens patriae*, it cited,[2] *inter alia*, *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, and *Pennsylvania* v. *West Virginia*, 262 U. S. 553,

[2] As shown by 71 L. ed. 513. The official report does not summarize the Government's argument.

592 (evidently for the purpose of distinguishing those cases), as well as relying upon *Massachusetts* v. *Mellon*, 262 U. S. 447, 485, 486, and many other cases.

And the Court there said (273 U. S. 12, 18):

> "Nor can the suit be maintained by the state because of any injury to its citizens. They are also citizens of the United States and subject to its laws. In respect of their relations with the federal government 'it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.' *Massachusetts* v. *Mellon, supra*, pp. 485-486."

"Protective measures" for citizens, both under the federal anti-trust laws and under the Interstate Commerce Act, "flow" from their status as citizens of the United States, not from their status as citizens of particular States. Those laws confer federal rights, not state rights. In their relation to those laws, citizens stand as citizens of the United States in relation to the Federal Government, not as citizens of individual States in relation to the States in which they live.

We think this distinction is made clear by *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315. There it was held that the Federal Home Owners' Loan Act, to the extent that it permitted the conversion of state associations into federal ones in contravention of the laws of the State of their creation, was an unconstitutional encroachment upon the reserved powers of the States.

Answering the contention that Wisconsin had no standing as *parens patriae* to present the constitutional question involved, under the doctrine of *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Florida* v. *Mellon*, 273 U. S. 12, this Court pointed out that a distinctly state right was involved, and that the rights of non-consenting shareholders and creditors to object to the conversion to a federal association was

a state right, flowing from the State, not a right flowing from their relations to the Federal Government. It said (296 U. S. at 340-341):

> "The standing of Wisconsin to resist a trespass on its powers is confirmed if we view the subject from another angle of approach. In the creation of corporations of this quasi-public order and in keeping them thereafter within the limits of their charters, the state is *parens patriae*, acting in a spirit of benevolence for the welfare of its citizens. Shareholders and creditors have assumed a relation to the business in the belief that the assets will be protected by all the power of the government against use for other ends than those stated in the charter. Aside from the direct interest of the state in the preservation of agencies established for the common good, there is thus the duty of the *parens patriae* to keep faith with those who have put their trust in the parental power. True, most of the shareholders in the cases now before us assented to the change. Even so, an important minority were not represented at the meetings, and their approval is not shown. Creditors other than shareholders have not been heard from at all. To these non-vocal classes the *parens* owes a duty which it is free to vindicate by suit. *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355, 356; *Kansas* v. *Colorado*, *supra*; *Georgia* v. *Tennessee Copper Co.*, *supra*; *New York* v. *New Jersey*, *supra*; *Pennsylvania* v. *West Virginia*, *supra*.
>
> "The ruling in *Massachusetts* v. *Mellon*, 262 U. S. 447, is nothing to the contrary, though it is made a cornerstone of the argument in favor of the statute. There the state of Massachusetts attempted to enjoin the enforcement of an Act of Congress appropriating money to be used in cooperation with the states to reduce maternal and infant mortality. The ruling was that it was no part of the duty or power of a state to enforce the rights of its citizens in respect of their relations to the Federal Government. Cf. *Florida* v. *Mellon*, 273 U. S. 12. Here, on the contrary, the state becomes a suitor to protect the interests of its citizens against the unlawful acts of corporations created by the state itself."

We think the present case is clearly distinguishable from that case. Whatever rights citizens of Georgia may have against threatened injury, under the allegations of the amended complaint as construed and limited by this Court's opinion of March 26, 1945, are rights flowing to them from the federal anti-trust laws and from the Interstate Commerce Act, and hence are rights flowing to them *as citizens of the United States*, federal rights under federal laws, and hence rights flowing to them *in respect of their relations to the Federal Government*.

It follows that the United States alone may represent them as *parens patriae* in the vindication of those rights. And it cannot maintain a suit on their behalf in the original jurisdiction of this Court.

It further follows that the attempt of the State of Georgia to assume the guise of *parens patriae* on behalf of such citizens of the United States, who also happen to be citizens of Georgia, for the vindication of such federal rights, is "an abuse of the opportunity" to resort to the original jurisdiction of this Court. *Massachusetts* v. *Missouri*, 308 U. S. 1, 19.

That abuse is in no wise cured by the fact that the Department of Justice, in this particular case, sees fit not to insist on the exclusive right of the United States to stand as *parens patriae* for the vindication of such federal rights, but seeks to waive that right in favor of Georgia, for the obvious purpose of creating the guise of original jurisdiction here where it otherwise would not exist. Neither the Department of Justice nor the United States can confer original jurisdiction on this Court by either consent, waiver, or relinquishment of sovereign rights.

With great respect we submit that the original cases upon which the Court relies[3] are entirely distinguishable from

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[3] *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; *Missouri* v. *Illinois*, 180 U. S. 208; *New York* v. *New Jersey*, 256 U. S. 296; *Kansas* v. *Colorado*, 206 U. S. 46; *North Dakota* v. *Minnesota*, 263 U. S. 365; *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Colorado* v. *Kansas*, 320 U. S. 383.

this case. Each of those cases involved a distinctly state right. Not one of them involved a right flowing from federal statutes. Each of them involved rights of citizens of a state *as citizens of the State* and participating in the right of the State itself. Not one of them involved rights of citizens of the United States as such citizens and flowing from federal statutes or from their relations to the Federal Government.

Indeed, the majority opinion in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 600, ended with the statement: "If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides." That is, the Congress.

The clear implication, we think, was that if Congress had regulated the interstate commerce in natural gas, federal rights, as distinct from state rights, would have been involved and the State would have had no standing as *parens patriae* to represent citizens with respect to such federal rights.

This Court in its opinion of March 26, 1945, in this case (p. 7), says, with reference to such cases as *Georgia* v. *Tennessee Copper Co.* and *New York* v. *New Jersey*, *supra*, that: "Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams."

But we submit that this statement confuses gravity of injury with quality of right. It is not a question of comparative gravity of injury. It is a question of the nature of the respective rights and the source whence they flow.

The right of a State and its citizens to be free from noxious gas, sewage, etc., by which it is invaded by other states or by citizens of other states, is distinctly a state right, inherent in State sovereignty. It is not a federal right, flowing from and conferred by federal statutes. As to such state right the complaining State is admittedly *parens patriae* for its citizens.

But the right of a State and its citizens to be free from discriminatory interstate freight rates flows from the Interstate Commerce Act. And whatever right they have to complain of coercion or conspiracy in the making of such rates flows either from the Interstate Commerce Act or from the federal anti-trust laws, or from a combination of both, and is a federal right as to which citizens stand in relation to the Federal Government. That Government, not the State of Georgia, is the *parens patriae* as to such rights.

For the reasons hereinbefore stated, we submit that this petition for rehearing should be granted.

Respectfully submitted,

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOMAS W. DAVIS,
Attorney.

CAROLINA, CLINCHFIELD AND OHIO RAILWAY,
ATLANTIC COAST LINE RAILROAD COMPANY and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
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SEABOARD AIR LINE RAILWAY COMPANY,

By W. R. C. COCKE,
Attorney.

SOUTHERN RAILWAY COMPANY,

By S. R. PRINCE,
SIDNEY S. ALDERMAN,
Attorneys.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

SIDNEY S. ALDERMAN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER N. 10 ORIGINAL

THE STATE OF GEORGIA,

Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

PETITION FOR REHEARING BY THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *et al.*

GEORGE S. LEISURE,
RALSTONE R. IRVINE,
ROBERT W. PURCELL,
Attorneys for The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company.

JAMES V. HAYES,
THEODORE S. HOPE, JR.,
DONOVAN LEISURE NEWTON & LUMBARD,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NUMBER 11 — ORIGINAL

THE STATE OF GEORGIA,

Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*,

Defendants.

PETITION FOR REHEARING BY THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *et al.*

To the Honorable, the Supreme Court of the United States:

Now come The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company, being two of the defendants referred to in the amended bill of complaint herein as the "Northern defendants," and present this, their petition for a rehearing of the motion of the State of Georgia for leave to file its amended bill of complaint and of the returns of these defendants to the rule to show cause why such leave should not be granted and for a reconsideration of the opinion and order thereon dated March 26, 1945.

These defendants, for grounds of such petition, adopt the propositions and the reasoning in support thereof fully set forth in the petition for rehearing filed herein by the eight "Southern defendants," and respectfully submit that upon the grounds therein stated, as well as upon the grounds set forth in the original returns of the several defendants, this petition for rehearing should be granted.

Both the majority and the minority opinions of this Court sustained most of the legal propositions urged by the several defendants in their oral arguments and their briefs. The limited issues as to which there was disagreement are of great significance and should again be subjected to analysis, which now may be concentrated upon them alone. The consequences of the decision are portentous: in addition to the results foreseen in the petition for rehearing filed by the Southern defendants, the decision may tend to freeze existing rate structures because of the possibility that every change of rates might become the basis of new litigation grounded on the baseless charge that it results from a conspiracy to coerce some carrier or to discriminate against some city, county, state or region. These consequences are of such grave importance that considerations of the public interest justify this Court in further considering the issues involved.

WHEREFORE, these defendants respectfully urge that the petitions for rehearing be granted, and that, upon further consideration, leave to file the bill of complaint be denied and the bill be stricken from the docket of the Court.

Respectfully submitted,

GEORGE S. LEISURE,
RALSTONE R. IRVINE,
ROBERT W. PURCELL,
Attorneys for The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company.

JAMES V. HAYES,
THEODORE S. HOPE, JR.,
DONOVAN LEISURE NEWTON & LUMBARD,
of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for delay.

RALSTONE R. IRVINE,
Of Counsel.

To: T. GRADY HEAD,
Attorney General of Georgia.

PLEASE TAKE NOTICE that on the 20th day of April, 1945 the within Petition for Rehearing will be filed with the Clerk of the Supreme Court of the United States.

A printed copy of the Petition for Rehearing is served upon you herewith.

RALSTONE R. IRVINE,
Counsel for The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company.

Service accepted this day of April, 1945.

....,
Counsel for the State of Georgia.

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CLERK

IN THE

Supreme Court of the United States

No. 11, Original—October Term, 1944.

THE STATE OF GEORGIA, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Defendants.

MOTIONS OF NORTHERN DEFENDANTS FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS, AND FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE PLEAD

and

BRIEF IN SUPPORT OF MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS.

JOHN DICKINSON,
ANTHONY P. DONADIO,
ROBERT W. PURCELL,
HORACE L. WALKER,
K. L. RICHMOND,
B. G. STACKHOUSE,
W. T. PIERSON,
THOMAS P. HEALY,
D. LYNCH YOUNGER,
E. RANDOLPH WILLIAMS,
JOSEPH A. MCCLAIN, JR.,
PAUL S. PARSONS.
Counsel for Northern Defendants.

MAY 25, 1945.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

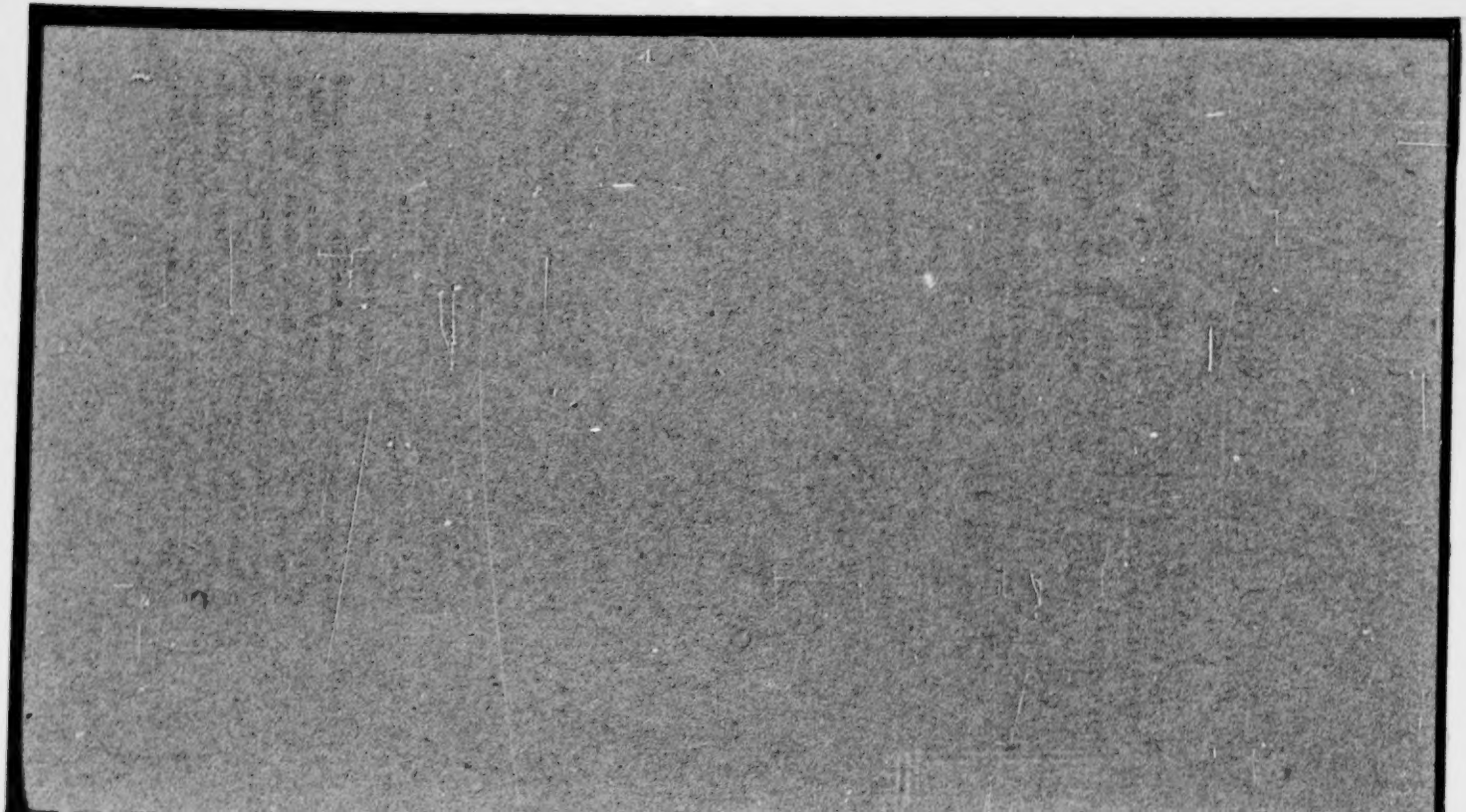


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IN THE

Supreme Court of the United States

No. 11, ORIGINAL—OCTOBER TERM, 1944.

The State of Georgia, Complainant,

v.

The Pennsylvania Railroad Company et al., Defendants.

MOTION OF NORTHERN DEFENDANTS FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS.

Comes now each of defendants The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago and Eastern Illinois Railroad Company, L. F. DeRamus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Norfolk and Western Railway Company, Richmond, Fredericksburg and Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company, herein as in the amended bill of complaint

termed "Northern defendants", and separately and severally represents to the Court as follows:

The amended bill of complaint, herein termed the complaint, as construed in the opinion of the Court herein, dated March 26, 1945, *State of Georgia* v. *Pennsylvania R. Co.*, U. S. , 65 S. Ct. 716, charges "a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed", to the alleged injury and damage of the plaintiff herein, and this Court has held that said complaint, to the extent that it sets forth such charges of coercion, discrimination, and damage, may properly be filed; but said complaint fails to aver or specify with definiteness or particularity the nature of the cause or causes of action alleged, the acts alleged to constitute coercion or discrimination, or the nature of said acts, or the rates or classes or kinds of rates by which the alleged discrimination has been or may be accomplished, or the instances of alleged injury and damage suffered by the plaintiff, or the nature of said injury and damage; and said complaint, in that and other respects more fully stated in the accompanying brief in support of this motion, lacks sufficient definiteness and particularity to enable each or any of said defendants intelligently and properly to prepare its responsive pleading or to prepare for trial; and these defects in the complaint were explicitly recognized by the Court in its opinion filed herein on March 26, 1945, in the following language (p. 16):

> "The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise."

To the end, therefore, that each of these defendants may properly frame its responsive pleading and prepare for trial and be in a position to take advantage of all legal

and other defenses available to it, each said defendant separately and severally moves the Court for an order directing that plaintiff amplify its complaint by filing a more definite statement or a bill of particulars with respect to the following matters:

I.

By what acts, or kinds or classes of acts, and in what manner, and on or about what dates, or between what dates, the sixty rate bureaus, committees, conferences, associations, and other private rate-fixing agencies, referred to in Section 9 and in Section 11 or in either of said Sections, of the plaintiff's complaint, or any one or more of such bureaus, committees, conferences, associations or agencies, and if so which, have been used, as alleged, and by which of the defendants, (*a*) for the purpose of, or in furtherance of, or in connection with, the making or carrying out of the alleged unlawful contracts, combinations, and conspiracies in restraint of trade and commerce among the several states, alleged in said Section 9 or elsewhere in said amended complaint; or, as further alleged in said Section 9, (*b*) for the purpose of, or in furtherance of, or in connection with, the alleged monopolization of such trade and commerce; or (*c*) for the purpose of, or in furtherance of, or in connection with, the alleged concerted action and collusion for the establishment of arbitrary and non-competitive rates and charges in said trade and commerce to and from the State of Georgia, or the alleged exaction of unjust, unreasonable, arbitrary or non-competitive charges from the State of Georgia, or from shippers or receivers of freight in Georgia.

II.

Whether by the allegations contained in Section 10 of the complaint, or by any other allegations in

said complaint, the plaintiff claims, or means to claim, that all or any, and if so which, of the rate bureaus, associations, and/or agencies, referred to in Section 9 and in Section 11 or in either of said Sections, of said complaint, has power by its constitution or by-laws, or by agreement between the defendants, or any of them, or claims the power, or has in fact exercised the power, to veto or prevent, against the will of any defendant or of any rail carrier which is a member of such rate bureau, association, or agency, any reduction in the freight rates to or from Georgia, proposed or initiated by any defendant, or other rail carrier, or which might be proposed or initiated by such defendant or rail carrier; and, if so, in what particular instances, and in connection with what particular rates, and on what commodities, and between what origins and destinations, and on or about what dates, such power has been claimed or exercised in the case of any freight rates to or from Georgia.

III.

Whether by the averments contained in Sections 9, 10, 11, or 12, or other Sections of the complaint, the plaintiff alleges or intends to allege that defendants or any two or more of them in employing the conference method of rate-making were motivated by a common and express purpose or desire, or acted in concert in furtherance of a common plan, to establish or maintain such rates as would unfairly discriminate against or be disadvantageous to the State of Georgia, its ports, or its people; or whether the said complaint means only to allege that without any express purpose, design, plan, or desire on the part of any of the defendants to discriminate against or disadvantage the State of Georgia, its ports, or its people, the

defendants or some of them, through the conference method of rate-making, have established and now maintain rates to or from Georgia which are nevertheless allegedly discriminatory against or disadvantageous to Georgia, its ports, or its people.

IV.

Which defendant or defendants, by what means or instrumentalities, in what ways, and at or since what time or times, have been dominated or coerced by which other defendant or defendants as alleged in Section 13 of the complaint, and with respect to what Southern intraterritorial rates and what interterritorial rates; and what is meant by the allegation that some of the defendants are "generally" so dominated and coerced by other defendants; and whether by the allegation contained in said Section plaintiff claims that the refusal of a connecting carrier to join with an originating carrier in the establishment of a proposed reduced joint rate constitutes domination or coercion of such originating carrier, and, if so, whether such refusal constitutes such domination and coercion when based (1) upon the fact that the proposed reduced rate would disturb a rate relationship prescribed or approved by the Interstate Commerce Commission, (2) upon representations by shippers to the connecting carrier that the proposed reduced rate would make, give, or cause undue or unreasonable preference or advantage to Georgia, its ports, or its people and would subject said shippers to undue or unreasonable prejudice or disadvantage in violation of Section 3(1) of the Interstate Commerce Act, or (3) when based upon the failure of the originating carrier to agree to just, reasonable, and equitable divisions of the proposed reduced rate.

V.

What rates and charges for the transportation in interstate commerce of freight to or from points in Georgia, or between points in Georgia and the North, and on what commodities, and between what origins and destinations, the plaintiff claims by the allegations in Sections 3, 5, 9, and 19 of the complaint to be extortionate, excessive, illegal, unlawful, unjust, unreasonable, arbitrary, non-competitive, and unlawfully and wrongfully exacted from the State of Georgia and from shippers in Georgia; and wherein such extortion, excessiveness, illegality, injustice, unreasonableness, arbitrariness, and non-competitive and unlawful and wrongful character consists with respect to said rates and charges, and each of them?

VI.

Whether by the allegations contained in Sections 3 5, 9, 11, and 19 of the complaint, or by any of its allegations, the plaintiff alleges that any rates, charges, or classifications now maintained for the transportation of freight to or from Georgia, or between Georgia and the North, and if so which, are unjust or unreasonable within the meaning of those terms as used in paragraphs (5) (a), and (6) of Section 1 of the Interstate Commerce Act; and, if not, wherein their alleged extortionate, excessive, illegal, unjust, unreasonable, arbitrary, non-competitive, or unlawful or wrongful character consists.

VII.

What rates and charges for the transportation in interstate commerce of freight to or from points in Georgia, or between points in Georgia and the North, on what commodities, and between what origins and

destinations, are by Sections 3, 4, 9, and 19 of the complaint alleged to prejudice, or to be unfair, prejudicial, or disadvantageous to, Georgia, its ports, or its people, or to prefer, or to give preference or advantage to, other States, their ports, or their people; which States, ports, or people are alleged to be unlawfully preferred or advantaged, and wherein does such unfair, prejudicial, disadvantageous, preferential, advantageous, or wrongful character consist with respect to said rates and charges, and each of them.

VIII.

Whether, by the allegations contained in Sections 3, 4, 9, 11, and 19 of the complaint, or by any of its allegations, the plaintiff alleges that any rates, charges, or classifications now maintained for the transportation of freight to or from Georgia, or between Georgia and the North, and if so which, are unjustly discriminatory, or subject Georgia, its ports, people, or traffic to any undue or unreasonable prejudice or disadvantage or give any undue or unreasonable preference or advantage to any other States, their ports, people, or traffic, and if so which such States, ports, people or traffic, within the meaning of those terms as used in Sections 2 and 3 (1) of the Interstate Commerce Act; and if not, wherein their alleged unfair, prejudicial, disadvantageous, preferential, advantageous, or wrongful character consists.

IX.

Whether, by the allegations contained in Sections 9, 10, 12, 14, and 15 of the complaint, or by any of said allegations, the plaintiff claims that rates being charged for the transportation of freight to and from Georgia, or between Georgia and the North, are un-

justly or unduly or unlawfully discriminatory or prejudicial against shippers or consignees or ports or places in Georgia, and, if so, what rates, on what commodities, and between what origins and destinations, are alleged to be unjustly or unduly or unlawfully discriminatory or prejudicial, and wherein such unlawful discrimination or prejudice is alleged to consist with respect to such rates, and each of them.

X.

Whether, by the allegations of discrimination contained in Sections 9, 10, 12, 14, and 15 of the complaint, or by any of said allegations, the plaintiff claims that any particular rate or rates for the transportation of freight to and from Georgia, and, if so, on what commodities, and between what origins and destinations, are discriminatory; or whether plaintiff claims that it, or shippers in Georgia, are being discriminated against, by an average of rates, or a level of rates, charged for the transportation of freight to and from Georgia, and, if so, how said average or level is computed, and what rates, on what commodities, and between what origins and destinations, enter into said average or level.

XI.

Whether, by the allegations contained in Sections 14, 15, and 16 of the complaint, or by any of said allegations, and by Exhibit 3 thereof, plaintiff claims that the rates referred to are unjustly or unduly or unlawfully discriminatory or prejudicial, or are wrongful or injurious, to Georgia and its people, by virtue of their being higher, where they are higher, for the same mileage, or are fixed at a higher rate per mile, than rates charged on the same commodities between points within Official Territory.

XII.

Whether, at the time of the filing of the complaint herein, any of the rates to or from the ports of Savannah or Brunswick, Georgia, referred to in Section 4 of the complaint, had been prescribed or approved, with respect to their measure or with respect to their relationship to rates from or to North Atlantic ports, by the Interstate Commerce Commission, and, if so, which of such rates had been so prescribed or approved; and whether the rates from Alton, Illinois, to Baltimore, Maryland, and Savannah, Georgia, referred to in said paragraph, are in either instance applicable on export traffic, and, if in either instance not so applicable, then what is or are the first-class export rate or rates from Alton, Illinois, to Baltimore, Maryland, and Savannah, Georgia, respectively.

XIII.

Whether any of the rates referred to in the complaint are export or import rates to or from the ports of Georgia, and, if so, which rates are so referred to, and on what commodities, and from and to what points do they apply and whether they are alleged to be discriminatory or unduly prejudicial to Georgia and its ports as compared with the rates applicable on like export or import traffic from or to one or more of the North Atlantic ports, and, if so, which of such ports.

XIV.

Whether the rates referred to in the complaint are limited to the class rates, or whether they include commodity rates; and, if they include commodity rates, what are the commodities and the rates to which reference is made.

XV.

Whether, in the instances where the rates complained of as discriminatory are class rates, the complaint means, by reference to the allegations in Section 11 or otherwise, to allege or claim or imply that the articles of freight traffic to which such class rates are applicable are in each instance subject to classification ratings identical with those applicable to like articles shipped on class rates within Official Territory, and where such ratings are identical whether in each instance they represent the same percentage of first class; and whether the allegations of discrimination in respect of rates to and from Georgia include, and are also directed to, the classification ratings governing such rates.

XVI.

Whether the rates shown in Exhibits 1 and 3 of the complaint are in all instances joint class rates lawfully published and filed with the Interstate Commerce Commission, and, if not, then in what instances are they not; and whether, as to each instance cited in said Exhibit 1 the expression "Official Basis" as therein used has reference to a general or an individual rate basis; and, if a general basis, whether predicated upon the Official Classification or exceptions thereto, or a uniform percentage of class rates, or upon an average of specific commodity rates, and, if the latter, how such average is computed; and, if an individual basis, from and to what points of origin and destination in Official Territory the rate forming the "Official Basis" as used in said complaint is applicable, and, in each instance, whether such rate or basis, at the time of the filing of the complaint herein, had been prescribed or approved by the Interstate Commerce Commission.

XVII.

What commodities are referred to by the expression "some commodities" in Section 14 of the complaint; whether the said rates and charges therein mentioned are class rates or rates made a unform percentage of the first class rates; and whether the rates therein referred to, at the time of the filing of the complaint herein, had been prescribed or approved by the Interstate Commerce Commission, or had been established by defendants in accordance with rate bases or relationships prescribed or approved by the Interstate Commerce Commission.

XVIII.

Whether, by any of the allegations of the complaint, or by any of the characterizations therein, plaintiff means to allege that the rates, charges, or classifications complained of are unjust or unreasonable contrary to paragraphs (4), (5) (a), or (6) of Section 1, or unjustly discriminatory contrary to Section 2, or unduly or unreasonably preferential or unduly or unreasonably prejudicial contrary to Section 3(1), of the Interstate Commerce Act; and, if not, in what respects, if at all, the rates complained of are alleged to be illegal or unlawful.

XIX.

Whether the rates complained of in the allegations contained in Sections 9, 10, 14, 15, and 16 of the complaint, and in Exhibits 1 and 3 thereof, include rates which, at the time of the filing of the complaint herein, had been prescribed by the Interstate Commerce Commission or approved by it, or rates established by defendants in conformity with rate bases or relationships theretofore prescribed or approved

by the Interstate Commerce Commission; and, if so, what are the rates complained of, and between what origins and destinations, which had been so prescribed by the Commission or approved by it or which are in conformity with rate bases or relationships so prescribed or approved by the Commission.

XX.

Whether the complaint, in so far as it relates to these Northern defendants or any of them, involves only joint interterritorial rates from or to stations in Georgia to or from stations in Official territory; and, if as to the said defendants the complaint involves any other rates, what other rates are so involved, and what complaint is made against these said defendants with respect thereto.

XXI.

Whether, by the averments contained in Sections 3, 4, and 5 and in other paragraphs of the complaint, plaintiff means to allege as to interterritorial rates to or from Georgia, a different measure or character of unlawfulness with respect to the northbound rates than with respect to the southbound rates, and whether said complaint means to allege that the rates to Georgia should be no higher than the rates from Georgia, or that the rates from stations in Georgia properly may or should be lower, or on a lower basis, than rates to stations in Georgia.

XXII.

With reference to the allegation contained in Section 10 of the complaint, to the effect that defendants have declined and refused to establish rates for the carrying of freight based upon the cost of con-

structing and maintaining their several lines of railroad, and the cost of carrying freight over the same, and upon such other elements as should be considered by each particular railroad, in establishing its tariff rates, what are the other elements besides cost of construction, maintenance and carriage, which plaintiff claims should be considered by each railroad in establishing its tariff rates; whether such elements include the consist of the traffic on the particular railroad or in the territory in which it operates, transportation conditions on the particular railroad or in the particular territory, the value of the commodity, and the value of the service; and what is meant by the expression "what the traffic will bear."

XXIII.

Whether, by the averments contained in Sections 4, 5, 9, 12, 16, 19, and Exhibits 1 and 3, or by any other averments contained in the complaint, alleging the establishment or maintenance by defendants of rates or charges applicable to the transportation of freight in interstate commerce to or from points in Georgia, or between points in Georgia and the North, allegedly unfair, prejudicial, or disadvantageous to Georgia, its ports, or its people, or allegedly preferential of or advantageous to other States, their ports, or their people, and which the opinion of the Court herein of March 26, 1945, construed as averring the establishment and maintenance of "discriminatory rates," the plaintiff means to allege or imply any one or more, and if so which, of the following: (1) that the rates, as compared with which the rates to or from Georgia are so alleged to be discriminatory against Georgia, its ports, and its people, are the rates on like traffic within Official territory; (2) that the costs of transporting freight in Georgia and

in Southern territory are no higher than in Official territory; (3) that railroad traffic conditions, including the consist of the traffic and competitive conditions, in Georgia and in Southern territory are no different than in Official territory; (4) that railroad operating conditions attendant upon the transportation of freight in Georgia and in Southern territory do not differ from those in Official territory; (5) that economic conditions affecting railroad transportation in Georgia and in Southern territory are not different from those affecting transportation in Official territory; (6) that there are no conditions affecting the rates to or from Georgia which justify their being on a higher basis or level than the rates applicable to like traffic within Official territory; or (7) that Georgia is lawfully entitled to rates within Southern territory, and between Southern and Official territories, no higher than the rates on like traffic within Official territory regardless of any differences in costs of service or in traffic, operating, or economic conditions affecting transportation under the respective rates.

XXIV.

Whether, by any of the allegations contained in the complaint, it is claimed that the defendants, or any of them, by any of their acts, other than the fixing or charging of rates duly published and filed, discriminate or have discriminated against plaintiff, its ports, or its people, and, if so, which of defendants, and by what acts and at what time or times, discriminate or have so discriminated against plaintiff, its ports, or its people.

XXV.

Wherein, in what manner, and to what extent are shippers or receivers of freight or ports in Georgia,

and if so which, or the State of Georgia itself, injured as alleged in Sections 3, 4, 5, 6, 9, 10, 12, 14, 16, 18, and 19 as a result of the alleged conspiracy; which persons, industries, or ports in Georgia have been or are being hindered, limited, distrained, or restricted in their markets as alleged as a result of the alleged conspiracy; whether such allegations refer to actual or prospective shippers or receivers of freight or industries, and, if prospective, what shippers or receivers of freight or industries plaintiff alleges would be located or established in Georgia if the alleged conspiracy were removed but would otherwise be prevented by the alleged conspiracy from being located or established in Georgia; and what rates plaintiff alleges would have been maintained to or from Georgia, and what relationships would have existed between the rates to or from Georgia and other rates, except for the alleged conspiracy.

XXVI.

What is meant by the term "national market" used in Section 3 of the complaint; whether it is synonymous with "Official Territory," as described in Section 8 thereof, or whether it also includes "Southern Territory" as therein also described, or other portions of the United States, and, if so, what other portions; and which of Georgia's products or prospective products have been or are denied equal access with those of other States to the said "national market"?

XXVII.

What measures "to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people," referred

to in Section 3 of the complaint, have been taken by the State of Georgia which have been or are being frustrated or counteracted by the rates complained of; and by what acts, or kinds or classes of acts, and in what manner, and on or about what dates, or between what dates, have such measures been or are they being so frustrated or counteracted, and by whom?

XXVIII.

Whether, by the allegations contained in Sections 9, 12, and 14 of the complaint, or by any of the said allegations, the plaintiff claims that it, or shippers or receivers of freight in Georgia, is or are injured by any particular rate or rates for the transportation of freight to and from Georgia, and, if so, on what commodities, and between what origins and destinations; or whether plaintiff claims that it, or shippers or receivers of freight in Georgia, is or are injured by an average of rates, or by a level of rates, being charged for the transportation of freight to or from Georgia, and if so, how said average or level is computed, and what rates, on what commodities, and between what origins and destinations, enter into said average or level.

Each of these said "Northern defendants" separately and severally represents that the specification and particularization in the above-indicated respects, sought by this motion for a more definite statement or for a bill of particulars, is needed by each of these said defendants in order to enable it properly to prepare and frame its responsive pleading and prepare for trial and be in a position to take advantage of all legal and other defenses

available to it, and particularly to enable each of said defendants to know whether or not, and if so, to what extent, under the opinion of the Court herein, including footnote 7 at pp. 13-14 of the pamphlet copy of said opinion, it is entitled to claim protection under Certificate No. 44, issued March 20, 1943, under Sec. 12 of the Act of June 11, 1942 (56 Stat. 357) by the Chairman of the War Production Board (8 Fed. Reg. 3804).

WHEREFORE, these defendants separately and severally pray that an order be made directing that plaintiff amplify its complaint by filing a more definite statement or a bill of particulars with respect to the matters above mentioned, and that defendants' time to answer or otherwise plead be extended until 60 days after the filing of a further amended complaint or a more definite statement or bill of particulars.

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MAY 25, 1945.

IN THE

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The State of Georgia, Complainant,

v.

The Pennsylvania Railroad Company, et al., Defendants.

MOTION OF NORTHERN DEFENDANTS FOR AN EXTENSION OF THE TIME WITHIN WHICH TO ANSWER OR OTHERWISE PLEAD.

Comes now each of the undersigned "northern defendants" in the above entitled cause and separately and severally represents to the Court as follows:

These "northern defendants" are filing with the Court, simultaneously herewith, a motion to require plaintiff to amplify its complaint with a more definite statement or a bill of particulars, so that these defendants may be enabled properly to prepare a responsive pleading in answer to the complaint; and, for the reasons set forth in said motion, and in the supporting brief simultaneously filed herewith, these defendants are unable to make an adequate, informative and properly responsive answer or otherwise to plead to the said complaint unless and until the said complaint has been amplified and clarified by a more definite statement or a bill of particulars, as requested in said motion.

WHEREFORE, these northern defendants respectfully move that the Court enter an order extending the time

within which these defendants may file an answer or may otherwise plead until sixty days after the filing by plaintiff of a further amended complaint or a more definite statement or a bill of particulars in amplification of its complaint, as requested in said defendants' motion; or, in the event that the plaintiff should refuse to file a further amended complaint or a more definite statement or bill of particulars in amplification of its complaint, and this Court should deny this and any and all other motions to require plaintiff to file such a more definite statement or bill of particulars in amplification of its complaint, then these defendants respectfully move that the Court enter an order extending the time within which these defendants may file an answer or may otherwise plead until sixty days after the date on which notice of the denial by the Court of all such motions for a more definite statement or a bill of particulars has been received by them.

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v.

The Pennsylvania Railroad Company et al., Defendants.

BRIEF IN SUPPORT OF MOTION OF NORTHERN DEFENDANTS FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS.

I. THE ALLEGATIONS OF THE COMPLAINT LACK SUFFICIENT DEFINITENESS AND PARTICULARITY TO ENABLE DEFENDANTS PROPERLY TO UNDERSTAND AND MEET THE ISSUES TENDERED AND TO PREPARE THEIR RESPONSIVE PLEADINGS, IN THAT, ALTHOUGH SAID ALLEGATIONS FIND THEIR VALID BASIS, UNDER THIS COURT'S OPINION, IN THE CHARGES OF COERCION AND DISCRIMINATION EMBODIED IN THE COMPLAINT, SAID ALLEGATIONS DO NOT SUFFICIENTLY INFORM DEFENDANTS AS TO WHAT PARTICULAR ACTS OR KINDS OR CLASSES OF ACTS OF COERCION AND DISCRIMINATION ARE COMPLAINED OF AND HOW SAID ACTS OR CLASSES OF ACTS RESULT OR HAVE RESULTED IN INJURY AND DAMAGE TO PLAINTIFF.

within which these defendants may file an answer or may otherwise plead until sixty days after the filing by plaintiff of a further amended complaint or a more definite statement or a bill of particulars in amplification of its complaint, as requested in said defendants' motion; or, in the event that the plaintiff should refuse to file a further amended complaint or a more definite statement or bill of particulars in amplification of its complaint, and this Court should deny this and any and all other motions to require plaintiff to file such a more definite statement or bill of particulars in amplification of its complaint, then these defendants respectfully move that the Court enter an order extending the time within which these defendants may file an answer or may otherwise plead until sixty days after the date on which notice of the denial by the Court of all such motions for a more definite statement or a bill of particulars has been received by them.

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The State of Georgia, Complainant,

v.

The Pennsylvania Railroad Company et al., Defendants.

BRIEF IN SUPPORT OF MOTION OF NORTHERN DEFENDANTS FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS.

I. The Allegations of the Complaint Lack Sufficient Definiteness and Particularity to Enable Defendants Properly to Understand and Meet the Issues Tendered and to Prepare Their Responsive Pleadings, in That, Although Said Allegations Find Their Valid Basis, Under This Court's Opinion, in the Charges of Coercion and Discrimination Embodied in the Complaint, Said Allegations do not Sufficiently Inform Defendants as to What Particular Acts or Kinds or Classes of Acts of Coercion and Discrimination are Complained of and How Said Acts or Classes of Acts Result or Have Resulted in Injury and Damage to Plaintiff.

Under the opinion of Mr. Justice Douglas in this case, the amended bill of complaint, herein termed the "complaint", is permitted to be filed because and to the extent that it charges "a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed", to the injury and harm of Georgia. This is apparent from the following statements in Mr. Justice Douglas' opinion (pp. 13-16 of pamphlet opinion):

> "It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates *clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.* * * *

> "* * * The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influence of a combination which exceeds the limits of the collaboration authorized for the fixing of joint through rates. *It seeks to put an end to discriminatory and coercive practices.* The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs *which are free from the restrictive, discriminatory, and coercive influences of the combination.* * * *

> "* * * If it is shown that the alleged combination exists *and uses coercion in the fixing of joint through rates*, only an injunction aimed at future conduct of that character can give adequate relief. Indeed, so

long as the collaboration which exists exceeds lawful limits and continues in operation, the only effective remedy lies in dissolving the combination or in confining it within legitimate boundaries. Any decree which is entered would look to the future and *would free tomorrow's rate-making from the coercive and collusive influences alleged to exist.* It cannot of course be determined in advance what rates may be lawfully established. *But coercion can be enjoined. And so can a combination which has as its purpose an invidious discrimination against a region or locality.* * * *

"As we have said, we construe the bill to charge *a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed.* We hold that under that construction of the bill a cause of action under the anti-trust laws is alleged." (Emphasis supplied.)

It is plain from the above language that the charges of coercion and discrimination are vital and indispensable elements in the foundation upon which the complaint has been permitted by this Court to stand. The essence of the cause of action which, according to Mr. Justice Douglas' opinion, is stated in the complaint, lies in the charges of coercion and discrimination which the complaint contains.

Since this is so, it follows that the defendants, in order properly to understand the issues thus validly tendered by the complaint, to prepare their responsive pleadings, and to prepare to meet the issues, must have sufficient specification of what is alleged as to the coercive and discriminatory action with which they are charged.

to enable them to know what is the specific nature of the charges made against them. Before defendants can answer the plaintiff's charges, they must be given enough information to make it possible for them to identify the conduct complained of, and to know what particular aspects or phases of that conduct are alleged to have rendered it unlawfully coercive or discriminatory. Otherwise, defendants are prevented from making an answer which would be informative and helpful to the Court. In order to make a proper and helpful answer, defendants must be able to admit those charges which they can truthfully and properly admit and deny those charges which they can truthfully and properly deny. But defendants cannot truthfully admit or deny a charge which is so vague, general, and indefinite that it does not apprise them either of the factual situation on which the charge is based or of the legal theory on which the plaintiff relies with respect to that factual situation.

Such, however, is the nature of the charges made against the defendants in Georgia's complaint. As will be shown more fully below, the charges in the complaint are so vague and general that they do not apprise the defendants of the specific conduct on their part which is claimed to constitute unlawful coercion or discrimination, or of the specific respects in which defendants' conduct is alleged to be unlawfully coercive or discriminatory. Nor do they apprise the defendants of the specific respects in which their conduct is alleged to result in injury or damage to Georgia. These and many other aspects of the complaint leave the defendants in the position of being without sufficiently specific knowledge as to the charges against them to be able truthfully either to admit or to deny those charges. Therefore, defendants in this motion ask the Court to require plaintiff to amplify and particularize its charges in these respects, so that defendants may properly answer them.

A. (Pars. I–IV of Motion).

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity in That, Although Said Allegations Allege Coercion by Some Defendants of Other Defendants and Coercion Resulting From Rate Bureau Action, They Do Not Specify the Acts or Kinds or Classes of Acts Which Constitute the Alleged Coercion, Or the Particular Defendants Which Are Alleged To Have Coerced Other Defendants Or the Instances Of Such Coercion, Or the Rate Bureaus Which Have, Or the Instances In Which They Have, Been Used To Coerce Any Defendants In the Fixing Of Rates.

There are in the complaint five Sections—Sections 9, 10, 11, 12, and 13—containing charges which especially suggest alleged coercive action on the part of the defendants or some of them, and which require amplification and clarification in the respects sought by Paragraphs I to IV of the motion of these defendants.

Sections 9 and 11 of the complaint deal generally with alleged action by rate bureaus and associations which is claimed to constitute collusion and combination in restraint of trade. These charges are to the effect that all of the defendants, through the use of some sixty rate bureaus and associations, have entered into and engaged in unlawful combinations and agreements in restraint of trade and commerce, and by such concerted and collusive action have fixed arbitrary and non-competitive rates and charges for rail transportation of freight, in such a way as to prejudice, harm, and injure the State of Georgia, its ports and shippers in favor of other states, ports, and shippers. Section 11 sets forth certain additional information as to the general way in which certain of the rate bureaus and associations operate.

But nowhere in either Section 9 or 11 or elsewhere in the complaint is any reference made to any specific

action by any rate bureau or bureaus, which is alleged to have resulted in the fixing, coercively or otherwise, of a specific rate which has actually constituted discrimination against or otherwise resulted in concrete injury and damage to Georgia or any of its ports or shippers. The complaint refers without specification to "some sixty rate bureaus, committees, conferences, associations and other private rate-fixing agencies," and the exhibit in which these numerous rate bureaus and associations are listed indicates that they are scattered throughout the various sections of the country. Since the bureaus so listed substantially exceed sixty in number, the complaint is wholly indefinite as to which of them are alleged to have been used in the fixing of the rates to and from Georgia of which complaint is made. Moreover, there is no indication as to which defendants are members of which bureaus. Without some specification of the particular rate bureaus which are alleged to have been used by defendants, coercively or otherwise, in restraint of trade, of the particular actions of such bureaus and of the particular rates which are claimed to have resulted in actual injury or damage to plaintiff, it is impossible for defendants truthfully and informatively to answer these charges.

It may very well be that the particular matters which are intended to be embraced in these general charges are, in defendants' opinion, not in restraint of trade; or it may be that there is no element of coercion in them; or it may be that rates lower than those approved by rate-bureau action were in fact established by independent action of member lines. Specific allegations as to which particular bureau actions are complained of by the plaintiff, and explicit identification of the rates established or maintained as a result thereof, would place defendants in a position to make specific, informative, and truthful admissions or denials, and thereby to simplfy and clarify the issues.

For these reasons, Paragraph I of the motion of these defendants calls for a particularization or a more definite statement, as to what acts, or kinds or classes of acts, and in what manner, and on or about what dates the various rate bureaus or associations referred to in the complaint, or any of them, and if so which, have been used by the defendants or any of them and if so by which defendants, for the alleged purpose of making or carrying out contracts or combinations in restraint of trade, or for the alleged purpose of monopolizing trade, or the establishment or exaction of arbitrary or non-competitive rates, as alleged.

Section 10 of the complaint charges that all defendants, conspiring and combining through the rate bureaus and associations referred to in Section 9, adopt arbitrary and non-competitive rates, which are collected by the rail carriers engaged in the transportation to which the rates apply. It is further charged that the rates thus adopted by the defendants may not be changed without the approval of some of the rate bureaus or association, and that no one railroad can change joint through rates without rate bureau approval. Finally it is charged that the result is to prevent any one of the defendants from reducing by unilateral action the arbitrary and non-competitive rates thus established.

These charges are apparently intended to convey the impression that freedom of action for establishing rates for transportation over the lines of individual railroads is interfered with and prevented by the collusive and concerted action of the defendants through the use of the rate bureaus and associations referred to. Undoubtedly these were among the principal charges which this Court had in mind in its discussion of the factor of coercion referred to above.

Obviously, there are many kinds of ways in which the freedom of action of an indivdual railroad in establishing rates for transportation over its own lines might be interfered with. For example, in the case of a joint

through rate, applicable from an origin on one railroad to a destination on another railroad, the concurrence of both of the railroads involved in the transportation between that origin and destination is required for the establishment and maintenance of the rate. In the absence of that concurrence the shipper would be obliged to pay a combination of local rates, each established by separate action of the railroad on which it applied, and in that case the shipper would ordinarily pay a higher rate than if there were available to him a joint through rate established by the concurrence of the two railroads, since the purpose of such joint through rates is to make possible, by joint action, a lower rate than would be available to the shipper in the absence of such joint action. Plainly, such a joint through rate, established by the concurrence of the participating railroads, cannot be further reduced by the unilateral action of any one railroad, and to that extent the freedom of action of each of the participating railroads is interfered with. If that is what is meant, and all that is meant, by these charges of coercive action set forth in Section 10, as is intimated by the statement in Section 10 that "no line can change *joint through rates* without the approval of the private rate-fixing agencies created by defendants", then the answer of the defendants might very well be to admit the fact but broadly deny the legal implication.

Moreover, even a broad denial of the legal implication would not be helpful or informative to the Court, and a more helpful and informative answer would be made possible if plaintiff were further required to specify wherein the alleged coercion lies in the case of a joint through rate—whether, for example, it would constitute coercion, within the plaintiff's charge, for a railroad to refuse voluntarily to join in the establishment of a reduced rate, if such refusal were based (1) upon the fact that the proposed reduced rate would disturb a rate relationship prescribed or approved by the Interstate Commerce Commission, (2)

upon representations by shippers to the railroad that the proposed reduced rate would make, give, or cause undue or unreasonable preference or advantages to Georgia, its ports, or its people, and would subject said shippers to undue or unreasonable prejudice or disadvantage in violation of Section 3(1) of the Interstate Commerce Act, or (3) when based upon the failure of the carrier proposing the reduced rate to agree to just, reasonable and equitable divisions of the rate. If the plaintiff's charge of coercion under Section 10 of the complaint is limited to the matter of joint through rates, a specification by the plaintiff of what constitutes the coercion, where a participating carrier voluntarily refuses to join in a joint through rate proposed by other carriers, is essential in order to enable the defendants to make a helpful and informative answer.

On the other hand, if these charges under Section 10 are intended to be broader and to go so far as to say that the rate bureaus act in such a way that no individual railroad can establish or change any rate for transportation on its lines whether or not it is a joint through rate, without the approval of one or more rate bureaus, then defendants' answer would undoubtedly be a wholly different one. If such a broad charge is in fact intended, then plaintiff should surely be required to particularize, as to what the authority is, whether in the constitution or by-laws of the rate bureau or association or by separate agreement of the members thereof, referring specifically to the provision in the by-laws or constitution or in the separate agreement, by which the rate bureaus or associations have or claim to have the power to veto or prevent unilateral action by individual railroads in the maintenance or establishment of rates; and also to state specifically what action, taken by what rate bureau or association, at what time, and with the participation of what defendants, is responsible for the alleged broad restraint upon the individual railroads' freedom of action in establishing and maintaining rates.

Plainly, until defendants are apprised of the intended scope and meaning of these charges and of the particular actions and factual situations embraced within the charges, they are not in a position to make a truthful, helpful and informative answer to these charges.

For this reason Paragraph II of the motion of these defendants calls for a particularization or more definite statement as to whether by the charges made in Section 10 or elsewhere in the complaint the plaintiff means to claim that all or any, and if so which, of the various rate bureaus and associations referred to has or claims power by its constitution or by-laws or by agreement among the defendants, and if so, under what specific constitutional, by-law or other provision, or has in fact exercised or is threatening to exercise the power, to veto or prevent, against the will of any defendant or other railroad member of such rate bureau or association, any reduction in the freight rate to and from Georgia, proposed or initiated by any defendant or other railroad, and if so in what instances, in connection with what rates, properly related to commodities, origins, and destinations, and on what dates, such power has been or is being claimed or exercised with respect to any rates to or from Georgia.

As further bearing upon the precise scope of the cause of action alleged in Sections 9, 10, 11, and 12 of the complaint, Paragraph III of the motion of these defendants seeks a specification as to the nature of the alleged conspiracy of defendants in employing the bureau or conference method of rate-making. As stated, the Court has construed the complaint to charge a conspiracy among defendants to use the rate-bureau procedures to discriminate against Georgia. But it is not clear from these or other sections of the complaint whether plaintiff means to allege that defendants, or any two or more of them, in employing the conference method of rate-making were motivated by a common and express purpose or desire, or acted in con-

cert in furtherance of a common plan, to establish or maintain such rates as would unfairly discriminate against, or work to the disadvantage of, Georgia, its ports, or its people; or whether the complaint means only to allege that, without any such express purpose, design, plan, or desire on the part of any of the defendants, the rates which have been established or maintained by defendants to or from Georgia, through the conference method of rate-making, are allegedly discriminatory against or disadvantageous to Georgia, its ports, or its people.

Further charges concerned with alleged coercive action are contained in Section 13 of the complaint. There it is charged that the Southern defendants, with lines wholly or principally in the South, generally are dominated and coerced by the Northern defendants, and therefore that said Southern defendants, even when they desire, cannot publish joint through rates between Georgia and the North when the Northern carriers refuse to join in said rates. Here again, as in the case of Section 10, it may be that the charges are intended to refer only to joint through rates, which of necessity require the concurrence of the participating railroards and cannot be changed by the unilateral action of any one of those railroads. To the extent that these charges refer only to such joint through rates and to the fact that such rates cannot be reduced without the concurrence of all the participating railroads, and depending on what is alleged to constitute the coercion where there is only a voluntary refusal by a carrier to participate in a proposed reduced joint rate, one kind of answer would be appropriate; while to the extent that these charges are intended to be broader and to allege a general and comprehensive domination and coercion of the Southern defendants or some of them by the Northern defendants or some of them, a wholly different kind of answer would be appropriate; and in the latter case the particular kind of answer that should appropriately be made could not be

determined without more specific information as to which of the defendants have been dominated and coerced by which other defendants, by what means said coercion has been made effective, and with respect to what rates, interterritorial or intraterritorial, and what instances or kinds of action are alleged by plaintiff to constitute domination or coercion. Obviously, in the absence of a more particular and definite statement from the plaintiff as to the scope and meaning of the charge of coercion and domination by some defendants of other defendants, and as to the specific instances and factual situations embraced within said charges, defendants are not in a position to make a truthful, helpful and informative answer to these charges.

For this reason, defendants in Paragraph IV of this motion call for a particularization and more definite statement as to which defendants, by what means or instrumentalities, in what ways, and at what times, have been dominated or coerced by which other defendants and with respect to what Southern intraterritorial rates and what interterritorial rates; and what is meant by the allegation that some defendants are "generally" so dominated and coerced by other defendants; and whether plaintiff claims that the refusal of a connecting carrier to join with an originating carrier in the establishment of a proposed reduced joint rate constitutes coercion or domination of such originating carrier, and if so whether such refusal constitutes domination or coercion when based (1) upon the fact that the proposed reduced rate would disturb a rate relationship prescribed or approved by the Interstate Commerce Commission, (2) upon representations by shippers to the connecting carrier that the proposed reduced rate would make, give, or cause undue or unreasonable preference or advantage to Georgia, its ports, or its people, and would subject said shippers to undue or unreasonable prejudice or disadvantage in viola-

tion of Section 3(1) of the Interstate Commerce Act, or (3) when based upon the refusal of the originating carrier to agree to just, reasonable, and equitable divisions of the proposed rate.

B. (Pars. V–XXV of Motion).

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity With Respect to the Nature of the Alleged Conspiracy "To Discriminate Against Georgia In the Rates Which Are Fixed", the Nature of the Alleged Discrimination In Rates Which Is the Subject of Said Conspiracy, and the Identity of the Rates or Categories of Rates To Which the Allegations Relate, and With Respect to the Nature, Qualities, or Attributes of the Rates Which Are Alleged To Make Them Discriminatory Against Georgia.

The averments of the complaint are so general, inartificial and vague and are so lacking in sufficient definiteness and particularity with respect to the subject of discrimination as to make it impossible for defendants to formulate an answer thereto which would produce clear, definite and understandable issues. The insufficiency of the complaint in this regard is especially manifest with respect to (1) the nature of the alleged conspiracy "to discriminate against Georgia in the rates which are fixed" to or from stations therein, (2) the nature of the alleged discrimination in rates which is the subject of the alleged conspiracy, (3) the identity of the rates or categories of rates to which the allegations of the complaint relate, and (4) the nature, qualities, or attributes of the rates which are alleged to make them discriminatory against Georgia. The shortcomings of the allegations of the complaint in these several respects are the subject of Paragraphs V to XXV of the motion of these defendants for a more definite statement or for a bill of particulars, which will be discussed under the several subjects indicated.

1. *(Pars. V–IX of Motion).*

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity with Respect to the Nature of the Alleged Conspiracy "to Discriminate Against Georgia in the Rates Which are Fixed".

Sections 3, 5, 9, and 19 of the complaint variously characterize the rates which are the subject of the alleged conspiracy to discriminate against Georgia as "unjust", "extortionate", "illegal", "excessive", "unreasonable", "arbitrary", "non-competitive", and "unlawful and wrongfully * * * exacted". These various characterizations might seem to relate to the intrinsic amount of the rates to or from Georgia, as distinguished from the propriety of the relation of the rates to or from Georgia to other rates. The terms used in Paragraphs (5)(a) and (6) of Section 1 of the Interstate Commerce Act to describe this quality in rates or charges are "unjust and unreasonable".

Sections 3, 4, 9, and 19 of the complaint characterize the rates which are the subject of the alleged conspiracy to discriminate against Georgia, as "unfair", "prejudicial", or disadvantageous to Georgia, its ports or its people, or as preferential and advantageous to other States, their ports or their people. These characterizations appear to relate to the propriety of the relationship of the rates to or from Georgia to other rates. The terms used in Section 3(1) of the Interstate Commerce Act to denote this quality in rates are "undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage".

The complaint does not in terms allege "discrimination" in the rates to or from Georgia, or that such rates are "discriminatory" against it, its ports, or its people. This may be in deference to the fact that Section 2 of the Interstate Commerce Act, which prohibits "unjust

discrimination," is confined to situations where different charges are made for the transportation of like traffic for the same line-haul over the same route. *Wight* v. *United States*, 167 U. S. 512, 518 (1897); *Int. Com. Com.* v. *Alabama Midland Ry.*, 168 U. S. 144, 166 (1897); *Tide Water Oil Co.* v. *Director General*, 62 I. C. C. 226, 227 (1921); *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I. C. C. 609, 648 (1939).

The Interstate Commerce Commission and the courts, however, have frequently employed the term "discrimination" in a generic sense, as embracing violations of either Section 2 or 3(1) of the Interstate Commerce Act,* and this would seem to be the sense in which it was used by this Court in its opinion of March 26, 1945, herein when it said (pp. 2-3 and 16 of pamphlet opinion):

> "It is sufficient at this point to say that for purposes of this motion for leave to file we construe the allegation that defendants have conspired to fix the rates so as to 'prefer' the ports of other States over the ports of Georgia as a charge that defendants have conspired to fix rates so as to discriminate against Georgia.
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* See Interstate Commerce Acts Annotated, p. 1106, where, in introducing the annotations of cases involving undue preference and prejudice under Section 3(1) of the Interstate Commerce Act, 49 U. S. C. Sec. 3(1), the following appears:

> "(*Editorial comment:* In consideration of the annotations following, it should be borne in mind that the words 'discrimination' and 'preference and prejudice' have been used countless times both by the courts and by the commission, as interchangeable. Only in recent years has even the commission attempted precision in the use of these words, as relating to differing matters of substance.)"

An illustration of the point will be found in the decisions of the Commission and the Supreme Court in the *Shreveport case*, which involved Section 3(1) and not Section 2 of the Act. *Railroad Commission of La.* v. *St. L. S. W. Ry. Co.*, 23 I. C. C. 31, 39, 47 (1912); *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 349-350, 355-356, 359 (1914).

> "As we have said, we construe the bill to charge a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed".

If the Court has thus used the words "discriminate", "discriminatory", and "discrimination" in the generic sense, as seems likely, it is also possible that the Court did not construe the complaint as charging a conspiracy among defendants to establish or maintain rates to Georgia which were unjust or unreasonable, in the sense of being too high. But it is to be remembered that the opinion of the Court of March 26, 1945, was not primarily concerned with delimiting the bounds of all causes of action intended to be embraced in the complaint, but rather was concerned to determine, as a preliminary matter, whether it contained a sufficient statement of a cause of action to justify the Court in granting leave to file.

Accordingly, in view of the looseness of the allegations of the complaint with respect to the nature of the unlawfulness of the rates which are alleged to be the subject of a conspiracy to discriminate against Georgia, these defendants in Paragraphs V, VI, VII, VIII, and IX, seek a specification and particularization of the allegations in this respect. Without this information the defendants have no clear understanding of the nature of the precise causes of action which plaintiff may be alleging against them. It is essential to the formulation of a properly responsive pleading that defendants know the precise nature of the alleged conspiracy, but this cannot be known in the absence of a clearer specification of the nature of the illegality in the rates which defendants are alleged to impose, or to seek to impose, upon Georgia, its ports, or its people.

2. *(Pars. X–XI).*

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity with Respect to the Nature of the Alleged Discrimination in Rates Which is the Subject of the Alleged Conspiracy.

The complaint is wholly general and vague as respects the nature of the alleged discrimination which is the subject of the conspiracy charged. Indeed, except for such clarification as is given the complaint by the opinion of the Court of March 26, 1945, there would be no certainty that "discrimination" as such was alleged at all, since the complaint itself avoids the use of the term, as above noted. As indicated in the Court's opinion, the discrimination against Georgia which is alleged is "in the rates which are fixed". But the complaint does not at all indicate what those rates are or what it is in or about those rates that makes them allegedly discriminatory. For this reason these defendants have included in their motion for a more definite statement Paragraphs X and XI. Paragraph X seeks to develop whether the allegations of discrimination are based upon any *particular* rate or rates, or whether they are based upon an *average* of rates or a *level* of rates charged for the transportation of freight to or from Georgia, and, if so, how said average or level is computed, and what rates enter into said average or level. Paragraph XI seeks a more definite statement as to whether by the allegations contained in Sections 14, 15, and 16 of the complaint or otherwise, or by Exhibit 3, the plaintiff alleges that the rates are discriminatory by virtue of their being higher, where they are higher, for the same mileage, or are fixed at a higher rate per mile, than rates charged on the same commodities between points within Official territory.

3. *(Pars. XII–XVII of Motion).*

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity with Respect to the Identity of the Rates or Categories of Rates to Which the Complaint Refers.

The complaint is wholly indefinite and vague as to what rates or categories of rates are intended to be referred to therein. The generality of the complaint in this respect leaves wholly uncertain the scope of the charges against these defendants in respect of the alleged conspiracy to discriminate against Georgia in the matter of rates. Without greater particularity on this score the responsive pleadings of defendants can serve little purpose in the way of defining or clarifying the issues.

Accordingly, in Paragraphs XII, XIII, XIV, XV, XVI, and XVII of the motion of these defendants for a more definite statement, various particulars are asked in respect of the identity of the rates or categories of rates to which the allegations of the complaint relate.

Thus, Paragraphs XII and XIII seek to develop whether the allegations of the complaint relate to export or import rates to or from the ports of Georgia which are alleged to be prejudiced, and which are the North Atlantic ports alleged to be preferred, and whether any of the rates to or from the ports of Savannah or Brunswick, Georgia, specifically mentioned in the complaint, have been prescribed or approved by the Interstate Commerce Commission with respect to their measure or their relationship to rates from or to North Atlantic ports, and whether said rates are applicable on export traffic.

Paragraph XIV seeks particulars as to whether the rates referred to in the complaint are limited to the class rates, or whether they include commodity rates, and, if so, what are the commodities and the rates to which reference is made. Paragraph XV seeks to have the complaint

make plain whether, in the instances where the rates complained of as discriminatory are class rates, the complaint means, by reference to the allegations in Section 11 or otherwise, to allege or claim or imply that the articles of freight traffic to which such class rates are applicable are in each instance subject to classification ratings identical with those applicable to like articles shipped on class rates within Official territory, and, where such ratings are identical, whether in each instance they represent the same percentage of first class; and whether the allegations of discrimination in respect of rates to and from Georgia include, and are also directed to, the classification ratings governing such rates.

Paragraphs XVI and XVII of the accompanying motion of these defendants seek to elicit particulars in respect of the rates shown in Exhibits 1 and 3, and to obtain a statement of what is meant by the expression "Official Basis" in Exhibit 1 in each instance, and as to what commodities are referred to by the expression "some commodities" in Section 14 of the complaint with suitable identification of the rates thereon.

4. *(Pars. XVIII–XXIV of Motion).*

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity with Respect to the Nature, Qualities or Attributes of the Rates Which are Alleged to Make them Discriminatory against Georgia.

The nature, qualities, or attributes of the rates which are alleged to make them discriminatory against Georgia have an important bearing upon the nature of the discrimination charged and upon the nature of the alleged conspiracy to discriminate. Yet the complaint, despite the variety of its characterizations of the rates to and from Georgia, is wholly indefinite with respect to the inherent nature or qualities or approved character or

want of conformity to known standards which are alleged to make them discriminatory against Georgia. Accordingly these defendants, in Paragraphs XVIII, XIX, XX, XXI, XXII, and XXIII, seek to obtain a more definite specification in these respects.

Paragraphs XVIII and XIX ask whether the complaint alleges that the rates, charges, or classifications referred to are unreasonable, unjustly discriminatory, or unduly or unreasonably preferential or unduly or unreasonably prejudicial, contrary to Sections 1, 2, or 3 of the Interstate Commerce Act, and if not, in what respects, if at all, the rates complained of are alleged to be illegal or unlawful. Paragraph XX asks particulars as to whether the rates complained of in Sections 9, 10, 14, 15, and 16 of the complaint and in Exhibits 1 and 3 thereof, include rates prescribed by the Interstate Commerce Commission or approved by it, or rates established by defendants in conformity with rate bases or relationships so prescribed or approved. Plaintiff's case may depend upon its ability to establish that, except for the alleged conspiracy to discriminate against Georgia in the matter of rates, it would have secured, or may in the future secure, lower rates than otherwise available to it. But the Commission has power to prescribe minimum rates as well as maximum rates, and these, in particular cases, may be the same figure, so that a particular rate is both a maximum and a minimum rate. 49 U. S. C. Sec. 15(1); *Arkansas Jobbers & Mfrs. Asso.* v. *Director General*, 59 I. C. C. 662, 669 (1920); *Ridenour-Baker Mercantile Co.* v. *A. T. & S. F. Ry. Co.*, 113 I. C. C. 629, 634 (1926); *Chicago Gravel Co.* v. *A., T. & S. F. Ry. Co.*, 118 I. C. C. 633, 647 (1926); *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 386 (1932). It may therefore be important to the framing of a properly responsive pleading by these defendants that the com aint state whether the rates referred to in the allegations contained

in Sections 9, 10, 14, 15, and 16, and in Exhibits 1 and 3, include rates prescribed by the Interstate Commerce Commission or approved by it, or rates established by defendants in conformity with rate bases or relationships so prescribed or approved.

Paragraph XX of the accompanying motion of these defendants asks a further statement as to whether the complaint, in so far as it relates to these Northern defendants or any of them, involves only joint interterritorial rates between stations in Georgia and stations in Official territory, and, if as to said defendants other rates are involved, what they are, and what complaint is made against these defendants with respect thereto.

Paragraph XXI asks that the complaint be made to state whether as to interterritorial rates to or from Georgia, a different measure or character of unlawfulness is alleged with respect to the northbound rates than with respect to the southbound rates, and whether the complaint means to allege that the rates *to* Georgia should be no higher than the rates *from* Georgia, or that the rates *from* stations in Georgia properly may or should be lower, or on a lower basis, than rates *to* stations in Georgia.

Paragraph XXII of the accompanying motion asks that plaintiff state, in connection with the allegation in Section 10 thereof to the effect that defendants have declined to establish rates based upon cost and upon such other elements as should be considered, what are the other elements besides cost which plaintiff claims should be considered by each railroad in establishing its rates, and whether such elements include the consist of the traffic and transportation conditions on a particular railroad or in the particular territory, the value of the commodity, and the value of the service, and what is meant by the expression "what the traffic will bear".

The opinion of the Court herein of March 26, 1945, has construed the averments of the complaint as charg-

ing a conspiracy to discriminate against Georgia in the rates which are fixed. In the course of its opinion (pp. 14-15) the Court also stated:

> "It is true that the injury to Georgia is not in the existence of the combination *per se* but in the rates which are fixed by the combination."

It is therefore important that the complaint make definite precisely what is comprehended in the discrimination charged. Discrimination necessarily connotes comparison. Accordingly, in Paragraph XXIII of the accompanying motion of these defendants, amplification of the complaint is sought so that it shall be clear therefrom whether the plaintiff means to allege or imply any one or more, and if so which, of the following:

> (1) That the rates with which the rates to or from Georgia are compared are the rates on like traffic within Official territory;
>
> (2) That the costs of transporting freight in Georgia and in Southern territory are no higher than in Official territory;
>
> (3) That railroad traffic conditions, including the consist of the traffic and competitive conditions, in Georgia or in Southern territory do not differ from those in Official territory;
>
> (4) That railroad operating conditions in Georgia or in Southern territory do not differ from those in Official territory;
>
> (5) That economic conditions affecting railroad transportation in Georgia or in Southern territory are not different from those affecting transportation in Official territory;

(6) That there are no conditions affecting the rates to or from Georgia which justify their being on a higher basis or level than the rates applicable to like traffic within Official territory; or

(7) That Georgia is lawfully entitled to rates within Southern territory, and between Southern and Official territories, no higher than the rates on like traffic within Official territory regardless of any differences in costs of service or in traffic, operating, or economic conditions affecting transportation under the respective rates.

The concluding paragraph of this group, Paragraph XXIV of the accompanying motion, is residual in character, and asks whether the complaint makes any charge of discrimination by defendants against Georgia, its ports, or its people, other than in the fixing and charging of rates duly published and filed.

C. (Pars. XXV–XXVIII of Motion).

The Allegations of the Complaint Lack Sufficient Definiteness and Particularity With Respect to the Nature, Scope and Extent of the Alleged Injury to Georgia and Its People.

This is a suit by a "person" (*Georgia* v. *Evans*, 316 U. S. 159 (1942)) under Section 16 of the Clayton Act (15 U. S. C., Sec. 26) for injunctive relief against threatened loss or damage alleged to result from a violation of the anti-trust laws. That section provides that "any person * * * shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the anti-trust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity,

under the rules governing such proceedings." The language of this section makes the injunctive relief available against, and only against, threatened loss or damage. Threatened loss or damage must thus be actually shown. The granting or withholding of the injunctive relief provided by this section is subject to the same conditions and principles as are applicable in cases where the general jurisdiction of courts of equity is invoked for injunctive relief against threatened conduct that will cause loss or damage to the party seeking relief. Accordingly, it is essential to plaintiff's case that it definitely establish the fact of such injury or threatened injury for which it is without other adequate remedy: *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82 (1902); *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471 (1917); *Duplex Co.* v. *Deering*, 254 U. S. 443, 464-465 (1921); *Matthews* v. *Rodgers*, 284 U. S. 521, 525-526 (1932); *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94 (1932); *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-52 (1938).

The allegations in Sections 3, 4, 5, 6, 9, 10, 12, 14, 16, 18, and 19 purport to charge injury or threatened injury suffered by Georgia, its ports and its people as a result of the alleged conspiracy among the defendants. But those allegations do not indicate with any particularity or definiteness how, in what respects and to what extent, Georgia or its ports or people have been injured by the alleged conspiracy. They do not indicate which persons or which industries or which ports in Georgia have been or are being or will be adversely affected by the conspiracy, or what particular and specific effects the conspiracy has had or is threatening to have upon them or how those effects have been or are likely to be brought home to them.

There is indication in the allegations of these sections that the alleged injury is claimed to arise from the *rates*,

established, maintained and charged. The opinion of the Court recognizes this in its statement (pamphlet opinion pp. 14-15) that "the injury to Georgia is not in the existence of the combination *per se* but in the rates which are fixed by the combination." Since if the rates to or from Georgia were unreasonable or discriminatory in the sense of being unduly prejudicial to Georgia, its ports or shippers, or unduly preferential to other States or ports or shippers therein, a remedy would be available to Georgia before the Interstate Commerce Commission, and since the Court has permitted the complaint herein to be filed upon the basis of alleging a cause of action not cognizable by the Interstate Commerce Commission, it becomes important to these defendants in the preparation and filing of their answer or other responsive pleading that the complaint should be made to specify with definiteness wherein, in what manner, and to what extent, the alleged conspiracy operates to the injury of Georgia, its ports, its shippers or receivers of freight, or its industries, actual or prospective.

Furthermore, to the extent that Georgia's case may depend upon a showing that except for the alleged conspiracy other rates more favorable to Georgia would have been or would be maintained, or that the relationships which would have existed or which would exist between the rates to or from Georgia and other rates would have been or would be more favorable to it than those which have been maintained or which otherwise would be maintained, plaintiff should be required to make its complaint specific in these regards. For example, if Georgia claims injury resulting from the maintenance of rates alleged to be unfavorable to it, as compared with the rates which would be maintained in the absence of the claimed conspiracy, then Georgia should be made to specify not only what rates are made unfavorable as a result of the conspiracy, which would otherwise not be

unfavorable, and in what respects they are unfavorable, but also whether the claimed injury is alleged to be suffered by existing shippers or receivers of freight or industries, or by prospective shippers or receivers of freight or industries, and if the latter, what prospective shippers or receivers of freight or industries would be located or established in Georgia if the alleged conspiracy were removed but would otherwise be prevented by the alleged conspiracy from being located or established in Georgia.

Accordingly, in paragraphs XXV, XXVI, XXVII, and XXVIII of the accompanying motion these defendants have set forth their requests for particulars in order that the allegations of the complaint with respect to the vital question of injury may be made sufficiently clear to enable them intelligently to prepare their responsive pleadings.

II. Since the Complaint is Lacking in Sufficient Definiteness and Particularity to Enable Defendants Properly to Understand and Meet the Issues Tendered and to Prepare a Responsive Pleading, Plaintiff Should be Required to Amplify said Complaint With a More Definite Statement or a Bill of Particulars, as Requested in Defendants' Motion Herein.

A. In an Original Jurisdiction Case of this Character, this Court, in Determining the Procedure to be Followed under its Rules, Should be Guided by and Should Follow by Analogy the Rules of Civil Procedure Which this Court has Prescribed for Application to Like Cases in the District Courts.

It has been demonstrated above that the charges in the complaint which constitute the vital elements on which the complaint has been allowed to stand are so vague and

general and lacking in particularity and specification that defendants are unable truthfully and informatively to answer those charges. The question is therefore presented as to what is the proper remedy in this proceeding whereby defendants may obtain sufficient particularization and specification of the charges to make it possible for them to answer.

Formerly, the rules of this Court provided that the procedure to be followed in cases of original jurisdiction was to be determined by reference to the practice and procedure applicable in the Courts of King's Bench and of Chancery.* This provision has been abolished and in its place have been substituted the provisions of the present Rule 5 of the Rules of this Court, adopted in 1939. The provisions of the present Rule 5 are as follows:

"ORIGINAL ACTIONS

"Cases on the original docket shall be governed, as far as may be, by the rules applicable to cases on the appellate docket.

"The initial pleading in any such action may be accompanied by a brief and shall be prefaced by a motion for leave to file, which motion will be presented to the court by the clerk on the first motion day following its lodgment in the clerk's office. If leave to file is granted the cases will be placed on the original docket and the parties shall make such cash deposit with the clerk for the payment of his fees as he may require.

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* The text of the former Rule 5 of the Rules of this Court, adopted in 1928 and effective until 1939, was as follows:

"*Practice.* This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of Congress."

"Additional pleadings shall be filed as the court directs."

In the present case, the provision of the Rule stipulating that cases on the original docket shall be governed by the rules applicable to appellate cases obviously has no application, since there is no rule applicable to appellate cases which provides for particularization or amplification of a complaint. Therefore, the only provision of Rule 5 which is applicable at the present stage of this case is the provision that "additional pleadings shall be filed as the Court directs."

Accordingly, under its own rules, this Court has left itself free to determine what is the proper procedural remedy in a situation of this character, where particularization and amplification is sought of a complaint allowed by this Court to be filed under its original jurisdiction.

It is urged that, in determining what procedure should be adopted in such a situation, this Court should follow by analogy the Federal Rules of Civil Procedure which it has prescribed for application in the Federal District Courts. Since this Court is at the present stage of this case exercising functions similar to those exercised by the District Courts in the early stages of cases before them—viz., supervision of the pleadings for the purpose of obtaining the shortest, simplest and most specific framing of the issues which is possible—the logical and reasonable course for this Court to follow is to apply by analogy the procedural rules which it has itself prescribed for application in the District Courts under similar circumstances. That procedure will be as readily applicable and as effective for this Court, in exercising its original jurisdiction at the present stage of this case, as it would be if this case were in a District Court. There would be no doubt as to the applicability of the procedure prescribed by Rule 12(e) for obtaining a more definite statement or a bill of particulars, if this case were in a District Court.

B. Under the Rules of Civil Procedure Applicable in the District Courts, the Proper Remedy for a Complaint Which Lacks Sufficient Definiteness and Particularity to Enable the Defendant to Meet the Issues Tendered and Prepare a Responsive Pleading is an Order Requiring Plaintiff to Amplify the Complaint with a More Definite Statement or a Bill of Particulars, as Requested in Defendants' Motion Herein.

Under the Rules of Civil Procedure prescribed by this Court for application in the District Courts, where a complant is so vague and general and so lacking in particularity as to render it impossible for the defendant properly to meet and understand the issues tendered and properly to prepare a responsive pleading, a motion for a more definite statement or a bill of particulars will lie under Rule 12.

That rule provides, in paragraph (e), that before responding to a pleading, "a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial." This Rule is a continuation in revised form of old Federal Equity Rule 20, which provided that "a further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleadings, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just." Old Equity Rule 20 was in turn taken from, and was in fact practically identical with, one of the English "Rules of the Supreme Court, 1883," adopted under the provisions of the Judicature Act of 1873.* Under the English Rule, as well as under old

* Rule 7, Order XIX, of the "Rules of the Supreme Court, 1883," provided as follows:

"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

These rules were applicable in the High Court of Justice, which was created as a part of the Supreme Court and which included both the Chancery Division and the King's Bench Division.

Equity Rule 20 of the Federal Equity Rules, the courts have required a pleader to amplify his pleading with a further and better statement or further and better particulars, whenever it appeared that the pleading did not allege facts with sufficient particularity and definiteness to enable the opposing party to know what case he had to meet and to plead responsively or otherwise prepare to meet that case.*

While under the old Rule there was some question as to whether or not a distinction was intended between "a further and better statement" and "further and better particulars,"† the new Rule has been drafted so as to avoid any such distinction.‡ Therefore, it is unimportant, under the new Rule, whether the motion requests and the order requires a more definite statement or a bill of particulars or both, since the object is the same in any event, viz., to secure sufficiently specific and accurate information to make possible preparation of the responsive pleading or preparation for trial.

Since, as demonstrated above, the complaint in the present case embraces matters, vital to its maintenance, which are not averred with sufficient definiteness or particularity to enable the defendants properly to prepare

---

* Examples under the English Rule are to be found in the following: *Blackie* v. *Osmaston*, 28 Ch. D. 119 (1884); *Newport Slipway Drydock and Engineering Co.* v. *Paynter*, 34 Ch. D. 88 (1886); *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410 (1887). In the *Newport Slipway Drydock and Engineering Co.* case, it was observed by Cotton, L. J., that "The object of the particulars is to enable the party calling for them to know what case he has to meet."

Examples under the old Federal Equity Rule 20, including examples of cases under the anti-trust laws, may be found in the following: *Locker* v. *American Tobacco Co.*, 194 F. 232, 200 F. 973 (1912); *Patterson* v. *Corn Exchange of Buffalo*, 197 F. 686 (1912); *Whitaker* v. *Whitaker Iron Co.*, 238 F. 980 (1916); *Universal Oil Products Co.* v. *Skelley Oil Co.*, 12 F. 2d 271 (1926); *Harry Prochaska Inc.* v. *Consolidated Lithographing Corp.*, 51 F. 2d 362 (1931); *Stanley Co.* v. *American Telephone & Telegraph Co.*, 5 F. Supp. 380 (1933).

† See, e. g., *Ashton Valve Co.* v. *Bailey*, 6 F. (2d) 235 (1925).

‡ See Moore's Federal Practice, par. 12.07.

their responsive pleading, the case is an appropriate one, within the language of the present Rule 12(e), for application of the remedy of compelling plaintiff to give a more definite statement or a bill of particulars in amplification of its complaint.

The district courts, in applying this rule, have frequently required complaints to be amplified by more definite statements or bills of particulars, particularly where, as here, the scope of the complaint is so broad and its allegations are so general that a multitudinous number of complex and varied transactions, involving actions by and relations among a large number of persons or corporations, spread over an extended period and throughout a wide area, may be involved. For example, in *Walling* v. *West Virginia Pulp & Paper Co.*, 2 F. R. D. 416 (E. D. S. C., 1942), the Administrator of the Wage and Hour Division sought an injunction to restrain violations of the Fair Labor Standards Act which were alleged in general and sweeping terms in the complaint. In granting the defendant's motion to compel the Administrator to make his complaint more definite and certain or furnish a bill of particulars, the court said (pp. 419-421 of 2 F. R. D.):

> "It cannot be overlooked that *a primary function of a bill of particulars is to furnish relevant details in amplification of a pleading, to avoid surprise, narrow the controversy, and expedite the trial.* * * *
>
> "The contention that matters of evidence may not be procured by a bill of particulars, as an abstract proposition, is entirely correct, but I do not apprehend that to be the purpose of the pending motion. It is one thing to charge A with purchasing pulpwood from B which had been produced for him by the labor of C when B had not paid his laborers in accordance with the Act, but it is another thing to produce evidence establishing those alleged facts.

"There is respectable authority for the general proposition that facts within the knowledge of the moving party may not be required by a bill of particulars, but there are exceptions to this doctrine. *A complaint might be drawn with such generality of expression as to comprehend a dozen or a hundred transactions, all within the knowledge of the defendants, but that would not deprive the defendants of the right to know which one or more of the possible transactions the plaintiff bona fide referred to and intended to rely upon. It is hardly reasonable to believe that the rules were intended to put a responsive pleader to a distinct disadvantage, to force him to plead in ignorance of what was intended by his adversary, and then resort to the cumbersome methods of discovery, depositions or interrogatories to ascertain what factual and legal issues he would be called upon to meet on the trial of the case.* * * *

"In his printed brief the plaintiff takes this position: 'Simply stated, the amended complaint alleges that the defendant has bought, received, handled and used in its production activities, goods produced in violation of the Act, and that the defendant is unlawfully availing itself of interstate commerce to dispose of goods, the principal ingredient of which has been produced in violation of the Act. * * * Where it has no knowledge sufficient to form a belief as to any of such allegations, defendant can so state and such averment is construed a denial in terms. * * *'

"This statement appears to be an admission that the allegations of the complaint deal only in generalities and legal conclusions and give the defendant no reasonably accurate information concerning the real issues it will be called upon to meet on the trial of the cause. True, the defendant can answer by saying that it has no knowledge or sufficient information

to form a belief as to the truth of the allegations made, but what of it? Is it not entitled to know what it is to meet in court before trial time arrives? *Is it not entitled to frame its answer in contemplation of the issues the plaintiff intends tendering? And what is the objection to informing the defendant just what the controversy is about? Why deny the potency of Rule 12(e), and force the defendant to resort to more cumbersome and less expeditious methods to ascertain what he is to be called upon to answer for?''* (Emphasis supplied.)

Thus in that case the court took cognizance of the fact that the breadth and generality of the complaint made it possible for it to embrace hundreds of different transactions, involving different times and circumstances, and, while the transactions were within the knowledge of the defendant in the sense that the defendant was involved in all of them, the court nevertheless held that the defendant was entitled to know with some particularity which transactions he would be called to account for, and in what respects he would be called to account for them, so that he could properly plead with respect to those transactions.

So in the present case, the breadth and generality of the complaint are such as to enable it to embrace not only hundreds but thousands of transactions, involving not only many different times and circumstances, but also a great many different individuals and associations located in different and widely scattered parts of the country. Plainly, defendants are entitled to be apprised with more particularity as to the transactions for which they must account, so that they may properly plead with respect thereto.

Complaints in anti-trust suits are especially apt to be drawn with such breadth and generality as to require

amplification and particularization, because of the complexity and far-flung character of the transactions embraced by such complaints. This has been recognized many times by the District Courts, which have in numerous cases required such complaints to be amplified and particularized under the procedure provided therefor in Rule 12(e).

Thus in *United States* v. *Griffith Amusement Co.*, 1 F. R. D. 229 (W. D. Okla., 1940), the Government brought suit, under the Sherman Act, against certain motion picture exhibitors and distributors by means of a complaint which attempted to cover negotiations and transactions between and among exhibitors and distributors extending over a period of five years, and the sale, distribution and exhibition of motion pictures in approximately one hundred theatres scattered through several states. The complaint alleged the existence of certain agreements between exhibitors and distributors but did not specify which distributors entered into the agreements with which exhibitors, nor the times and places of the alleged combinations and conspiracies, and in other respects lacked particularity. In requiring particularization of the complaint in response to the defendants' motions, the court said, after quoting Rule 12(e) (p. 231 of 1 F. R. D.):

> "This rule has to do with the pleadings alone, and the purpose of the bill of particulars is to make the petition sufficiently definite to enable a defendant to know what he or it is alleged to have done. *It is no defense, therefore, to a motion for a bill of particulars to say that the information which the defendants seek is within their knowledge.* A demurrer or a motion to dismiss might be good as against a complaint and whether or not a complaint states a cause of action is to be determined by its contents and not by what the defendants may know. *The complaint is the basis of the action and from it the court must*

determine whether or not a cause or causes of action are actually stated. • • •

"A conspiracy or combination cannot be alleged merely in the terms of the statute. *In other words, it is not sufficient to allege that these defendants entered into a combination or conspiracy.* A recognized definition, by the courts, of conspiracy is: 'The combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful by criminal or unlawful means.' There must be an agreement of some character before there can be a conspiracy. This agreement need not be in writing. It need not be at a meeting attended by all of the alleged conspirators, but *there must be express agreements or circumstances which would justify the court in reaching the conclusion that a combination had been formed. There must be alleged certain acts of each of the alleged conspirators which would connect him or it with the conspiracy, and after the conspiracy has once been shown to exist, the overt act of anyone of the alleged conspirators would be binding upon all. Each of the defendants, therefore, has a right to know what he or it is alleged to have done which made him or it a part of the conspiracy and these acts should be alleged with sufficient definiteness, not only to enable the defendants to meet the charge with proof at the time of trial, but to prepare his or its answer to the complaint.*" (Emphasis supplied.)

Again, in *Lowe* v. *Consolidated Edison Co.*, 1 F. R. D. 559 (S. D. N. Y., 1940), certain electrical appliance dealers and associations of such dealers brought suit to enjoin a number of utility operating companies and manufacturers and retailers of electrical appliances from carrying out an alleged conspiracy to dump on the retail market

quantities of appliances at prices below the true value of the appliances, and thereby to confront the plaintiffs with impossible competitive conditions so as to drive them out of business and monopolize the commerce in electrical appliances, in violation of the Sherman Act. The complaint also alleged price discriminations in violation of the Clayton Act and the Robinson-Patman Act. In requiring the plaintiffs to particularize their allegations in a large number of respects, pursuant to the defendants' motion under Rule 12(e), the court said (p. 562 of 1 F. R. D.):

> "*In cases founded upon the Anti-Trust Act* which are dependent for final relief upon the conformation of *numerous facts to such flexible concepts as monopoly, interstate commerce, restraint of trade,* etc., which are of serious and immediate concern to commercial enterprise, I think that the *court should require from plaintiffs in their pleading a statement of facts sufficiently complete to mitigate the dangers that might result if these cases proceeded upon the shaky foundations of a vague and somewhat indefinite complaint. United States* v. *Griffith Amusement Co.,* D. C., 1 F. R. D. 229. I am, therefore, inclined to consider liberally defendants' requests for particulars of plaintiffs' claim." (Emphasis supplied.)

In *Twin Ports Oil Co.* v. *Pure Oil Co.*, 46 F. Supp. 149 (D. Minn., 1942), an oil company sued another oil company for treble damages for loss allegedly sustained by the plaintiff as the result of a claimed conspiracy and combination among the defendants to restrict and fix certain practices and policies in the industry, in violation of the Sherman Act. In requiring further particularization and amplification of the complaint, in response to defendants' motion under Rule 12(e), the court said (p. 153 of 46 F. Supp.):

"It is urged that under the new rules, simplified pleadings are authorized and the mere statement that the wrong resulted in damage is sufficient without more. Generally, it may be stated that that seems to be the spirit of the new rules, and the construction which has been given to 12(e), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. *But where suits are instituted under the Sherman Anti-Trust Act, and especially where they involve large sums of money and will in all probability consume the time of the Court and counsel for a long period, it will be found that courts generally recognize the desirability, if not the necessity, of requiring the pleader to establish in the complaint a statement of sufficient facts regarding the causal connection between the wrong and the damage, so as to enable the defendant to be apprised of the legal theory which will be urged at the trial of the case and thus be able to frame responsive pleadings thereto.*

"Consequently, it would seem that, in framing their answer, these defendants are entitled to be informed as to how plaintiff would have received 3½ cents more for each gallon sold in absence of the existence of a conspiracy and how any variance between the old and new contracts affected plaintiff's margins and profits. This would not be pleading evidence, *but the complaint would then set forth the fact of damage, not as a conclusion of the pleader, but by facts from which damages reasonably appear or are logically and legally inferable.* This view as to the sufficiently of the pleading does not mean that the amount of damage plaintiff sustained should be pleaded with more definiteness than now appears, but that *the fact of damage—the causal connection between the wrong and the injury—should appear by properly pleaded facts and circumstances rather than the conclusions of the pleader.*" (Emphasis supplied.)

Thus, in all of the above cases, and others like them, the courts held that complaints which purported to cover a large number of complex transactions, involving numerous persons, times and places, but which consisted only of vague and general allegations and did not specify with particularity the wrongful acts complained of, were subject to a motion for a more definite statement or a bill of particulars under Rule 12(e). The complaint in the present case is clearly of that character. Its allegations with respect to the vital factors of coercion, discrimination and injury, as well as with respect to other factors, are of the most vague and general character. They consist merely of argumentative assertions and statements, clothed in legal and epithetical verbiage, to the effect that there has been joint action on the part of some or all of the defendants, that such joint action has somehow resulted in coercion against some or all of the defendants or other railroads, and has also resulted in discrimination, in some sense, against plaintiff, to the plaintiff's injury; but the complaint fails to specify what the joint action or actions were of which complaint is made, or when or where or how such actions were taken, or how and in what instances, and with respect to what defendants or other railroads, the alleged coercion took place, or whether the discrimination alleged to result in a discrimination in rates and if so in what rates, or, if not, what are the specific acts of discrimination complained of; and in many other respects, as pointed out above, the complaint fails to particularize with respect to vital factors on which the maintenance of the suit depends.

Without such particularization, defendants are at a loss to know how to plead in a truthful and informative way. For example, it is fundamental that joint action in and of itself does not necessarily constitute a violation of the anti-trust laws, but on the contrary may under appropriate circumstances be entirely consistent with the

spirit and letter of those laws. Especially is that true with respect to joint action on the part of railroads, which are by the Interstate Commerce Act not only permitted but are required to act jointly and enter into joint understandings for some purposes.* Plainly, therefore, it is not enough for plaintiff to allege merely that there has been joint action on the part of some or all of the defendants and that such joint action constitutes a combination or conspiracy in restraint of trade. Many of the instances of joint action taken by defendants or by some of them may be entirely consistent with, and free from the taint of infringement of, the anti-trust laws. Without knowing which of the many instances of joint action taken by some or all defendants are complained of as being contrary to the anti-trust laws, and what factual aspects of those instances of joint action are alleged to have constituted violation of the anti-trust laws, and without knowing specifically how the plaintiff has been affected by such instances of joint action, defendants are not able to give the court a helpful statement, by way of answer, as to what their position will be. The complaint should be so drawn that it shows on its face, if its allegations are taken as true, that there have been specific and identifiable transactions which constitute violations of the anti-trust laws.

III. Conclusion.

For the reasons stated above, it is submitted that the amended complaint herein, with respect to the essential features of alleged coercion, discrimination and damage, as well as with respect to other features, lacks sufficient definiteness and particularity to enable each or any of

* The fact that joint action among railroads is expressly contemplated by the Interstate Commerce Act, for the purpose of establishing reasonable through routes and joint rates involving more than one railroad, is expressly recognized by Mr. Justice Douglas in his opinion in the present case. (See p. 12 of pamphlet opinion.)

these defendants intelligently and properly to understand the issues tendered and meet those issues and to prepare a truthful, helpful and informative answer to the said complaint. These defendants therefore respectfully urge that their motion for a more definite statement or for a bill of particulars should be granted and that plaintiff should be required to amplify its complaint by filing a more definite statement or a bill of particulars with respect to the matters set forth in the said motion.

Respectfully submitted,

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May 25, 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 10, ORIGINAL

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Defendants.

BRIEF FOR THE "SOUTHERN DEFENDANTS" SUPPORTING MOTION FOR A MORE DEFINITE STATEMENT OF THE COMPLAINT OR FOR A BILL OF PARTICULARS.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 11, ORIGINAL

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Defendants.

BRIEF FOR THE "SOUTHERN DEFENDANTS" SUPPORTING MOTION FOR A MORE DEFINITE STATEMENT OF THE COMPLAINT OR FOR A BILL OF PARTICULARS.

INTRODUCTORY STATEMENT.

The amended bill of complaint is filed, pursuant to leave granted by this Court, for injunctive relief, defined and limited by section 16 of the Clayton Act (15 U. S. C. § 26) as relief

> "against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened con-

duct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings," etc.

The amended bill of complaint differs radically in theory from that of the original bill first presented, and it appears obvious that many of the positions assumed by the State of Georgia must still further be modified and altered to meet the opinion of the Court filed herein on March 26, 1945. Retention of averments and sections of the prayer inconsistent with the theory on which the Court permits the amended complaint to be filed results in confusion and undesirable complexity at the outset of the proceeding which, defendants respectfully suggest, should be removed by voluntary amendment of the complaint.

Testing the complaint "in a preliminary manner," and construing it "with that liberality accorded the complaint of a sovereign State," the Court has construed it as charging "a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed." (Opinion on Motion for Leave to File, pp. 16-17.) It is held that the complainant charges defendants with fixing "arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other States over the ports of Georgia." (Opinion page 1.)

The gravamen of the pending motion is that the complaint fails to set forth essential facts from which the conclusion of the pleader is drawn that a conspiracy or conspiracies exists, or exist, and that damage and injury to Georgia has resulted therefrom or is threatened; that rates on traffic to and from Georgia are the result of such conspiracy and are in fact arbitrary and non-competitive or discriminatory; that such rates in fact prefer ports of other States over ports of Georgia and discriminate against the latter; that coercion is in fact employed and exercised on these defendants and that such coercion is the result of the conspiracy charged.

Adjectives and epithets add nothing to a complaint except when descriptive of facts and actions specifically averred and set forth. Words of description, employed as conclusions of the pleader, are meaningless when the facts and actions so described are not averred, and cannot take the place of averments of fact in a complaint.

Without formal rule to control or guide the defendants or the complainant in the formulation of the issues to be decided, citations of decisions of trial courts in support of the pending motion seem appropriate only when the reasons assigned for the decision cited establish sound principles of equity pleading applicable to the instant case.

I.

THE ALLEGATIONS OF CONSPIRACY AND MONOPOLY ARE INDEFINITE, AMBIGUOUS AND CONFLICTING.

The District Judge of the District of Minnesota, Fourth Division, responding to a motion for a more definite statement of a complainant grounded on alleged conspiracy, recognized the particular value and necessity of conformity to sound rules of pleading in a case of this character, saying:

> "But where suits are instituted under the Sherman Anti-Trust Act, and especially where they involve large sums of money and will in all probability consume the time of the Court and counsel for a long period, it will be found that courts generally recognize the desirability, if not the necessity, of requiring the pleader to establish in the complaint a statement of sufficient facts regarding the causal connection between the wrong and the damage, so as to enable the defendant to be apprised of the legal theory which will be urged at the trial of the case and thus be able to frame responsive pleadings thereto. (Citing cases.)" *Twin Ports Oil Co.* v. *Pure Oil Co.* (1942), 46 Fed. Supp. 149, 153.

The opinion cited quotes from an opinion in *Edward Lowe, et al.*, v. *Consolidated Edison Company, Inc.* (S. D. N. Y.), 1 F. R. D. 559, ruling that the purpose of the Rules

of Civil Procedure is "to obtain short and concise statements of the facts upon which the pleader relies," but adding:

> "This does not mean, however, that defendants will be forced to answer general allegations and conclusions, rather than facts, or that the courts will treat the pleadings in all types of actions in the same manner. In cases founded upon the Anti-Trust Act which are dependent for final relief upon the conformation of numerous facts to such flexible concepts as monopoly, interstate commerce, restraint of trade, etc., which are of serious and immediate concern to commercial enterprise, I think that the court should require from plaintiffs in their pleading a statement of facts sufficiently complete to mitigate the dangers that might result if these cases proceeded upon the shaky foundation of a vague and somewhat indefinite complaint. United States v. Griffith Amusement Co., D. C., 1 F. R. D. 229. I am, therefore, inclined to consider liberally defendants' requests for particulars of plaintiffs' claim * * *." 46 Fed. Supp. 154.

Applying the quoted rulings, the District Court in the Minnesota case sustained the motion for a more definite statement of the complaint, to the extent of requiring

> "that the fact of damage—the causal connection between the wrong and the injury—should appear by properly pleaded facts and circumstances rather than the conclusions of the pleader." (46 F. Supp. 154.)

The necessity that the pending complaint be made more specific and clarified, for the protection and convenience of the complainant and the Court against unnecessary complexity of pleading and proof in the progress of the suit, as well as to enable these defendants properly to plead, is emphasized by comparing the averments of Article 13 of the complaint with the averments of Articles 9, 10, 11 and 12. The charge of unbusiness-like policies and conduct, obviously contrary to their own self interest and profit, by conspiring with all other defendants to prefer ports and areas not served by their lines of railroad and participating

in "monopolistic practices" which were "intended to be and were and are" effective to prefer others over their own shippers and patrons, is contradicted as to the defendants who join in this motion and brief by the charge in Article 13 that these defendants "generally are dominated and coerced" by the remaining defendants.

If it is possible to reconcile the conflicting and antagonistic positions thus assumed by the State of Georgia, it is clearly proper, and required by good pleading, that facts be averred which would establish, directly or by logical inference therefrom, the part it is claimed each of these defendants has had in the alleged conspiracy, and the means and methods they have employed or are capable of employing in its furtherance; the means and method by which, and the extent to which, it is claimed they or any of them have been coerced and dominated by others; the results or manifestations of such coercion and domination; and particularly whether injunctive relief is prayed against these defendants on account of the alleged disability under which it is charged they have been placed by their co-defendants, or whether it is charged that a conspiracy exists in violation of the anti-trust laws to which conspiracy these defendants are not voluntary parties.

In Article 9 of the complaint it is averred that "All of the defendants have * * * monopolized a substantial part of such trade and commerce." Apparently it is charged that this monopoly has been achieved by fixing rates between points in other sections of the country at lower levels than the rates applicable to traffic to and from Georgia. It is not charged that these defendants have any control or influence in the fixing of rates in sections not served by them, but rather that they are coerced and dominated by other defendants. These defendants are clearly entitled to have the complaint made more definite in respect to the charge that they have monopolized any part of interstate trade and commerce, with specification of what commerce and by what means and methods, if in fact this charge is intended to apply to them.

The complaint not only makes conflicting and antagonistic averments in respect to the existence and nature of the alleged conspiracy, as pointed out in the preceding paragraphs, but joins as defendants carriers by railroad serving different sections and areas, whose interests and motives are obviously conflicting and diverse in respect to the subject matter of the suit, that is—service by railroad of the cities and communities of the State of Georgia.

Under the averments of the complaint there can be no common interest, in all rail rates to and from Georgia, between the two groups of defendants as designated in the complaint itself. The complaint, by clear implication, recognizes the financial interests of the "Northern Defendants" as primarily dependent upon the economic prosperity of the area served by them; but by implication not so clear seems to charge the "Southern Defendants" with seeking to injure and retard the similar development of the area served by them. Is that in truth the tenor and basis of the complaint against these defendants, or is it intended to charge them only with being "coerced and dominated"?

All defendants are entitled to have the complaint clarified and made specific by the averment of facts relied upon to establish not only the connection of each defendant with the conspiracy charged, but if the conspiracy charged differs as between the two groups of defendants, each group, and each defendant in each group, is entitled to a clear statement of what is charged against the group.

The conflicting averments of the complaint and the number and separate grouping of the defendants differentiate this case from cases in which a conspiracy is charged against a single group of merchants, manufacturers or traders for their common gain, and give to the complaint a complexity which adds force to the obvious necessity that the complaint be made more specific and definite in its accusations against each defendant and each group of defendants.

Directly applicable and in point is the ruling of the District Court in *United States* v. *Griffith Amusement Company* (W. D. Oklahoma) 1 F. R. D. 229, 231:

> "* * * There must be alleged certain acts of each of the alleged conspirators which would connect him or it with the conspiracy, and after the conspiracy has once been shown to exist, the overt act of anyone of the alleged conspirators would be binding upon all. Each of the defendants, therefore, has a right to know what he or it is alleged to have done which made him or it a part of the conspiracy and these acts should be alleged with sufficient definiteness, not only to enable the defendant to meet the charge with proof at the time of trial, but to prepare his or its answer to the complaint."

The motion does not test the sufficiency of the complaint as presenting a cause of action with sufficient clarity to require adjudication of its merits, as in *Swift and Co. v. United States*, 196 U. S. 375, and *Louisiana Farmers Protective Union* v. *Great Atlantic & Pacific*, 131 F. (2d) 419. For that purpose the complaint has been construed with "liberality accorded the complaint of a sovereign State." The important position of these defendants in the economy of the State of Georgia is implicit in the complaint. They seek by their motion to have the issues clarified, that their answers and proof may be pointed and complete, without unnecessary waste of the time and labor of representatives of the State of Georgia and the defendants and of the Court. These defendants are endeavoring by their motion to have the controversy brought within a reasonable compass, to avoid unnecessary prolixity in pleading and proof, and by that means to expedite the trial of the merits. An order sustaining the motion will undoubtedly expedite rather than delay final adjudication of the suit.

II.

THE COMPLAINT IS INDEFINITE IN ITS REFERENCES TO RATES AND CHARGES.

The Court construes the complaint "to charge a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed." (Opinion, page 16.) It is not clear whether the complaint is so limited.

Reference is made in Article 11 of the complaint to procedure employed in arriving at rates "between points located in Southern Territory," but it is not clear that such rates are included in the conspiracy charge, since the "Northern Defendants" may not be assumed to be concerned with Southern intraterritorial rates. The complaint is vague and indefinite in its reference to rates, and these defendants cannot know whether they are required to answer only with respect to joint through rates, or as to all interterritorial rates and also as to rates applying wholly within Southern Territory. If only joint through rates are in question, obviously the complaint should be required specifically so to aver.

References in the complaint to specific rates on traffic to and from Georgia are meager and no specific averments are made which establish or from which there can be inferred any causal connection between such rates and the alleged conspiracy or conspiracies. In Article 5 of the complaint, and in Exhibit 1, referred to therein, reference is made to rates on manufactured products from points in the North to points in Georgia which are alleged to be higher than the official rate for transporting the same commodities a like distance in Official Territory. No rates to Georgia "ports" are included in these references, and all of the rates cited apply to manufactured products southbound. The references are made in support of the averment that Georgia has suffered damage or injury in its proprietary capacity, which averments are apparently eliminated from the case by the reference thereto on page 6 of the Opinion of March 26, 1945. The disparity pointed out in the rate comparisons made in Article 5 of the complaint suggests that, if not in fact based upon sound and lawful considerations, they were fixed so as to protect and prefer southern manufacturers of the same commodities, including those located in the State of Georgia.

The only other reference in the complaint to specific rates on traffic to and from Georgia is in Article 16 and in Exhibit 3 there referred to. There is no averment of fact in

respect to the rates shown on Exhibit 3 that any of them were fixed or arrived at in furtherance of the alleged conspiracy, and the complaint makes no averment that transportation conditions between the point identified on the exhibit are similar or identical, so that an identical rate per mile would be reasonable or legal or could receive the approval of the Interstate Commerce Commission in the administration of the Interstate Commerce Act.

It is recognized that all railroads involved in a joint haul, whether two or more, must agree in the establishment of a joint rate covering the movement. If one railroad involved refuses to join in an increase or a reduction in rate, are we to understand that the mere refusal to join is complained of? If so, is it to be assumed that the proposing railroad is right and the refusing railroad is wrong? There may be, and doubtless are, many cases in which the proposing railroad is satisfied after hearing the reasons given by the refusing railroad that on the merits the proposed rate is too high or too low and it withdraws or modifies its request without domination or coercion.

It will be necessary for defendants to know which rates are charged to have been made by coercion in order that they may examine into each such rate evidencing the alleged conspiracy and present the reasons for non-concurrence or for yielding in order for the Court to determine whether the decision was arbitrary or the result of collusion or coercion or combination or was made in the exercise of a right and for good reason. Therefore, if references in the complaint to specific rates are material to the cause of action, we submit that, in order to properly prepare for the defense of this case, the defendants are entitled to a statement of facts showing each rate made or failed to be made, reduced or increased, because of or as a result of the alleged conspiracy, each railroad a party to the collusive action charged, and each Bureau or Association involved in each alleged conspirital act.

If references to specific rates are not essential to the cause of action they should be omitted by amendment filed

in response to the order of the Court which the Motion prays.

Interterritorial rates between the hundreds of railroad stations located within the State of Georgia and the thousands of stations located on the lines of the "Northern Defendants" in the several States constituting Official Territory, over multiple routes and combinations of routes, are multiplied to unbelievable thousands. If defendants and the Court are to be required to consider the basis and effect of specific rates in this proceeding, the rates so questioned should be identified and described with the particularity requested by the Motion, in order that proper response of these defendants may be prepared and filed.

III.

AVERMENTS ATTACKING USE OF BUREAUS, COMMITTEES, ETC.

In charging all defendants with monopolizing a substantial part of interstate trade and commerce and with fixing and establishing arbitrary and non-competitive rates through concerted action and collusion, the complaint charges the defendants with using some 60 rate bureaus, committees, conferences, etc., for that purpose. It is averred in Article 10 of the complaint that any proposal to change rates must be considered and acted on by some of such agencies "with power in the highest thereof finally to decide whether such proposal shall be accepted or rejected"; and that "No line can change joint through rates without the approval of the private rate-fixing agencies created by defendants." In Article 11 of the complaint it is charged that "Before an interterritorial rate is published, it must obtain the approval of the private rate-fixing organizations of all the territories involved." In the last paragraph of Article 11 of the complaint the several rate bureaus, committees, etc., are characterized as an "intricate private rate-fixing machinery which is not sanctioned by the Interstate Commerce Act and is prohibited by the Antitrust Acts..."

The construction given to the complaint preliminarily in the opinion of March 26, 1945, makes it obvious that fundamental issues of the trial will involve determination of the truth of the averments quoted in the preceding paragraph; that is, whether a proposal to change rates and charges on traffic to and from Georgia must follow the decision of one or more joint committees, conferences, etc.; whether any one of the defendants is deprived of the power to change a joint through rate without the approval of a bureau, committee, conference, etc.; whether an interterritorial rate must obtain the approval of joint bureaus or conferences "of all the territories involved" before it can be published; and whether the several rate bureaus, committees, conferences, etc., or any of them, are not sanctioned by the Interstate Commerce Act and are prohibited by the antitrust acts.

No facts are averred in the complaint which establish, or from which a court could make a legal or logical inference, that the several rate bureaus, conferences, etc., or any of them, are "prohibited by the Antitrust Acts." It is essential that the complainant be made to plead the facts relied upon to establish the several bureaus and committees as unlawful and prohibited by the antitrust acts. Otherwise defendants cannot know to what extent and particularity the plan of organization, control and action of each of the 60 rate bureaus and other organizations must be set forth and pleaded in the answers to be filed. That much the defendants are clearly entitled to and that much is requisite to the orderly and expeditious progress of the suit.

Apparently the characterization of the enumerated rate bureaus and other organizations as prohibited by the antitrust acts is made without regard to the effect of Certificate 44, identified in Section V(b) of the pending motion filed by these defendants, issued by the chairman of the War Production Board on March 20, 1943. Defendants believe that compliance by the State of Georgia with an order sustaining the pending motion, and particularly Section V

thereof, will disclose facts which render defendant's compliance with the provisions of said Certificate 44 a fundamental question going to the jurisdiction of the subject matter of the complaint, properly to be raised in an answer or other appropriate pleading filed after the complaint is made specific and definite.

No facts are averred in the complaint which establish or from which the Court could infer that the several rate bureaus, conferences, etc., are so used or organized that a proposed rate must have the approval of a group including railroads not directly participating in the proposed rate. No facts are averred which show the plan of organization and operation of any of the so-called "rate-fixing" committees or conferences. If the charge that a proposed interterritorial rate must obtain the approval of rate-fixing organizations of all territories involved before it is published can be construed as an averment of fact rather than a conclusion of the pleader, the complaint does not aver facts which would show that approval by the several organizations is withheld when the railroads participating in the proposed rate desire that it be published.

Meaning and intent cannot be read into the averments of Articles 10 and 11 of the complaint, with that degree of certainty necessary properly to prepare responsive pleadings, without averments of facts characterizing the plan, organization and operation of the agencies referred to and the actual operation of such agencies in respect to rate proposals. Certainly the answers to be filed and the proof to be taken will be made shorter and more pointed if the complaint is required to be made definite and specific in its averments with respect to the rate bureaus, committees, conferences, etc., employed by the defendants in the exchange of information essential to the publication of fair, reasonable and non-discriminatory rates both within and among the several territories served by the defendants.

The charge made in Articles 10 and 11 of the complaint that no rate proposal can be put into effect without the ap-

proval of some or all of the rate-fixing agencies referred to in the complaint is not only supported by no averments of fact from which the defendants and the Court can determine the basis of the charge, but no facts are averred which define or set forth the circumstances or basis upon which the approval alleged to be requisite is or may be granted or withheld.

If it is the position of the State of Georgia, in response to paragraph (a) of Section V of the Motion, that the agencies referred to are illegal *per se*, it seems obvious that the complaint is defective in its failure to set forth the sections of the governing rules or regulations of each such agency which it is claimed render it illegal or to aver facts showing illegal action contrary to said rules or regulations of such agencies. If the plan of organization of any such agency denies to a member of such agency the right to join in the publication of a proposed rate, in which publication all lines participating in the haul have agreed, that should be averred. Certainly, in the case of a joint through rate, the withholding of approval because one of the participating railroads declines to enter into it would not amount to a conspiracy. The complaint cannot be orderly progressed to adjudication without a full and definite statement of facts relied upon to establish illegality in the existence or operation of the several agencies listed in Articles 10 and 11.

IV.

CONCLUSION.

Each of the several requests for a more definite statement and for a statement of particulars, contained in the pending Motion, is accompanied by a statement pointing out the defects complained of, in accord with the procedure suggested for trial courts in rule 12(e) of the Rules of Civil Procedure. It is deemed unnecessary to repeat in this brief more of the statements of the Motion.

These defendants rely upon each and every ground of the

Motion and respectfully invoke the judgment of the Court that the Motion be sustained.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 12, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

MOTION BY THE "SOUTHERN DEFENDANTS" FOR EXTENSION OF TIME FOR FILING ANSWER OR OTHER APPROPRIATE PLEADINGS.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, Original.

THE STATE OF GEORGIA, *Complainant,*

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

MOTION FOR EXTENSION OF TIME FOR FILING ANSWER OR OTHER APPROPRIATE PLEADINGS.

Come now each of the so-called "Southern Defendants"—Atlantic Coast Line Railroad Company; Carolina, Clinchfield and Ohio Railway, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, *Lessees;* Louisville and Nashville Railroad Company; Illinois Central Railroad Company; Gulf, Mobile and Ohio Railroad Company; The Nashville, Chattanooga and St. Louis Railway; Seaboard Air Line Railway Company; and Southern Railway Company—and separately move the Court to extend the time for filing answer or other appropriate pleading for such reasonable time as the Court may determine after notice to said Defendants of action by the Court upon the Motions of above-named Defendants "For a More Definite Statement or for a Bill of Particulars by Plaintiff as to the Matters Alleged in the Amended Com-

plaint'' and as may be dictated by the nature of the Court's action thereon.

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Office - Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ~~11~~ 10, ORIGINAL.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

BRIEF BY THE STATE OF GEORGIA IN OPPOSITION TO DEFENDANTS' MOTIONS FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS AS TO THE MATTERS ALLEGED IN THE AMENDED COMPLAINT.

THE STATE OF GEORGIA,

By:

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Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,
CLAUDE SHAW,
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EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.

Counsel for Complainant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, ORIGINAL.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

BRIEF BY THE STATE OF GEORGIA IN OPPOSITION TO DEFENDANTS' MOTIONS FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS AS TO THE MATTERS ALLEGED IN THE AMENDED COMPLAINT.

PRELIMINARY STATEMENT.

On March 26, 1945, this Court granted the State of Georgia leave to file its amended complaint. On March 28, 1945, the Court issued a subpoena directed to the defendants to answer the said complaint on or before May 28, 1945. On or about May 25, 1945, one group of defendants, designated as Southern Defendants, filed a motion for more definite statement or a bill of particulars, and the remaining defendants, designated as Northern Defendants, filed a similar motion.

Since the two motions are in all essential respects identical, and since the demands made in both motions are substantially the same, we reply to the two motions in this brief.

SUMMARY OF THE AMENDED COMPLAINT.

The amended complaint, hereinafter called the complaint, charges the defendants named therein with conspiring, combining, confederating and agreeing jointly, in violation of the antitrust laws, to fix arbitrary and noncompetitive rates and charges for transportation of freight by railroad moving to and from Georgia. Paragraphs 9 through 16 of the complaint set forth in specific terms the means and methods used by the defendants in so fixing freight rates. The complaint further charges that the individual defendants are prevented from initiating and establishing competitive rates, and that all rates must receive the approval of defendants' private rate-fixing agencies (set forth with particularity in the complaint). It is alleged that the effect of the conspiracy is to discriminate against the State of Georgia.

PRINCIPLES CONTROLLING PLEADINGS IN ANTITRUST CASES.

In pleading an antitrust case a unique problem is presented. In such a case a conspiracy is usually not proved by a single written agreement. It must be proved by a multitude of circumstantial facts. For this reason this Court has long recognized that this type of suit cannot be pleaded with that degree of specificity possible in other types of actions.

In *Swift & Company* v. *United States*, 196 U. S. 375, 395-396 (1905), Mr. Justice Holmes states:

> The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the na-

> ture of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them.

The principles enunciated by Mr. Justice Holmes were followed in *Louisiana Farmers Protective Association* v. *Great Atlantic & Pacific*, 131 F. (2d) 419, 422, (C. C. A. 8, 1942) where that court held:

> The courts have always recognized the difficulty in actions of the character hre, inherent in the nature of the case, in setting forth in precise detail the acts constituting the alleged violations of the antitrust laws. *Loewe* v. *Lawlor*, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Swift & Co.* v. *United States*, 196 U. S. 375, 395, 396, 25 S. Ct. 276, 279, 49 L. Ed. 518; *Buckeye Powder Co.* v. *E. I. Du Pont de Nemours Co.*, D. C., 196 F. 514. And since the adoption of the Rules of Civil Procedure, the cases require of the pleader only a plain and simple statement of his case in conformity to Rule 8 (a), 28 U. S. C. A. following section 723c. It is not necessary to set out in detail the acts complained of nor the circumstances from which the pleader draws his conclusions that violations of the acts of Congress have occurred and the pleader has been damaged.

In *United States* v. *Sugar Institute, Inc.*, 51 F. (2d) 1066 (D. C. S. D. N. Y., 1931), a civil suit brought under the Sherman Act, the court denied a motion for a further and better statement of the Government's claims filed pursuant to Equity Rule 20 (28 U. S. C. A., Sec. 723 App.) and in so doing the Court stated:

> Even if this were an indictment for a conspiracy on the criminal side of the court, I think that the defend-

ants' motion, as above limited, would have to be denied, for the complaint names all of the alleged conspirators, and adequately describes the conspiracy. Cf. *United States* v. *United States Brewers' Association, et al.* (D. C.) 239 F. 163, 170, 171; *United States* v. *Gouled, et al.* (D. C.) 253 F. 239.

A fortiori in a civil case of alleged conspiracy, such as this, the allegations are sufficiently definite and certain for "a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech," as Mr. Justice Holmes said in *Swift & Co.* v. *United States*, 196 U. S. 375, at page 395, 25 S. Ct. 276, 279, 49 L. Ed. 518.

Furthermore, a careful comparison of this petition with the petition in the *Swift* case, as printed in the record thereof in the Supreme Court, satisfied me that the complaint in this case is fuller and more precise in its description of the alleged conspiracy and the operation thereof than was the petition in the *Swift* case.

Without stating evidence, which is not required in pleading, I do not think the petition here could go much further than it does. It must be remembered that conspiracies of this kind are so vast that to set them forth involves in each case a new problem in pleading, as was indicated by Mr. Justice Holmes in the *Swift* case, 196 U. S. at page 396, 25 S. Ct. 276, 49 L. Ed. 518.

In view of the above decisions it is apparent that the complaint filed by the State of Georgia meets all of the standards of particularity advanced by these cases.

When the cause of action, as alleged here, consists of a conspiracy which is continued over a period of years, and which is effectuated by a continuing course of conduct and not by an isolated act or even a short series of acts, it is impossible to plead the cause of action with any more particularity than has been done in this complaint.

It is also well settled by decisions of this Court that even in a criminal indictment which requires greater particularity than a civil case, the conspiracy need not be alleged

with technical precision such as the defendants by their motions are seeking to require this plaintiff to do. *Wong Tai* v. *United States*, 273 U. S. 77, 81-82 (1927); *Rubio* v. *United States*, 22 F. (2d) 766, 767 (C. C. A. 9, 1927); *Sawyer* v. *United States*, 89 F. (2d) 139, 140-141 (C. C. A. 8, 1937); *United States* v. *Gouled*, 253 Fed. 239, 241-242 (D. C. S. D. N. Y., 1918); *Williamson* v. *United States*, 207 U. S. 425, 447 (1908).

The defendants base their motions for a bill of particulars on Rule 12 (e) of the Federal Rules of Civil Procedure and by doing so have necessarily presumed that this Court has adopted that rule of procedure in this case. Even if this Rule should be adopted by this Court, it would seem that it would then be necessary to consider it in connection with Rule 8 of the Federal Rules of Civil Procedure which specifically provides for "a short and plain statement of the claim showing that the pleader is entitled to relief".

The very object and purpose of the Federal Rules of Civil Procedure are simplicity and dispatch. As stated by Judge Charles E. Clark of the Circuit Court of Appeals, Second Circuit, and formerly Reporter to this Court's Advisory Committee on the Federal Rules of Civil Procedure:

> Under the new Rules (Rule 12 (e)), the practice of securing a bill of particulars, a weapon exquisitely designed to delay a cause and to make the pleadings technical, detailed, and therefore useless, and for little else is narrowly limited. A bill is obtainable only as to defects definitely pointed out or details which are needed to enable the moving party properly to prepare his responsive pleading or for trial. . . . Events already indicate that the limitation has not been made explicit enough, indeed that these bills ought to be abolished altogether, leaving the objection to a pleading to be framed on no lesser ground than failure to state any claim or defense. (25 A. B. A. J. 22.)

In keeping with this statement, the District Court in *United States* v. *Johns-Manville*, 1 F. R. D. 549 (D. C. N. D., Ill., 1941), denying a motion for a bill of particulars in an

antitrust civil action, stressed the simplicity and brevity in pleading which the rules require. It said:

> Rule 8 (a) of the Rules of Civil Procedure, 28 U. S. C. A., following section 723 (c), provides that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief". Forms are annexed to the Rules, among them forms of complaint that are undoubtedly intended to illustrate the manner in which the charge of the plaintiff should be set out. In those forms provision is not made for setting out in detail the acts complained of but merely what counsel for defense would undoubtedly call "mere conclusions of the pleader". See Forms 9, 10, 11 for example.
>
> In this action the Government charges a conspiracy, and it must be remembered that the existence of a combination to restrain trade such as charged here can seldom be proved by the evidence of witnesses to the effect that the parties have entered into a specific, oral or written agreement for that purpose. The proof usually consists of evidence of circumstances from which that conclusion follows. The allegation of the complaint in such cases cannot, in the nature of things, be as definite and specific as in cases of a different character. It is not necessary or proper for the pleader to set out in his complaint the circumstances from which he draws his conclusions. Nor is it necessary that such circumstances be set out to enable the defendant to answer. The complaint in this case charges agreements and understandings between the defendants of a nature condemned by the Sherman Anti-Trust Act and the Clayton Act, and with sufficient particularity to enable the defendants to answer.

See also *Sure-Fit Products Co.* v. *Med-Vogue Corporation*, 28 F. Supp. 489, 490 (E. D. Pa., 1939); *United States* v. *Columbia Gas & Electric Corp.*, 1 F. R. D. 358 (D. C. Del., 1940); *Tully* v. *Howard*, 27 F. Supp. 6, 7 (D. C. S. D. N. Y., 1939); *Moog* v. *Warner Bros. Pictures*, 29 F. Supp. 479 (D. C. S. D. N. Y., 1939).

These principles and decisions represent the modern trend of judicial thought to limit drastically, if not to abolish, the scope and application of Rule 12 (e). See this Court's Advisory Committee's Preliminary Draft of Proposed Amendments to Federal Rules, May 1944, pp. 15, 16.

DEFENDANTS' DEMANDS ARE WITHOUT MERIT.

This Court has decided that "the bill alleges a cause of action under the anti-trust laws" which has been presented "with sufficient clarity and specificity as to require a joinder of issues." *State of Georgia* v. *Pennsylvania R. R. Co., et al.,* U. S. , 65 S. Ct. 716, 728, (1945). Evidence, supporting or amplifying the allegations of the complaint, must be adduced at the trial and not by a bill of particulars.

The power of the defendants and the weapons for its exercise, to the detriment of the State and the people of Georgia, have been put forward. Acts through which a conspiracy is realized vary from instance to instance and from time to time; they cannot be recited in a bill of particulars, as asked for in defendants' motions.

An analysis of defendants' motions clearly demonstrates that their requests for particulars seek to obtain every conceivable detail of evidence from the plaintiff. They demand minute details concerning the means and methods employed to execute the conspiracy. They demand that we set forth the particular acts of each of the defendants, show the time and place where the said acts were consummated, identify the particular rate or rates on which the particular defendants conspired, point out the regions or localities involved, and define the meaning of common and ordinary words used in the complaint. Certainly it is not the office of a motion for a more definite statement or a bill of particulars to elicit minute details involving complete disclosure of plaintiff's evidence prior to trial, and serving unfairly to limit the scope of plaintiff's proof.

In *Makan Amusement Corp.* v. *Trenton-New Brunswick Theatre Co.*, 3 F. R. D. 429, 430 (D. C. N. J., 1944) the Court held:

> The remainder of the particulars sought by the defendants concerns the exact time and place of the alleged conspiracy, the agent or agents acting on behalf of the defendants, whether the agreement was oral or in writing, the particular acts committed by each of the defendants, the titles of the motion pictures plaintiff's theatre was prevented from exhibiting, the manner and means used to prevent such exhibition, the time and place when refusal to permit the plaintiff to exhibit the pictures was made, the admission prices of plaintiff's theatre, the time and place of the establishment of unreasonable clearance schedules and other similar and related matters.
>
> The defendants contend that each of them is not informed as to which of the particular acts it committed, when and where such acts took place, and the means and methods used to accomplish the acts charged; that the wrongful acts of the defendants must have directly and affirmatively affected the plaintiff to entitle it to bring this action; that each defendant is entitled to be told specifically what it has done in violation of the law, and the exact time, place, date and manner in which the defendants did the acts charged.
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> * * * * * * * * * *
>
> But the particulars sought under this rule must be limited to information necessary to enable the moving party to make responsive pleadings. The Federal Rules of Civil Procedure provide various means of securing other information, such as facts needed for trial, by way of interrogatories or discovery. See *Battin Amusement Co.* v. *Cocalis Amusement Co.*, D. C., 1 F. R. D. 769, and citations referred to therein for good coverage of the subject.
>
> In an action of this nature, it is important to consider that the conspiracy and combination are in most instances proven from circumstantial evidence. The usual facts are not at the disposal of the plaintiff for conspiracies and combinations are not apt to become common knowledge, making it extremely difficult for

persons outside of the conspiracy or combination to obtain accurate details concerning it. These principles were recognized and applied to factual situations similar to those appearing in the instant case in the cases of *Stewart-Warner Corporation* v. *Staley*, D. C., 42 F. Supp. 140; *United States* v. *Johns-Manville*, D. C., 1 F. R. D. 548, and *C. G. Simonin's Sons, Inc.* v. *American Can Co.*, D. C., 30 F. Supp. 901, cited by the plaintiff in its brief.

In comparing the demands of the present case with those denied by the court in the *Makan Amusement* case, we find striking similarities. For instance, in Article I of their demands the Southern defendants request:

(a) The date or dates when each said conspiracy, contract, combination, agreement, concerted action or collusion, illegal act, or joint action and agreement was made, entered into, agreed upon, or otherwise arrived at;

(b) The place or places where each of the same was made, entered upon, or otherwise arrived at;

(c) The period during which each of the same has been in effect;

(d) The name of every person or corporation party to the same, the names of all agents acting with respect thereto for or on behalf of any corporate party, and the period during which each party was and continued, or continues, to be a party to the same;

(e) Whether the same was in writing or oral, with a copy thereof if in writing, and a statement of the substantial provisions thereof if oral;

(f) If in any instance the alleged conspiracy, agreement, or concert of action is inferred from the acts of defendants and their agents or others, a statement setting forth the acts alleged to support such inference and to constitute such conspiracy, agreement, or concert of action, together with the names of all persons participating therein;

(g) The name of each and every co-conspirator, if any, involved in each said conspiracy, agreement, or collusive concert of action;

(h) Facts which establish, or from which a legal or logical inference may be drawn, that these defendants have or had any motive, intent, or desire to fix or participate in the fixing of any rate or rates prejudicial to or discriminating against Georgia, its citizens, ports, localities, or traffic.

The Northern defendants likewise ask for a multitude of details similar to those demanded by the Southern defendants. For example, in Article I of the Northern defendants' motion, they request:

By what acts, or kinds or classes of acts, and in what manner, and on or about what dates, or between what dates, the sixty rate bureaus, committees, conferences, associations, and other private rate-fixing agencies, referred to in Section 9 and in Section 11 or in either of said Sections, of the plaintiff's complaint, or any one or more of such bureaus, committees, conferences, associations or agencies, and if so, which have been used, as alleged, and by which of the defendants, (a) for the purpose of, or in furtherance of, or in connection with, the making or carrying out of the alleged unlawful contracts, combinations, and conspiracies in restraint of trade and commerce among the several states, alleged in said Section 9 or elsewhere in said amended complaint; or, as further alleged in said Section 9, (b) for the purpose of, or in furtherance of, or in connection with, the alleged monopolization of such trade and commerce; or (c) for the purpose of, or in furtherance of, or in connection with, the alleged concerted action and collusion for the establishment of arbitrary and non-competitive rates and charges in said trade and commerce to and from the State of Georgia, or the alleged exaction of unjust, unreasonable, arbitrary or non-competitive charges from the State of Georgia, or from shippers or receivers of freight in Georgia.

To comply with the demands set forth by these defendants would unduly hinder and delay the progress of this

case and clearly are not necessary to enable to defendants to prepare their responsive pleadings. The motions are designed merely to becloud the issues.

Since the motions filed by the Northern and Southern defendants raise substantially the same points, we shall, for simplicity of treatment, discuss the demands in the motion of the Southern defendants and cite similar demands of the Northern defendants.

Article I of Southern Defendants' Motion.

(*Northern Defendants' Demands I & III.*)

Under Article I of their motion the Southern defendants demand that Georgia furnish the date or dates when each conspiracy, contract, combination, concerted action, collusion, illegal act, joint action and agreement was made or entered into; the place or places where such agreements were made; the period ef existence of each agreement; the name of every person, corporation, or agent acting with respect thereto and the period during which each corporation or person continued as a party to the conspiracy; whether each such agreement was in writing or oral, and if in writing, a copy thereof; the facts *supporting the inferences* of the conspiracy; the name of each and every co-conspirator involved in the conspiracy, and the "facts which establish . . . that these defendants have or had any motive, intent or desire to fix or participate in the fixing of any rate or rates prejudicial to or discriminating against Georgia, its citizens, ports, localities or traffic."

The demands of the Northern defendants likewise ask specifications as to times, places, names of persons, charges and rates, agencies and instrumentalities and the manner in which they operate.

Such demands are disposed of by *Wong Tai* v. *United States*, 273 U. S. 77, 82 (1927) in which the Court stated:

> The defendant also made a motion, supported by affidavit, for a detailed bill of particulars, setting forth

with particularity the specific facts in reference to the several overt acts alleged in the indictment, with various specifications as to *times, places, names of persons,* quantities, prices, containers, buildings, *agencies, instrumentalities, etc., and the manner in which and the specific circumstances under which they were committed.* This motion—which in effect sought a complete discovery of the Government's case in reference to the overt act—was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called "for too much details of evidence." [Emphasis supplied.]

The Court of Appeals in *Sawyer* v. *United States,* 89 F. (2d) 139, 140 (C. C. A. 8, 1937) likewise said:

> The motion of appellant for a bill of particulars requested that forty-two separate items of particulars be furnished to him. These items for the most part were requests for evidence and the sources thereof; *for information as to the time, place, and circumstances of well-nigh every move made and act done by each of the co-indictees;* for information as to number present, the identity and occupation of those present, *and the statements made and conversations had by each of the co-indictees;* . . . precisely *where and when such conspiracy was entered into, and when and where and under what circumstances appellant became a party to it; what act or acts specifically were done by appellant personally, and when and where such acts were done,* and by whom and of what occupation is such witness), does the government purpose proving the specific acts performed by appellant in the carrying out of the conspiracy; to furnish appellant copies of all admissions against interest made by him, and the times and places of such admissions, with the names and occupations of the witnesses thereto, and whether such admissions were voluntarily made, and for copies of all statements and admissions made by others of the alleged conspirators, the time and place made, before whom made, and by what witnesses the government will attempt to prove the making of such admissions.
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> • • • • • • • • • • •

> Obviously, for the most part it was not possible for the government to furnish the particulars requested, and the demand for them was vain, idle and frivolous. For example, how could the government know or prove precisely when and where and by whom the conspiracy was formed, or when, where, and by whom every given act in carrying it out was had or done? The government cannot be required by a motion for a bill of particulars to do impossible things. . . .
>
> In the last analysis, well-nigh half of the forty-two items of requested particulars were demands that the Government be compelled to furnish to appellant statements of the witnesses and copies of the evidence, by which it purposed proving such of the allegations of the indictment. The obtention of evidence in the hands of an adverse party is not the function or office of a bill of particulars. *Olmstead* v. *United States, supra; Rubio* v. *United States, supra.* Other well-known methods of procedure to obtain copies of documentary evidence in the hands of an adversary are open to a party, and may be resorted to, in all proper situations in the course of trial. [Emphasis supplied.]

Testing the demands made in Article I of the Southern defendants' motion and Articles I and III of the Northern defendants' motion against these decisions, the conclusion is inescapable that defendants are seeking evidence which Georgia is not required to plead and which is not the office of a bill of particulars to supply.

Not only are the demands here improper under the precedents just cited, but they are particularly inappropriate in the light of the familiar principles of antitrust law which must govern this proceeding. Analysis of the demands here reveals that defendants have not only asked for evidence but that they have requested circumstantial evidence, as, for example, when they demand "the acts alleged to support such inference" or "facts which establish, or from which a legal or logical inference may be drawn, that these defendants have or had any motive, intent, or desire to fix or participate in the fixing of any rates." Certainly such

demands are in plain contravention of the ordinary rules of pleading. They are peculiarly objectionable when it is remembered that this Court has on numerous occasions announced that intent or motive is immaterial in antitrust cases. (See *infra*, pp. 21-22). It follows, therefore, that defendants have not only demanded circumstantial evidence but they have demanded such circumstantial evidence of allegations which are immaterial in an antitrust pleading.

Article II of the Southern Defendants' Motion.

(Northern Defendants' Demands V through XII, XIV, XVI, XVII, XIX, XX, and XXI.)

Here, the defendants demand that with respect to the charge of discrimination Georgia furnish a bill of particulars, and thus incorporate in its complaint innumerable details concerning rates—classifications, "classes and commodities on which said rates apply," ports or places in Georgia affected, origins, destinations, whether the rates are applicable on export or import traffic, whether Georgia is "being discriminated against, by an average of rates or a level of rates," and "how such level or average is computed" and "what rates, on what commodities, and between what origins and destinations, enter into said average or level."

They further request Georgia to state whether or not the rates in question are subject to the jurisdiction of the Interstate Commerce Commission and whether or not the rates were fixed, established and approved or disapproved by a decision of the Interstate Commerce Commission "and whether the plaintiff State of Georgia or its public service commission has challenged the same as unlawful, illegal or discriminatory in either Docket No. 28300, *Class Rate Investigation, 1939*, or Docket No. 28310, *Consolidated Classification*, now pending before and undecided by the Interstate Commerce Commission."

The question of the lawfulness of rates does not enter into this controversy since, as observed by the Court in its opinion in this case (65 S. Ct. 716, 725):

> . . . Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant carriers be enjoined.

Since this is not a proceeding to review a determination of the Interstate Commerce Commission, but rather a suit to enjoin the rate-fixing combination and conspiracy, it becomes immaterial whether the Interstate Commerce Commission has approved or disapproved any rate referred to in defendants' demands. The Court in its opinion (65 S. Ct. 716, 727) stated:

> . . . The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us.

Moreover, a mere recital of defendants' demands for myriad rate data clearly demonstrates that defendants by their motions seek evidence and not particularization for the purpose of preparing responsive pleadings. It is difficult to conceive of more extravagant demands. When it is remembered that there are trillions of rates, the insuperable burden that would be placed upon the State of Georgia is clearly apparent.

Article III of the Southern Defendants' Motion.

(Northern Defendants' Demands I (b).)

The demands made in these articles call either for evidence or for facts which appear on the face of the complaint. Details as to dates, names of persons, corporations, agencies and instrumentalities have been characterized by the courts as evidentiary. *Wong Tai* v. *United States, su-*

pra; Sawyer v. *United States, supra; Makan Amusement Corp.* v. *Trenton-New Brunswick Theatre Co., supra,* and cases cited therein.

The other demands of the defendants for facts from which the power or intent to monopolize is inferred, the acts by which the monopoly has been achieved, the means and the methods used to monopolize trade and commerce, the particular agencies named in the complaint through the instrumentality of which the alleged monopoly was achieved, and whether the allegations of monopoly are directed against the Southern defendants request information obviously appearing sufficiently on the face of the complaint.

Paragraphs 9, 10 and 11 of the complaint allege that "*all* of the defendants have, using therefor some sixty rate bureaus, committees, conferences, associations and other private rate fixing agencies, . . . entered into and engaged in unlawful and wrongful contracts, combinations, agreements and conspiracies in restraint of trade and commerce among the several States. . . ." They show how the private rate making machinery operates, demonstrating that the individual lines, and in case of joint through rates, the connecting carriers, are prevented from exercising independent judgment in the fixing of rates. The complaint shows that rates to and from Georgia cannot be put into effect without the approval of the private rate fixing agencies.

Article IV of the Southern Defendants' Motion.

(Northern Defendants' Demands II and IV.)

In addition to demands for matters of evidence and for those answered on the face of the complaint, the defendants, in these articles, pose hypothetical questions.

Defendants ask whether it is charged that "the mere refusal by the Northern defendants to join in joint through rates desired by the Southern defendants, in and of itself without more, constitutes a general domination and coercion of the Southern defendants by the Northern defendants." It is submitted that this demand raises a hypotheti-

cal question which the State is not required to answer. It is clear from a reading of the complaint that Georgia does not allege that a mere refusal by Northern lines to join in joint through rates in and of itself constitutes coercion of the Southern defendants. Under paragraphs 9-13 of the complaint plaintiff charges the defendants with coercively using the rate-making machinery set forth in Exhibit 2 of the complaint for the purpose of fixing arbitrary and non-competitive rates.

Nor should the State of Georgia be required here to answer the hypothetical question involving a legal theory as to whether the complaint charges a separate and additional conspiracy among the Northern defendants.

Article V of the Southern Defendants' Motion.

(Northern Defendants' Demands III, and the Last Paragraph of XXVIII, pp. 16 and 17.)

The defendants demands that Georgia state whether or not it intends:

> to charge that the use of rate bureaus, committees, conferences, associations, or other such agencies is illegal *per se* in the absence of coercive methods in such rate-making and conspiracy or collusion to discriminate against the plaintiff or its citizens.

In the above demand the defendants are again posing a question outside the issues of this controversy. It is immaterial as to whether or not the private rate-making machinery alleged in the complaint is illegal *per se*. The complaint alleges coercion and discrimination. The Court has already construed the bill "to charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed." Clearly it is pointless, and in a bill of particulars improper, to indulge in a legal discussion as to whether or not the rate-making machinery is *per se* illegal in the absence of the other factors charged in the complaint.

Defendants further demand that Georgia state whether or not it charges that "any rate bureau, committee, conference, association, or other so-called 'private rate fixing agency' has been or is being used by these defendants which has not been approved by Certificate No. 44 of March 20, 1943, by the Chairman of the War Production Board." Here again defendants ignore the allegations of the complaint as well as the opinion of the court on this very question. The Court said (65 S. Ct. 716, 727, footnote 7):

> We have considered the argument that Certificate No. 44, issued March 20, 1943, under § 12 of the Act of June 11, 1942, 56 Stat. 357, 50 U. S. C. A. Appendix, § 1112, by the Chairman of the War Production Board (8 Fed. Reg. 3804) protects this alleged combination from the charges contained in the bill. That certificate approves joint action by common carriers through rate bureaus and the like in the initiation and establishment of rates. We do not stop to analyze it beyond observing that in no respect would it be a bar to the present action. It does not purport to be retroactive. It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. Moreover, legal means may be employed for an illegal end.

Since it clearly appears from the opinion of the Court that Certificate 44 (8 F. R. 3804-3805, March 27, 1943) is no bar to the cause of action alleged, further particulars bearing on compliance or non-compliance on the part of the rate bureaus with the certificate are immaterial.

Article VI of the Southern Defendants' Motion.

(Northern Defendants' Demands III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XIX, XXIII.)

Most of these demands call for particulars of the discriminatory rates the irrelevance of which has been carefully examined in our discussion of Article II of the Southern defendants' Motion and corresponding demand of the

Northern defendants and need not be further stressed. It may be noted, however, in connection with defendants' demand to know whether the Interstate Commerce Commission, in Docket No. 28300 and Docket No. 28310, has disapproved the rates resulting from the conspiracy, that on May 15, 1945, ten days prior to the filing of defendants' motions, the Commission did find the rates there investigated to be discriminatory against the South. *Class Rate Investigation* (Docket No. 28300) and *Consolidated Investigation* (Docket No. 28310—I. C. C.—(mimeographed report sheets 3,270).

Defendants further ask whether Georgia uses the words, "preference", "prejudice", "discriminate" and "discriminatory" as used in Section 1 (4), Section 2, and Section 3 of the Interstate Commerce Act, "or, if not, then in what sense or with what meaning the said terms are intended". Since this is not a rate case under the Interstate Commerce Act, the words used in the complaint cannot be restricted to definitions in that Act but must be given their ordinary meaning. As Mr. Justice Holmes observed in *Swift & Co.* v. *United States, supra,* at page 395:

> Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech.

Defendants also request facts showing that the defendants have intended purposely to conspire or discriminate against Georgia, its ports or its people.

The question of intent on the part of defendants to conspire against plaintiff is immaterial under the allegations of the complaint. This case is brought under the antitrust laws and clearly shows an actual restraint or monopoly on the part of these defendants. It is only in those cases where the proof or allegations come short of showing an actual monopoly or restraint that intent may become neces-

sary to characterize the acts done as unlawful. Mr. Justice Holmes in *Swift & Company* v. *United States*, *supra*, stated at page 396:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, a monopoly—but require further acts in addition to the mere forces of nature in order to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.

Mr. Justice Peckham in *United States* v. *Joint Traffic Association*, 171 U. S. 505 (1898) said (pp. 561-2):

> An unlawful intent in entering into the agreement was held immaterial, but only for the fact that the agreement did in fact and by its terms restrain trade.

Furthermore, the rule has been well established that the defendants in such cases are conclusively presumed to have intended the results of their unlawful activities. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897), *United States* v. *Joint-Traffic Association*, *supra*; *Swift & Company* v. *United States*, *supra*; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 224 (1940); *United States* v. *Quaker Oats Company*, 232 Fed. 499 (D. C. N. D. Ill., 1916), app. dis., 253 U. S. 499 (1920). These authorities demonstrate that intent need not be pleaded in an anti-trust case, even though in the category of cases described by Mr. Justice Holmes in *United States* v. *Swift & Company*, *supra*, intent may be a necessary part of the proof to establish the offense. Here, where a price fixing conspiracy is involved, and a *per se* violation consequently results, intent or motive need not be pleaded or proved. *United States* v. *Aluminum Company of America*, 148 F. (2d) 416 (C. C. A., 2, 1945).

Article VII of the Southern Defendants' Motion.

(Northern Defendants' Demands XXII, XXIII, XXV Through XXVIII.)

The defendants seek to require Georgia to amplify the allegations of damage set forth in the complaint. But this Court has already foreclosed discussion of the issue when it stated (65 S. Ct. 716, 728): "Damages must be presumed to flow from a conspiracy to manipulate rates." The point is reinforced by the fact that Georgia seeks no damages, merely the enjoining of the conspiracy. Moreover, even if Georgia did not enjoy the presumption of damages, the complaint itself recites on its face in great detail the injuries it now suffers from the conspiracy. (pp. 8-9 of the complaint) In the words of the Court: "The threatened injury is clear."

THE MOTIONS SHOULD BE DENIED IN THEIR ENTIRETY BECAUSE OF THE UNREASONABLENESS OF THEIR SCOPE.

Regarded in their entirety the defendants' motions are tainted by unreasonableness and extravagance. They present an unlimited and unrestrained effort to require a complete disclosure by the State of its proof prior to the trial of the suit regardless of whether the evidence is known to the defendants or is available to them. The true purpose of defendants, as illustrated by their numerous demands for evidence, is not to obtain an amplification of the pleadings essential to answer, but rather to ascertain what evidence the State possesses and to limit its proof at the trial.

In *Wainer* v. *United States*, 82 F. (2d) 305 (1936), the Court of Appeals for the Seventh Circuit specifically held that the unreasonableness of the demands justifies the trial court in denying the entire motion. The court said (p. 307):

> In addition, however, the information requested was of such character as to disclose the unreasonableness of the request, and the court was justified in exercising its discretion to deny the motion because of that fact. Such

> an application is always submitted to the sound discretion of the court, and, there having been no abuse, the action should not be disturbed. *Wong Tai* v. *United States*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545; *Knauer* v. *United States* (C. C. A.) 237 F. 8.

Similarly, in *Rockwood Co.* v. *Northwestern Fire & Marine Ins. Co.*, 26 F. (2d) 824 (E. D. N. Y., 1928), the court stated (p. 825):

> But, even if I felt that plaintiff was entitled to any particulars of the defendant's defense, which I do not, I would deny this motion in the exercise of discretion, because the particulars demanded go far beyond any to which plaintiff could be entitled, and represent a fishing excursion for the defendant's evidence * * *.

See also *Sawyer* v. *United States, supra; Johnson* v. *United States*, 5 F. (2d) 471, 474 (C. C. A. 4, 1925).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the defendants' motions for more definite statement and for bill of particulars should be denied *in toto*.

Respectfully submitted,

THE STATE OF GEORGIA,

By:

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Office - Supreme Court, U. S.
FILED
JUN 15 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 11, Original—October Term, 1944.

THE STATE OF GEORGIA, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Defendants.

REPLY BRIEF OF NORTHERN DEFENDANTS TO BRIEF OF THE STATE OF GEORGIA IN OPPOSITION TO DEFENDANTS' MOTIONS FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS.

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JUNE 15, 1945.

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IN THE

Supreme Court of the United States

No. 11, ORIGINAL—OCTOBER TERM, 1944.

The State of Georgia, Complainant,

v.

The Pennsylvania Railroad Company et al., Defendants.

REPLY BRIEF OF NORTHERN DEFENDANTS TO BRIEF OF THE STATE OF GEORGIA IN OPPOSITION TO DEFENDANTS' MOTIONS FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS.

I. INTRODUCTION.

These defendants characterize as unfounded and wholly inappropriate the gratuitous charges, at pages 11 and 21 of the brief of the State of Georgia, that their motion for a more definite statement or for a bill of particulars is "designed merely to becloud the issues" in this case, and that "the true purpose of defendants,

* * * is not to obtain an amplification of the pleadings essential to answer, but rather to ascertain what evidence the State possesses and to limit its proof at the trial", and the equally objectionable suggestion intimated in the quotation from *Sawyer* v. *United States,* 89 F. (2d) 139, at 140, reproduced at page 13 of the same brief, to the effect that the demand for particulars is "vain, idle and frivolous."

These defendants are not insisting upon any "technical precision" in the plaintiff's pleading; but, for the purpose of properly preparing their answer and defense, are claiming that they have a right to have the charges against them stated more clearly and with the greater particularity appropriate to a legal document than that shown in the complaint now on file, which is drawn with the sweeping vagueness and generality of a newspaper article or a political address.

Nor are these defendants, as charged in the brief of Georgia, asking for evidence or evidentiary details. They are asking only that the charges against them be sufficiently identified for them to be able to meet those charges by apt admissions or denials, and to assemble facts for presentation at the trial of the case which will be relevant to the contentions which the plaintiff will advance.

The brief of Georgia properly emphasizes that in such a case as this the evidence will be largely "circumstantial." It is for this very reason that the defendants are entitled to greater particularity as to the nature and scope of the charges, and as to what they include and what they exclude. They are entitled to know at least within what channels the circumstantial evidence may have to be met, so that they are not left to deal at large with all the circumstances of the rate structure of the country as to all articles and all localities in Northern and Southern territory. Or, if they are to be left thus at large, they are entitled to know it now.

II. PLAINTIFF'S OBJECTIONS ARE WITHOUT SUBSTANCE.

A. Plaintiff's Objections Summarized.

A scrutiny of plaintiff's brief discloses, aside from discussions of cited cases, only two apparently substantial objections to furnishing the particulars sought. The first of these, appearing at page 7 of its brief, is the suggestion that

> "This Court has decided that 'the bill alleges a cause of action under the anti-trust laws' which has been presented 'with sufficient clarity and specificity as to require a joinder of issues.' *State of Georgia* v. *Pennsylvania R. R. Co., et al.*, U. S. , 65 S. Ct., 716, 728 (1945)."

But reference to the entire paragraph from which the quoted phrases are drawn shows that they are not to be understood as a holding by this Court that the complaint is so clear and specific as to make unnecessary or inappropriate a more definite statement or a bill of particulars. Thus, in the same paragraph the Court stated (p. 16 of the pamphlet opinion):

> "*The complaint may have to be amplified and clarified* as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed." (Italics inserted.)

What the Court was obviously referring to in the first passage above quoted was merely the view that the complaint was sufficiently specific, in alleging a cause of action, to permit its being filed.

The second objection to furnishing a more definite

statement or a bill of particulars is the suggestion at pages 7 and 15 that defendants demand "myriad rate data" and "minute details" the furnishing of which would place an "insuperable burden" upon plaintiff.

This objection to the furnishing of the data sought by Northern defendants is without substance as a practical matter. Thus, the rates here involved to and from Georgia can be only a fraction of those which frequently come before the Interstate Commerce Commission for investigation and adjudication. Yet Rule 31(a) of the Commission's Rules of Practice, in setting forth specifications for formal complaints, provides:

> "The several rates, fares, charges, schedules, classifications, regulations, or practices of which complaint is made should be set out by specific reference to the tariffs or schedules in which they appear, whenever that is practicable." Interstate Commerce Acts Annotated, p. 9793.

The particulars sought by Northern defendants could readily be furnished by plaintiff.

These defendants lay no special emphasis on names and dates beyond what is necessary to lay out the field within which they have to answer. Considering the novel character of this case, the wide scope of the subject matter, the indefiniteness of the field, and the vagueness and generality of the allegations of the amended complaint, herein termed "the complaint," the requests of Northern defendants for a more definite statement or bill of particulars will be found upon analysis to be modest. Indeed, plaintiff's reply appears largely to avoid any discussion of the requests of Northern lines in its concentration upon the more detailed requests of Southern defendants. The Northern defendants respectfully submit that their requests should be separately considered upon their own merits.

B. General Nature of the Particulars Sought By Northern Defendants and the Character of Plaintiff's Response.

Aside from a very brief summary of the complaint, the opposing brief of the State of Georgia begins with quotations from cases and thereafter treats in broad and superficial fashion defendants' requests for a further and better specification of its cause of action. To adopt here the same sequence of treatment might well tend to obscure the nature of the information actually sought, by an abstract discussion of cases and principles without reference to the specific particulars covered by the motion. A more helpful approach, in the opinion of these defendants, would be to outline the cause of action recognized by this Court in its opinion of March 26, 1945, and then to point out the relation borne to that cause of action by the requests of Northern defendants for more definite statement.

At the outset it is to be recognized that the complaint, even as amended, is not drawn so as clearly to set forth the nature of the cause of action intended to be stated. This appears from the opinion of the Court (pp. 2-3, pamphlet opinion) wherein it was found necessary, because of their lack of clarity, to construe the allegations of the complaint with respect to two of the most important subjects, viz., "coercion" and "discrimination."

The cause of action recognized by this Court, as having been stated by the complaint so construed, is based on a charge of "a *conspiracy* among defendants *to use coercion* in the fixing of joint through rates and *to discriminate against Georgia* in the *rates* which are fixed." (Italics inserted.) This is a statement not of two causes of action, but of one. This is recognized by the Court in the sentence which immediately follows:

> "We hold that under that construction of the bill *a cause of action* under the anti-trust laws is alleged." (Italics inserted.)

To sustain this cause of action envisaged by the Court it would appear that Georgia must establish:

(1) A *conspiracy* to use *coercion* in the fixing of rates,

(2) a *purpose* or *intent* to discriminate against Georgia in the rates fixed,

(3) actual *discrimination* in the *rates* to and from Georgia, and

(4) *injury or threatened injury* to Georgia sufficient to justify issuance of an injunction for the future.

In view of the vagueness and generality of the complaint Northern defendants seek a more definite statement to elicit particulars along the following lines:

(1) What is the *conspiracy* charged?

(2) What is the nature of the *coercion* which is charged?

(3) Does the complaint mean to allege an actual *intent or purpose* on the part of defendants to discriminate against Georgia?

(4) What *discrimination* in rates is alleged; by what *standard* (the Interstate Commerce Act or otherwise) is the alleged discrimination to be determined to be such; and what *rates* are alleged to be so discriminatory?

(5) What is the nature or the basis of the damage or threatened injury to Georgia or its people which requires or permits injunctive relief to be granted?

In general, and with few exceptions, plaintiff's opposing brief sheds no light upon the nature and basis of its cause of action, but rather adds to the confusion.

Thus, at page 2 it summarizes its complaint as charging defendants with conspiring to fix arbitrary and non-competitive rates the effect of which is to discriminate against Georgia. It is not clear therefrom whether plaintiff is standing upon the cause of action recognized by this Court, or whether it is depending on a somewhat different cause of action. Thus, the Court construed the bill as charging "a *conspiracy* among defendants to use coercion in the fixing of joint through rates and *to discriminate against Georgia* in the rates which are fixed." (Italics inserted.) From plaintiff's summary the question arises as to whether plaintiff means to disavow alleging such conspiracy *to discriminate against Georgia*, and instead to allege a general conspiracy *to fix arbitrary and non-competitive rates*, without any particular purpose to discriminate against Georgia, but resulting in some rates alleged actually to have that effect.

The general character of plaintiff's opposition to requests for particularization in respect of the several elements of its case, and concerning which these defendants ask a more definite statement, will now be noted.

1. Coercion.

Despite plaintiff's allegation in paragraph 13 of its complaint that the Southern defendants generally are coerced by the Northern defendants and therefore cannot publish joint rates between Georgia and the North when Northern carriers refuse to join therein, and despite the Court's construction of this allegation (p. 3 of pamphlet opinion) as "a charge that the Northern roads use coercion on the Southern roads in the fixing of joint through rates", plaintiff's brief now states (pp. 16-17) that "Georgia does not allege that the mere refusal by Northern lines to join in joint through rates in and of itself constitutes coercion of the Southern defendants." This information is helpful as far as it goes, but plain-

tiff's brief then proceeds to say that "plaintiff charges the defendants with *coercively* using the rate-making machinery set forth in Exhibit 2 of the complaint for the purpose of fixing arbitrary and non-competitive rates." (Italics inserted.) But this statement, which merely substitutes the term "coercively" for "coercion," sheds no light upon the nature of the coercion which is charged or the processes or means through which it operates.

This Court itself evidently regarded this subject as an appropriate one for more definite statement in saying (p. 16 of pamphlet opinion):

> "The complaint may have to be amplified and clarified as respects the coercion * * * charged * * *."

2. Purpose or Intent to Discriminate Against Georgia.

On this subject Northern defendants (Par. III, p. 4) ask whether plaintiff alleges that defendants in employing the conference method of rate-making were motivated by a specific purpose or desire to establish or maintain such rates as would unfairly discriminate against or be disadvantageous to Georgia, or whether the complaint means only to allege that without any such purpose or desire the defendants, through the conference method of rate-making, have established and now maintain rates which are allegedly discriminatory against or disadvantageous to Georgia.

Plaintiff objects to being required to clarify its complaint in this respect, and at pages 19-20 of its brief, states:

> "The question of *intent* on the part of defendants *to conspire against plaintiff* is *immaterial* under the allegations of the complaint." (Italics inserted.)

In support of this position plaintiff refers to a number of cases. But whatever may be the rule in this

respect applicable to other causes of action, it is apparent from the language of the Court in this case that the cause of action recognized by it here has for one of its necessary elements an *intent or purpose to discriminate against Georgia.* Thus, at page 16 of its pamphlet opinion, the Court construed the complaint as charging "a conspiracy * * * *to discriminate against Georgia* in the rates which are fixed." (Italics inserted.)

In this connection it is to be noted that plaintiff, at page 2 of its brief, appears to be counting on a conspiracy *to fix arbitrary and non-competitive rates,* the end products of which conspiracy—viz., *the rates*—are alleged to discriminate against Georgia. Again at page 17 plaintiff states that the complaint charges defendants with coercively using the rate bureaus *for the purpose of fixing arbitrary and non-competitive rates.*

But if this were the purpose and the object of the conspiracy, there would be no reason to suppose that it would necessarily result in any disadvantage to Georgia. Indeed, such a conspiracy might just as well work to the advantage of Georgia and to the disadvantage of some other state or states. There is no necessary causal relation between a conspiracy to fix arbitrary and non-competitive rates and rates which are discriminatory against or disadvantageous to Georgia.

In other words, it would be very different and would require a different answer if the charge of Georgia were (*a*) that the defendants were conspiring with a purpose or intent to discriminate against Georgia, than if the charge were (*b*) that they were conspiring with an intent to fix arbitrary rates which might or might not have the effect of discriminating against Georgia. The answer and proof in the two cases would necessarily have to be different.

It is to be borne in mind that in this suit Georgia is embarking on a course which, as to the relation of the antitrust acts to the making of freight rates, is

uncharted. Ever since the days when, following the decisions in *United States* v. *Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505, the railroads revised their rate-making organizations so as to preserve to individual roads the right of independent action, and until the decision of this Court granting leave to plaintiff to file this complaint, it has been generally believed, by railroads, shippers, and regulatory authorities alike, that the antitrust acts were without application to the normal making of rates by the bureau method. Even under the Court's opinion, which holds that under its construction of the bill a cause of action under the antitrust laws is alleged (p. 16, of pamphlet opinion), there is no attempt, nor was there any necessity therefor, fully to explore the bounds of the Court's jurisdiction in this type of case, which necessarily has an intimate relation to the jurisdiction over rates confided by Congress to the Interstate Commerce Commission.

It is therefore important, especially where Georgia can so simply and easily do so, that it should specify with definiteness such matters as the nature of the intent or purpose of defendants to discriminate against Georgia, if any such intent is to be alleged or sought to be proved, and, if not, to make clear that fact. Only so can the hearing proceed with any certainty toward the trial of the issues. Directness and simplicity of procedure is not served by a refusal to furnish such reasonable specification of the charges as will permit an early definition of the issues.

3. Nature of the Alleged Discrimination and Description of the Rates Alleged To Be Discriminatory Against Georgia.

In response to Northern defendants' Paragraphs V-XXIV, which seek particulars as to the nature of the discrimination alleged and as to the rates which are

alleged to be discriminatory against Georgia, plaintiff's brief at page 15 states:

> "The question of the *lawfulness* of rates does not enter into this controversy * * *." (Italics inserted.)

The reason given for this position—that the Court (65 S. Ct. 716, 725) observed that Georgia was "not seeking an injunction against the continuance of any tariff; * * *"—is no justification for the refusal. While Georgia seeks no injunction against the maintenance of any particular rates, it is an essential part of its cause of action as recognized by this Court to establish the *discriminatory character* of the rates fixed to and from Georgia. This is implicit in the Court's statement (pamphlet opinion, p. 16) that "The complaint may have to be amplified and clarified as respects the * * * *discrimination* charged * * *." (Italics inserted.)

In response to those of defendants' inquiries which seek to elicit particulars as to the character of the unlawfulness or discriminatory quality of the rates involved, plaintiff, at page 19 of its brief, states:

> "Since this is not a rate case under the Interstate Commerce Act, the words used in the complaint cannot be restricted to definitions in that Act but must be given their ordinary meaning."

However, terms used in the complaint to characterize the alleged unlawfulness of the rates are also used in the Interstate Commerce Act, and while not there defined, have been the subject of many decisions and have a well understood signification. To the extent, therefore, that the complaint uses such terms it should be required to state if it intends their employment in any different sense, or if it seeks to rely on some other and different kind and definition of discriminatory and unreasonable rates than those which the Interstate Commerce Act was enacted to prevent.

As to characterizations of unlawfulness of rates, employed in the complaint, which are not used in the Act, plaintiff should be required to make clear what unlawfulness is charged.

In response to such of defendants' requests for particulars as seek to ascertain whether the rates alleged to discriminate against Georgia are rates prescribed or approved by the Interstate Commerce Commission or fixed by defendants with relation thereto, the plaintiff, at page 15 of its brief, objects to furnishing such particulars on the ground that "Since this is not a proceeding to review a determination of the Interstate Commerce Commission, * * * it becomes immaterial whether the Interstate Commerce Commission has approved or disapproved any rate referred to in defendants' demands."

In support of this position plaintiff quotes from the Court's opinion (pamphlet opinion, p. 15) to the effect that "The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us." But this statement of the Court does not support plaintiff's refusal to furnish the requested information. Thus, the information sought by Northern defendants in Paragraphs XII, XVI, XVII, and XIX, relates to whether the rates assailed as discriminatory against Georgia *were established* and *are maintained* pursuant to Commission requirements. The Court's statement relates to rates voluntarily fixed by defendants which subsequently may or may not be held unlawful by the Commission. In view of the fact that a Commission order prescribing rates or rate relationships or fixing minimum rates may absolutely prevent, in particular cases, the establishment of lower rates to or from Georgia, it becomes of the first importance to know to what rates the complaint makes reference and whether they are the result of Commission action or approval.

These defendants by Paragraph XV of their motion seek to have plaintiff state whether the rates complained of as discriminatory are class rates or not. This may become of considerable importance in view of the decision

of the Interstate Commerce Commission of May 15, 1945, in *Class Rate Investigation, 1939,* No. 28300 *et al.* In that case the Commission has prescribed certain class rates applicable to and from Georgia which at the same time are both maxima *and minima.*

In this connection it may be noted that plaintiff, at page 19 of its brief, suggests, by purporting to speak for defendants, that the rates which the Commission found to be unreasonable and unduly prejudicial to Southern territory (Sheet 270) were "rates resulting from the conspiracy * * *." This is not so. On the contrary the rates which the Commission found to be unreasonable and unduly preferential and required to be changed were the very class rates which had been previously prescribed by the Interstate Commerce Commission itself.*

The Court (pamphlet opinion, pp. 14-15) in the instant case recognizes that the injury to Georgia is not in the existence of the combination *per se,* but in its effect, viz., *rates* which are fixed by the combination. Neither would the conspiracy, apart from the element of discrimination in the resulting rates, be necessarily unlawful, nor would there be a basis for any injunctive relief apart from damage or injury caused by the rates. If in view of outstanding orders of the Commission no other rates or rate relationships more favorable to Georgia could have been lawfully established or maintained by defendants, plaintiff's cause of action would necessarily fail. In order for defendants to answer in such manner as will join the appropriate issues, plaintiff should be required to identify the *rates* which it alleges to be discriminatory against Georgia, and to state whether they are Commission prescribed or approved. This is essential to enable the defendants to know upon what grounds to base their defense.

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* See excerpt and footnotes from Sheet 71 of the Commission's report annexed hereto as Exhibit 1.

4. THE NATURE AND CAUSE OF THE DAMAGE OR THREATENED INJURY TO GEORGIA.

Plaintiff's brief, page 21, responds to the requests contained in Paragraphs XXV-XXVIII of these defendants' motion, which relate to the question of damage and threatened injury, by objecting to being required to furnish any further specification whatsoever.

Despite the fact that this is a suit in equity by a "person" under Section 16 of the Clayton Act, 15 U. S. C. Sec. 26, for an injunction "against threatened loss or damage by a violation of the antitrust laws," and that plaintiff to prevail must show threatened injury,* plaintiff's brief (p. 21) opposes the furnishing of any particulars whatsoever with respect to the nature or cause of the damage or threatened injury on the ground that *damages are to be presumed.*

The portions of the Court's opinion to which plaintiff refers to support its position that damages are here to be presumed, and that therefore no further specification is appropriate, do not sustain that position. Thus, at page 21 of its brief, plaintiff inaccurately quotes the Court as saying that "Damages must be presumed to flow from a conspiracy to manipulate rates," and closes its brief response with the words of the Court (p. 16): "The threatened injury is clear." Had plaintiff continued the latter quotation it would have found the ensuing sentence of the Court's opinion which reads: "The damage alleged is sufficient to satisfy the *preliminary* requirements of this motion to file." (Italics inserted.)

This Court clearly recognized the appropriateness of a more definite statement on the subject of damages when, at pages 16-17 of the pamphlet opinion, it states:

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* *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *Duplex Co.* v. *Deering*, 254 U. S. 443, 464-465; compare *Texas* v. *Florida*, 306 U. S. 398, 406-412 with *Massachusetts* v. *Missouri*, 308 U. S. 1, 15-16.

"The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, *the damage suffered,* or otherwise. We do not test it against the various types of motions and pleadings which may be filed." (Italics inserted.)

To sustain its cause of action as construed in the opinion of the Court, it is particularly important that plaintiff establish damage and threatened injury sufficient to warrant the issuance of an injunction for the future. Aside from the legal requirement that it do so, since the suit is by a "person" under Section 16 of the Clayton Act, such proof is especially necessary in view of the possibility that with respect to the rates alleged to be discriminatory against Georgia, the Interstate Commerce Commission may have made such requirements as would have precluded or will preclude the establishment at least in certain instances of rates more favorable to Georgia. Thus, Section 15(1) and (3) of the Interstate Commerce Act, 49 U. S. C. Sec. 15(1) and (3), give the Commission both maximum *and minimum* rate power, the exercise of which in a particular case may result in the fixation of a single specific rate which is both maximum *and minimum.* Thus, whether in any instance there is a zone between the maximum and the minimum lawful rates is a question which may have been concluded by the Commission's action. Moreover, under its power to remove undue prejudice, the Commission may require the maintenance of a specific rate at any point within the so-called zone of reasonableness.*

A specific illustration of a description of rates which at the same time are both maximum and minimum lawful rates is contained in the Commission's recent decision in *Class Rate Investigation, 1939,* No. 28300 *et al.,* decided May 15, 1945, wherein the increased class rates found to be reasonable as maxima for official territory (Sheet 275) were also prescribed by the accompanying order (p. 2), as minimum rates. Obviously, in such a case

* See cases cited at page 42 of brief of Northern Defendants in support of their motion for a more definite statement.

no zone of discretion is left to the carrier; it is not permitted by law to charge any other rate. Defendants are entitled to know whether Georgia claims that she has been or will be damaged by the charging of a rate which, under such an order of the Interstate Commerce Commission, the defendants are legally required to charge.

In responding to Article V of Southern Defendants' Motion, plaintiff, at page 18 of its brief, objects to being required to furnish certain particulars requested by those defendants respecting Certificate No. 44 (8 F. R. 3804-3805, March 27, 1943) on the ground that the Court's statement in footnote 7 of its opinion herein (65 S. Ct. 716, 727) makes all such matters immaterial. This argument misinterprets the Court's statement. The footnote itself, like other portions of the opinion, clearly indicates that the Court was not attempting, in deciding whether to permit the filing of the complaint, to dispose finally of all questions which might arise during the course of the litigation when the pertinent facts had been fully developed of record. This is evident from the Court's statement:

> "*We are dealing with the case only in a preliminary manner.* Cf. *Missouri* v. *Illinois,* 200 U. S. 496, 517, 518. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed." (Emphasis supplied.)

In order that these defendants may be enabled properly to prepare and frame their responsive pleading and prepare for trial and be in a position to take advantage of all legal defenses available to them, and particularly to enable them to know whether or not, and if so to what extent, under the opinion of the Court, they are entitled to claim protection under Certificate No. 44, the specification and particularization in the respects sought in the motion of Northern defendants is necessary.

III. THE CASES CITED BY PLAINTIFF ARE NOT CONTROLLING.

At the outset of its brief, plaintiff presents an argument, purporting to be based on the decisions cited, which in substance is that, because of the highly complex, intricate and far-reaching character of the transactions ordinarily involved in anti-trust cases, a lesser degree of specificity in pleading those transactions should be required in such cases than in other types of cases. The inference apparently is that, the more complex, intricate and numerous are the transactions involved in a case, the less basis there is for requiring the plaintiff to furnish a bill of particulars or a more definite statement with respect to the transactions complained of.

Aside from the startling character of such an argument, which in effect says that the greater the complexity the greater the amount of vagueness and uncertainty in pleading that may be permitted, the cases cited by Georgia in its brief do not support this proposition. The two principal cases relied on by Georgia, *Swift and Company* v. *United States,* 196 U. S. 375 (1905), and *Louisiana Farmers Protective Union* v. *Great A. & P. Tea Co.,* 131 F. (2d) 419 (1942), did not even raise questions as to whether a bill of particulars or a more definite statement should be required. In both of those cases the question was whether or not, on demurrer or motion to dismiss, the complaint adequately stated a cause of action. Those cases might have been appropriate for Georgia to cite at an earlier stage of the present case, on the question whether or not its motion for leave to file the complaint should be granted. But a decision that a complaint sets forth a sufficiently specific cause of action to overcome a demurrer or motion to dismiss is an entirely different thing from a decision on the question whether or not a plaintiff should be required to furnish a more definite statement or a bill of particulars in order to enable the defendants to make an adequate and helpful answer.

In any event, the cases cited by plaintiff which do involve questions as to the propriety of requiring a bill of particulars or a more definite statement at the most show only that in some cases, including some anti-trust cases, and under some circumstances bills of particulars will not be required. The decisions cited by these defendants in their brief in support of their present motion (see pp. 51-60 of that brief), and many other like decisions, show that there are many other cases, including many anti-trust cases, in which the circumstances warrant that a bill of particulars or a more definite statement should be required. Whether or not a bill of particulars or a more definite statement should be required is a question which turns on the facts and circumstances of each case, and on the relevance and importance of the particulars sought to the basic issues of the case. It has been shown above, and in the brief originally filed by these defendants in support of the present motion, that the facts and circumstances of the present case, and the importance and relevance of the particulars sought, warrant the granting of defendants' motion.

IV. CONCLUSION.

In the light of the cause of action described and recognized in the Court's opinion *the argument of plaintiff*, in opposing any requirement that it furnish particulars, *may be summarized as follows:*

(1) Defendants have conspired to use coercion in the fixing of rates generally, including rates to and from Georgia, but the character and method of such coercion need not be specified;

(2) Whether defendants have had or have any actual intent to injure or discriminate against Georgia is of no importance, and indeed there may be no such intent;

(3) The lawfulness, under any standard, of the rates made pursuant to the alleged conspiracy is immaterial, and they may therefore be assumed to be entirely lawful;

(4) The way in which unspecified and unidentified rates are alleged to discriminate against Georgia and the nature and meaning of such alleged discrimination, and the standard of comparison on the basis of which discrimination is alleged to exist, need not be stated; and

(5) Damage to the plaintiff is to be presumed, regardless of whether or not there has been, is, or may be actual damage or threatened injury to Georgia.

This is a most amazing argument. Stated otherwise, a conspiracy to use coercion in the fixing of rates generally (and not only to and from Georgia) may be without any intent whatsoever to hurt or disadvantage Georgia, and the rates actually fixed may be entirely lawful and even beneficial to it, yet damage to Georgia is to be presumed regardless of what the actual facts may be.

Even if it be assumed *arguendo* that the United States in a proper proceeding could possible sustain such a cause of action, it is clear that the State of Georgia suing as a "person" under Section 16 of the Clayton Act (15 U. S. C. Sec. 26) for injunctive relief against threatened loss or damage is not entitled to prevail on any such basis. The very making of such an argument prompts the surmise that though the hands are the hands of Esau, the voice is Jacob's voice.

Plaintiff should be required to furnish the further specifications sought by these defendants.

Respectfully submitted,

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JUNE 15, 1945.

EXHIBIT 1.

Present class rates within and between the rate territories embraced in this proceeding are founded upon distance scales of rates, or key rates in specific amounts between named points in the determination of which the scales were used as a guide, applicable to both single and joint-line movements, prescribed by us in several extensive investigations,[22] and subjected to the general increase of 1938.[23] The first of these investigations was the southern revision originally decided in 1925, followed by the southwestern in 1927, and the eastern and western trunk-line revisions decided at approximately the same time in 1930. In 1934 the western trunk-line revision and the southwestern revision were modified as to the measure of the rate scales. In 1935 the lake-rail revision was required, and in 1938 the western-southern revision.

Broadly speaking, in those revisions all-rail class rates on a distance basis were required to be established intraterritorially within New England trunk-line and central territories, and southern, western trunk-line, and southwestern territories, respectively, and between the territories named for relatively moderate distances; key rates mostly were prescribed interterritorially between points farther apart, except largely between official and southern territories, and as to all rates between western trunk-line and southern territories.

---

[22] They will be termed "revisions" in this report, called by the following names, which revisions were prescribed in the proceedings cited: Eastern, *Eastern Class Rate Investigation* (1930), 164 I. C. C. 314, and supplemental reports, 171 I. C. C. 481, 177 I. C. C. 156, and 203 I. C. C. 357; southern, *Southern Class Rate Investigation* (1925), 100 I. C. C. 513, and supplemental reports 109 I. C. C. 300, 113 I. C. C. 200, and 128 I. C. C. 567; western trunk-line, *Western Trunk Line Class Rates* (1930), 164 I. C. C. 1, and several supplemental reports of which the sixth (1934), 204 I. C. C. 595, contains the principal bases for present rates; southwestern, *Consolidated Southwestern Cases* (1927), 123 I. C. C. 203, and a number of supplemental reports of which the twenty-first (1934), 205 I. C. C. 601, contains the principal bases for present all-rail class rates; western-southern, *Western-Southern Class Rates* (1938), 226 I. C. C. 497, and supplemental reports 231 I. C. C. 315, 232 I. C. C. 81, 238 I. C. C. 681, and 246 I. C. C. 119; and lake-rail, *Lake and Rail Class and Commodity Rates* (1935), 201 I C. C. 101, and supplemental report 214 I. C. C. 93.

[23] The rates described were subject also to the emergency general increase of 1942 during the period it was in effect, namely, March 18, 1942, to May 14, 1943, both inclusive.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ~~11~~ 10, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

REPLY BRIEF OF "SOUTHERN DEFENDANTS" TO BRIEF OF STATE OF GEORGIA ON MOTION FOR A MORE DEFINITE STATEMENT OF THE COMPLAINT OR FOR A BILL OF PARTICULARS.

June 15, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

REPLY BRIEF OF "SOUTHERN DEFENDANTS" TO BRIEF OF STATE OF GEORGIA ON MOTION FOR A MORE DEFINITE STATEMENT OF THE COMPLAINT OR FOR A BILL OF PARTICULARS.

PRELIMINARY STATEMENT.

The motion is addressed to the discretion of the Court, in the exercise of its original jurisdiction.

The motion was filed, pursuant to the invitation of the Court (Opinion on motion for leave to file, p. 16), and in order to have the issues clarified, to avoid unnecessary prolixity in pleading and proof, and in order that the answers of the defendants may be pointed and complete, without unnecessary waste of time and labor of representatives of the State of Georgia, the defendants, and of the Court.

The brief of the State of Georgia (page 7) quotes the Court's statement that the complaint presents a substantial

question with sufficient clarity and specificity to require a joinder of issues, without noting the reservations of the two preceding sentences of the opinion. The Court stated that it had not tested the complaint against motions and pleadings which might be filed, and that "The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise." (Opinion, page 16)

The theme of the brief filed by the State of Georgia appears to be that if the motion calls for particulars of the complaint in greater detail than the Court finds should be granted, then no part of the motion should be granted and no rule should be made for amplification or clarification of the complaint in any respect whatever. To that end the brief is devoted largely to those parts of the motion addressed to time, place and identification of acts constituting the alleged conspiracy and the participants therein, and omits reference to the presentation of the general merits of the motion in the supporting brief filed by these defendants.

Reference by the State of Georgia, in the final quotations in its brief (page 22), to a "fishing excursion" may well be given an application not intended, when made by a plaintiff apparently averse to disclosure of the facts upon which its charge of unlawful conspiracy is grounded.

The State cites *Swift and Company* v. *United States*, 196 U. S. 375, 395-396, and *Louisiana Farmers Protective Union* v. *Great Atlantic and Pacific*, 131 F. (2d) 419, 422. But, as pointed out in our supporting brief, at page 7, the opinion in those cases tested complaints against motions which would have defeated adjudication of the merits. The *Swift* case was before the Supreme Court on a general demurrer for want of equity. The Court held that the bill could not be dismissed. In the *Great Atlantic and Pacific Tea Company* case the appeal was from a judgment dismissing a complaint, upon the ground that it failed to state a case upon which relief might be granted. They are there-

fore not authorities in point, in the determination of what amendments and particulars should be required, in an exercise of judicial discretion, in aid of proper pleading and a more certain development of the material issues necessary to a correct decision.

Defendants are not seeking to put an undue burden upon Georgia and are not asking the impossible. If the State has long suffered under the wrongs alleged, it knows of what those wrong consist and can, and should, state the facts with sufficient particularity to enable the defendants to make an intelligent, responsive answer. Such procedure, we submit, will expedite the trial of the case.

The quotation from *United States* v. *Sugar Institute, Inc.*, 51 F. (2d) 1066, on pages 3 and 4 of Georgia's brief, is introduced by the finding of the District Judge that the complaint "adequately describes the conspiracy." The facts supporting that finding are not stated, and the opinion is of no assistance in arriving at the proper disposition of the motion in this case.

Judge Charles E. Clark's criticism (Georgia's brief, p. 5) of the rule permitting an order for a more definite statement or for a bill of particulars in the District Courts was evidently rejected in the adoption of the Rules of Civil Procedure. Its effect would be altogether to deprive the Court of any discretion in the proper formulation of pleadings.

In *United States* v. *Johns-Manville*, 1 F. R. D. 548, and *Makan Amusement Corporation* v. *Trenton-New Brunswick Theatre Co.*, 3 F. R. D. 429, 430, cited on Georgia's brief at pages 5, 6 and 8, similar motions were denied by District Courts. In the first of the two cases the Court observed that a conspiracy to restrain trade can seldom be proved by evidence of a "specific, oral or written agreement for that purpose." And in the second case cited it was said: "In an action of this nature, it is important to consider that the conspiracy and combination are in most instances proven from circumstantial evidence."

After all, each of the decisions referred to by both sides have to be examined in the light of the circumstances and facts surrounding each case. There should be no difference between counsel as to the principles of law involved. The difference between the cases is due to the differences in facts. Defendants are entitled to be informed of the charges against each of them so that they may be enabled to prepare responsive pleadings.

In the complaint of the State of Georgia it is left uncertain whether the charge of conspiracy is grounded upon the execution by defendants of written agreements establishing rate bureaus, conferences, etc., referred to in Article 11 of the complaint, and a theory that such agreements are illegal *per se;* or whether the legality of the agreements entered into is conceded and the conspiracy is grounded upon actions and circumstances outside of and beyond the written agreements or articles of association. The motion seeks to develop whether the defendants are charged with illegality in entering into association with each other by the agreements referred to in the complaint, or whether the conspiracy is in fact one evidenced only by circumstances from which inference of conspiracy is sought to be made.

This is no ordinary case of alleged conspiracy. The defendants are representative of a semi-public industry, regulated in great detail by the Congress of the United States and its agency, the Interstate Commerce Commission. Their agreements affecting rate making are semi-public documents and there is no suggestion in the complaint of secret agreements or arrangements among them. The purpose of the suit is to supplement regulation by the Commission with an injunctive order and decree of this Court. Georgia presents the issues as affecting the economic life and policies of the Nation. Certainly the importance of the case demands that the best thought and care of which counsel are capable be devoted to the preparation of pleadings and proof, in the public interest. The time which Georgia's able counsel may spend in clarifying the complaint, pursuant to

the order prayed by the motion, will contribute to the expedition with which the proceedings may be brought to a just and proper conclusion.

ARTICLE I OF MOTION; ALLEGATIONS OF CONSPIRACY.

The several sections of Article I of the motion filed by these defendants are designed and intended to have the complaint made more specific in its averments that these defendants are parties to the conspiracy or conspiracies complained of.

The ambiguous averments of the complaint leave it uncertain whether these defendants are charged with conspiracy only among themselves or with the "Northern Defendants." They are entitled to know what the charge is before preparing and filing their answers.

The request for a statement of time and place of each alleged conspiracy is made necessary by the indefinite averments of the complaint. A disclosure of evidence is not sought by the motion, nor is that its purpose. But it seems obvious that if Georgia cannot plead facts constituting a conspiracy the defendants should not be required to answer the generalities and unsupported inferences which constitute the complaint.

The complaint is susceptible to the construction that all averments and charges of conspiracy in other articles of the complaint refer and relate to the averments in Articles 9-13, inclusive, that the defendants have entered into agreements resulting in freight rates to and from Georgia which are complained of as being discriminatory and prejudicial to Georgia. If that is the correct construction, the motion calls for disclosure of whether all defendants are charged with being parties to all agreements referred to in the complaint. The State of Georgia has itself grouped the defendants into two classes, and by the averments of the complaint has charged one group with dominating and coercing the other. It is necessary to proper pleading that the

complaint be amended so as to identify the agreements to which each defendant is charged with being a party, with specification, at least, of the other parties thereto, the period during which such agreements are or were effective, and whether oral or written.

If the suggested construction is not the correct or intended construction of the complaint, and defendants are charged with actions and agreements other than those establishing the bureaus, committees, etc., referred to in Articles 9-13 of the complaint, it should be required that the complaint specifically so state, with reasonable identifying averments of time, place and parties.

The cases cited by the State of Georgia in its reply to this part of the motion (*Wong Tai* v. *United States*, 273 U. S. 77, and *Sawyer* v. *United States*, 89 F. (2d) 139) are cases in which the courts dealt with requests for bills of particulars in criminal cases, pleading entirely unlike and designed for a different purpose from the bill of particulars approved by the Rules of Civil Procedure for cases in equity. The excerpts quoted from the two opinions in the brief demonstrate that the rulings in those cases are not authority for the position of the State of Georgia that the motion of these defendants presents no proper appeal to the discretion of the Court in this case.

With particular respect to paragraph (h) of Article I of the motion of these defendants, it is conceded that a conspiracy sometimes may be directly pointed to an illegal result so as to render immaterial an issue of intent or motive on the part of the persons charged. This ground of the motion was made by these defendants in order that the complainant be given an opportunity to clarify its general and illogical charge that these defendants have engaged in a conspiracy without advantage to themselves, in order to effect a monopoly for the benefit and interest of other railroads, and sections served by them but not served by these defendants. Clarification of the bill in this respect may have a material bearing upon the ultimate issue of whether

rates alleged to be discriminatory against the State of Georgia are the result of a conspiracy to which these defendants are parties, or, if in fact discriminatory, are the result of economic conditions wholly outside and beyond the scope and application of the antitrust laws. (Please note here the quotation from *Swift and Company* v. *United States*, on page 16 herein.)

ARTICLE II OF MOTION; INDEFINITE REFERENCES TO RATES AND CHARGES.

The State of Georgia replies to this article of the motion of these defendants by asserting, with citation of the preliminary opinion of this Court, that the "lawfulness" of rates does not enter into the controversy; and that the fact that there are "trillions" of rates would render compliance by the State an "insuperable burden."

The motion does not suggest an issue with respect to "lawfulness" of rates. The complaint charges, however, that rates resulting from alleged conspiracy are discriminatory and prejudicial to Georgia. In one aspect of the bill it may be that Georgia is basing its charge of conspiracy entirely upon inferences drawn from alleged discrimination in rates. Alleged discrimination in rates is charged in the complaint in support of the general averments of conspiracy; and if the complaint has reference to some among "trillions" of rates, the burden of specifying and identifying the rates so questioned should be assumed by or cast upon the complainant before the defendants are required to answer.

If in fact it is the intention of Georgia to ask the Court to infer conspiracy from the alleged acts of discrimination, the State should be required to identify the rates from which the inference is sought in order that the answers may be made specific in respect to the manner and means by which they were arrived at and fixed.

No response is made by Georgia to the statements of the brief filed in support of the motion (pages 8-9), calling

attention to the uncertainty and indefiniteness of the complaint in its references to rates claimed to be discrimintory and to result from conspiracy. Apparently the lack of definite averment is admitted, and although the complaint is grounded upon the existence and maintenance of alleged discriminatory rates, the complainant, for the purposes of this motion, now takes the position that the task of identifying the rates upon which its cause of action is grounded is too great for it to assume or undertake in the complaint. Responding to a similar contention, and position that the facts called for could be ascertained by processes of discovery, the District Court, in *United States* v. *Griffith Amusement Company*, 1 F. R. D. 229, said:

> "This may be true and it is evident that the pleadings will be very voluminous. However, the plans and specifications for this structure were selected by the plaintiff and if it brought an action which, under the Rules of Civil Procedure and under the federal statutes, necessitates voluminous pleadings, the defendants are not chargeable therewith."

ARTICLE III OF MOTION; ALLEGATIONS OF MONOPOLY.

By Article III of the motion it is pointed out that the complaint is indefinite in its averments that the defendants have monopolized "a substantial part" of interstate trade and commerce, etc., in that no effort is made in the complaint to identify what part of interstate trade and commerce is referred to.

Georgia contents itself with a statement that the motion calls for a disclosure of evidence or of facts appearing on the face of the complaint. That position cannot be sustained.

References have already been made herein to the unusual character of the charge of conspiracy made by the complaint in this case. The departure from normal is emphasized in the charge that a monopoly has been effected by the alleged conspiracy.

By paragraphs (a), (b) and (h) of Article III of the motion, Southern Defendants ask that the specific part of trade and commerce claimed to have been monopolized be identified, with a statement of the period during which such monopoly has continued, and if the charge of monopoly is directed against the Southern Defendants, that facts be pleaded which would establish or from which it could logically and legally be inferred that these defendants have participated in the monopoly, with identification of the trade and commerce monopolized and the means and methods by which such monopoly was effected.

The averments of the complaint are subject to the conjecture that the State intends to charge that, by reason of the establishment of a lower level of freight rates in Northern Territory, citizens of that section of the country have enjoyed a larger proportion of the Nation's business than they are entitled to enjoy, but it is difficult even to conjecture the facts relied upon to characterize the result of the differences in rate levels as amounting to a monopoly. Certainly no facts are pleaded or suggested in the complaint which would render the Southern Defendants beneficiaries of any such monopoly. And if these defendants are not beneficiaries of the alleged monopoly they cannot properly be said to be participants therein unless the charge be that they are participants in a monopoly against their own interest.

The purpose of this article of the motion is to have the bill clarified with respect to the charge that these defendants are parties to an alleged conspiracy which has or may have produced, or contributed to the establishment of, a monopoly in interstate trade and commerce. Specification of the particular trade and commerce claimed to have been monopolized, the identity of the persons or corporations participating in the monopoly and benefiting thereby, will enable these defendants properly to prepare their answer. Without such specification they can do no more than to enter a general denial. If proof is to be offered

with respect to the creation or existence of monoply, resulting from the alleged conspiracy or conspiracies, the complaint should be made to identify that part of interstate trade and commerce claimed to have been monopolized, the parties monopolizing it, and the period during which such monopoly has existed.

ARTICLE IV OF MOTION; ALLEGATIONS OF COERCION.

Article IV of the motion asks for clarification of the allegation in Article 13 of the complaint.

The averments of Article 13 of the complaint seem to render uncertain and ambiguous all of the charges of the complaint in respect to the Southern Defendants. Clarification of meaning and intent of this article of the complaint is requisite to a proper answer on behalf of both groups of defendants.

The brief of the State of Georgia characterizes the inquiry of these defendants as hypothetical when they ask that the complaint make it clear whether the Northern Defendants are charged with a separate and additional conspiracy in the allegation that the Southern Defendants generally are dominated and coerced by the Northern Defendants and therefore cannot publish joint rates between Georgia and the North when the northern carriers refuse to join therein. The nature and scope of the complaint demonstrate that the inquiry is not hypothetical but that the Southern Defendants cannot know how properly to prepare their answers without clarification of the charge in Article 13 that they are under the domination and coercion of the other defendants in the case. That issue has been argued in the motion itself and the supporting brief, and it is not adequately met in the brief of the State of Georgia.

ARTICLE V OF MOTION; USE OF RATE BUREAUS.

The State of Georgia objects to the request that the complaint be required to make it clear whether it is charged that the use of the rate bureaus, committees, conferences, etc., described in the bill, is illegal *per se*, etc., as presenting a "question outside the issues of this controversy." The reply states (page 17) that it is immaterial "whether or not the private rate-making machinery alleged in the complaint is illegal *per se*." The supporting brief filed by these defendants calls attention (p. 10, Art. III) to the fact that in the last paragraph of Article 11 of the complaint the several rate bureaus, committees, etc., described therein are characterized as a rate-making machinery, "which is not sanctioned by the Interstate Commerce Act and is prohibited by the Antitrust Acts, . . ." It is true that the complaint charges coercion and discrimination, but it is not charged that these defendants have employed coercion. If so, of what did it consist? An allegation of discrimination in freight rates is not an allegation of conspiracy to discriminate.

The position assumed by the State of Georgia in its reply brief makes it all the more important and necessary that it be required to make its complaint more specific in its averments with respect to the legality or illegality of the use by the defendants of the several rate bureaus, committees, etc., referred to in the bill and listed on Exhibit 2 thereto. Defendants are entitled to know whether it is the theory and contention of the complaint that their several organizations and committees described in the complaint are illegal and prohibited by the antitrust acts in the absence of the charges of coercion and discrimination upon which this Court placed emphasis in granting leave that the amended complaint be filed.

In the complaint (Section 11) the procedure under which it is alleged a rate is established in Southern Territory through the Southern Freight Association is set forth. If it is that procedure of which complainant complains, that

is one thing; if the charge is that the defendants have gone beyond that and have conspired with and coerced the other defendants to refuse to make rates, or to refuse to concur in rates, that is a different thing. The charge of coercion being the kernel of the complaint, defendants are entitled to know of what the coercion consists, by whom exerted, and how.

Paragraphs (b) and (c) of Article V of the motion call for a statement of the position of the State of Georgia with reference to the effect to be given Certificate No. 44 of the Chairman of the War Production Board, and Section 12 of the Act of Congress of June 11, 1942 (56 Stat. 351, 357), in this proceeding.

The State refers to the footnote added by the Court to its opinion on the motion for leave to file as a ruling that the Certificate is not a bar to the cause of action alleged, and based upon that footnote takes the position that "further particulars bearing on compliance or non-compliance on the part of the rate bureaus with the certificate are immaterial."

Certificate No. 44 was referred to in the return of Southern Defendants to the rule to show cause why leave to file the amended complaint should not be granted. The reference was in support of the argument that the statutes of permanent application withheld jurisdiction of the subject matter of the suit from the courts, and the Act of Congress of June 11, 1942, Section 12, was referred to as "another demonstration of the public policy against court interference in antitrust suits with matters committed to the regulation of the Interstate Commerce Commission", etc. The full significance and import of the Act of 1942 and the Certificate of the Chairman of the War Production Board were not argued or put in issue as the Court's use of a footnote reference clearly implies.

In their return to the rule to show cause the Certificate was not pleaded by the defendants as a bar to the action because, in the return to the rule to show cause, there was

no opportunity to plead facts which would have established compliance with the Certificate.

It was and is our view that there was not a sufficient statement with reference to said bureaus and associations to make it appear factually upon the face of the complaint that the bureaus, associations, etc., were within the terms of Certificate No. 44. Accordingly, when these defendants filed their Motion for a More Definite Statement, under Article V, page 10, it was stated:

> "These defendants and the Court are entitled to a clear statement of position in the complaint with respect to defendants' compliance or non-compliance with Certificate 44 of the War Production Board, in order that the fundamental jurisdictional issues created by said certificate may properly be presented in the answer or by other appropriate pleading to be hereafter filed."

Defendants believe that compliance by the State of Georgia with an order sustaining the pending motion, and particularly Section V thereof, will disclose facts which render defendants' compliance with the provisions of said Certificate 44 a fundamental question going to the jurisdiction of the subject-matter of the complaint, properly to be raised in an answer or other appropriate pleading filed after the complaint is made specific and definite.

The defendants have not had their day in court on the question of whether, when the facts are developed, Section 12 of the Act of June 11, 1942 (56 Stat. 357), is a bar to the further prosecution of this suit and the issuance of an injunction herein. Complainant's effort to avoid a more complete statement with reference to the Associations should not succeed.

This suit is characterized in the opinion of the Court as one "to dissolve an illegal combination or to confine it to the legitimate area of collaboration." (Opinion, page 14) The complaint avers that the several rate bureaus, committees, etc., constitute a rate-fixing machinery which is pro-

hibited by the antitrust acts, with no charge or averment that the several agreements by which the said "machinery" is established have not been brought into full compliance with said Certificate 44 and the regulations of the Interstate Commerce Commission made a part thereof, or that the restrictions and limitations of the Certificate have been exceeded and violated in their execution.

The complaint has ignored the provisions of Section 12 of the Act of June 11, 1942, and the Certificate of the War Production Board, and that omission has been noted in the pending motion. If it is the position of the complainant that the existing bureaus and committees are in compliance with the statute and certificate, facts establishing compliance may be omitted from the answers; and if the contrary position is assumed, the complaint should be required to set out the basic facts and reasons relied upon to support that position.

When and if the State of Georgia is required to take a position and make its complaint specific with reference to the harmony or lack of harmony of the existing agreements among the defendants with the said Certificate and regulations of the Interstate Commerce Commission, and not until then, will these defendants be able properly to prepare and file their answers to the general allegation of the complaint that the so-called "private rate-fixing machinery" is prohibited by the antitrust acts.

That the complaint be made more definite in the respects set out in paragraphs (b) and (c) of this article of the motion of these defendants is essential to their proper responsive pleading.

ARTICLE VI OF MOTION; REFERENCES TO GEORGIA PORTS.

The sixth ground of the motion of these defendants is directed specifically to the allegations of Article 4 of the complaint, charging conspiracy to discriminate against Savannah and Brunswick, the two ports of Georgia.

In this article of the complaint an approach to definiteness is made, contrary to the policy of the complaint as a whole, to confine its averments to generalities and bare inferences. The allegation is made that the ports of Savannah and Brunswick suffer disadvantage and injury on account of rates within Official Territory to and from North Atlantic ports, illustrated by references to "the first-class rate" within Official Territory between Alton, Illinois, and Baltimore, Maryland, and the interterritorial first-class rate between Alton, Illinois, and Savannah, Georgia.

This article of the complaint having been limited in its application to the two seaports of the State of Georgia, it seems manifestly reasonable and helpful to the development of the issues that the complaint be made to specify whether the conspiracy and injury complained of are limited to export and import rates to and from the two Georgia ports; whether the reference to first-class rates is intended to be exclusive, and if not, what other rates are intended to be covered by said allegations, etc.

It is to be particularly noted that the intraterritorial rate between Alton and Baltimore with which the rate to and from the Georgia ports is compared is a rate in which the Southern Defendants do not participate and in the making of which they therefore have no part. The alleged discrimination therefore results from a comparison of rates in which the Southern Defendants participate with rates in which they do not participate. In the case of discrimination so created and arising the Southern Defendants are clearly entitled that the complaint be required to aver facts which establish motive and intent on their part that the alleged discrimination should result, as a necessary or integral element of the charge that the discrimination was brought about by conspiracy to which they or any of them were parties. Very much in point is the qutotation on page 20 of Georgia's brief, when the two immediately preceding sentences are added:

"The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. *Intent is almost essential to such a combination, and is essential to such an attempt.* [Italics supplied] Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." *Swift and Company* v. *United States*, 196 U. S. 375, 396.

ARTICLE VII OF MOTION; ALLEGATIONS OF DAMAGE OR INJURY.

Article VII of the motion notes the omission in the complaint of facts which would establish a causal connection between the alleged conspiracy, and particularly any participation of any of these defendants in any such conspiracy, and the damage or injury alleged to have been suffered by Georgia, its ports and its citizens.

This ground of the motion is made in accord with principles recognized in the well considered opinion of the District Court of Minnesota, Fourth Division, in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 46 F. Supp. 149, a case cited in the supporting brief of these defendants but unnoticed on the brief of the State of Georgia. The District Court, in an action for damages resulting from alleged conspiracy, recognized the necessity that the damage flow from and be caused by the conspiracy. The plaintiff was required to recast its complaint and to show facts establishing, or from which it logically and legally could be inferred, that the damage pleaded resulted from the alleged illegal acts and conduct of the defendants. In imposing this requirement on the plaintiff the District Court, at page 154 of the volume cited, said:

". . . if plaintiff cannot establish such causal connection which would permit recovery, then it is desirable that all parties be advised promptly of their status and

rights before entering upon a long and protracted trial."

The State of Georgia cites the statement of this Court in its opinion on the motion for leave to file the amended complaint (page 15) that "Damage must be presumed to flow from a conspiracy to manipulate rates . . ."

The quoted statement was made by the Court in its preliminary consideration of the complaint, wherein liberality of construction was the declared policy of the Court. In the same opinion the Court suggested that the complaint may have to be amplified and clarified as respects "the damage suffered" and otherwise (Opinion, page 16).

The complaint does not rely upon the suggested presumption. The inadequate averments of damage and injury remain in the complaint. The broad averments and generalities of the complaint may not be relied upon to support or prove conspiracy by inference from a mere disparity in rate levels and evidence of injury and damage. So long as the complaint avers that the State of Georgia, its ports and citizens suffer the injuries detailed in the complaint, it is material that the complaint contain proper averments to establish a causal connection between the damage claimed and the conspiracy itself. No facts supporting such causal connection have been pleaded, and this ground of the motion asks that this deficiency be corrected in order that the defendants may properly plead.

The brief of the State of Georgia states that the complaint "recites on its face in great detail the injuries it now suffers from the conspiracy." It is true that the complaint recites in general language many alleged injuries but the complaint does not recite facts which establish or from which it may be reasonably inferred that such injuries are the result of a conspiracy to which these defendants were or are parties.

CONCLUSION.

In the concluding pages of Georgia's brief we are charged with "unreasonableness and extravagance," and with presenting an "unlimited and unrestrained effort" to secure a disclosure of the State's proof prior to trail, "regardless of whether the evidence is known to the defendants or is available to them." It is suggested that the purpose of the defendants is "to ascertain what evidence the State possesses and to limit its proof at the trial." (Brief, page 21)

In making these accusations the State of Georgia ignores the suggestion of the Court that the "complaint may have to be amplified and clarified", etc. (Opinion, page 16), as well as the suggestion of our supporting brief (page 2) that the complaint be brought into harmony with the theory upon which the Court permitted it to be filed by voluntary amendment. The scope of the motions enables the Court to direct the amplification and clarification it deems proper.

An order of the Court directing the proper formulation of the pleadings will undoubtedly have the effect of limiting the proof or evidence at the trial. That is the purpose of good pleading, and if expedition of adjudication is desired such limitation is necessary and essential. The complaint can be brought into reasonable limits without prejudice to the State of Georgia, if it so desires and the Court requires it.

The motion of these defendants is presented in the belief that there is no essential conflict between their interests and economic prosperity and that of the State of Georgia. The differences lie only in the varying judgment of individuals in the evaluation of economic and industrial problems and in the determination of the proper methods by which such problems are to be met. The truth of the pending controversy can be arrived at only by the trial of

specific issues instead of by an undirected inquiry into broad generalities.

Respectfully submitted,

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By THOMAS W. DAVIS,
Attorney.

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June 15, 1945.

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AUG 14 1915

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

10
No. ~~11~~, Original

STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

BILL OF PARTICULARS.

THE STATE OF GEORGIA,

By:

ELLIS ARNALL,
Governor of Georgia,
T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,
CLAUDE SHAW,
Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for Complainant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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No. 11, Original

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THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

BILL OF PARTICULARS.

Now comes the State of Georgia, complainant, and in response to a decision of this Court, dated June 18, 1945, files this Bill of Particulars. The paragraph numbers employed below are those specified in the motion of the Northern Defendants.

I.

The acts complained of in this amended complaint, began in or about the year 1932 and have continued to the present, although the origin of the alleged illegal combination had its inception many years prior to this date, the exact date being unknown to complainant. In carrying out their unlawful conspiracy in restraint of trade and commerce, all defendants, jointly and severally, employ some sixty rate bureaus, committees, conferences, associations, and

other private rate fixing agencies, the same being identified by complainant as follows:

New England Freight Association
Southern Ports Foreign Freight Committee
Western Association of Railway Executives
Illinois Classification Committee
Central Freight Association
Traffic Executive Chairmen's Committee, Association of American Railroads
Coal and Coke Committee, Trunk Line Association
Consolidated Classification Committee
Special Ports Committee, Southern Freight Association
Traffic Executive Association—Southern Territory
Illinois Freight Association
Northern Lines Committee
Western Classification Committee
Southwestern Freight Bureau
Commissioner, Commissioner Plan—Western District
Association of American Railroads
Southern and Southwestern Freight Committee, Trunk Line Association
Eastern Railroad Presidents' Conference
Standing Rate Committee, Southern Freight Association
North Pacific Coast Freight Bureau
Western Traffic Executive Committee
Montana Lines Committee
Auxiliary Committee, New England Freight Association
Special Conference of Trunk Line, Central Freight, and New England Freight Associations with Southern Lines
Traffic Executive Association—Eastern Territory
Texas-Louisiana Freight Bureau
Board of Directors, Association of American Railroads
General Freight Conference, New York Harbor Lines, Trunk Line Association

Joint Conference of Contact Committees
Traffic Executive Committee, Illinois Freight Association
Pacific Freight Tariff Bureau
Joint Meeting of Chief Traffic Officers, Association of American Railroads
Auxiliary Committee, Trunk Line Association
Southeastern Presidents' Conference
Southern Freight Association
Coal, Coke and Iron Ore Committee, Central Freight Association
General Freight Committee, Trunk Line Association
Executive Committee, Southern Freight Association
Transcontinental Freight Bureau
Joint Conference of Trunk Line, Central Freight, and New England Freight Associations
Presidents Traffic Conference—Eastern Territory
Illinois-Indiana Coal and Coke Committee, Illinois Freight Association
Traffic Advisory Committee, Association of American Railroads
Freight Traffic Managers Committee, Trunk Line Association
Traffic Executive Associations—Eastern, Western and Southern Territories Association of American Railroads
General Committee, Central Freight Association
Ohio River & Mississippi Valley Committee, Illinois Freight Association
Committee of Directors, Commissioner Plan—Western District
Trunk Line Association
Traffic Executive Committee, New England Freight Association
Contact-Fourth Section Committee, Southern Freight Association
Southern Classification Committee
Auxiliary Committee, Central Freight Association

Official Classification Committee
Conference Committee, Western Traffic Executive Committee
Arizona-New Mexico Committee
General Committee, New England Freight Association
Pittsburgh-Mahoning and Shenango Valleys District Committee of the Trunk Line and Central Freight Associations
Coal and Coke Committee, Southern Freight Association
Illinois Rate Committee, Illinois Freight Association
Western Trunk Line Committee
Traffic Executive Committee, Trunk Line Association
Traffic Executive Committee, Central Freight Association
General Freight Committee, Southern Freight Association

It is the object and purpose of this illegal combination, by and through the rate fixing agencies above described, to dominate and control all freight rates by preventing individual carriers from initiating competitive freight rates in accordance with the provisions of the Interstate Commerce Act, to, from or within the State of Georgia and by preventing individual carriers engaged in transporting freight to, from or within the State of Georgia from protesting to the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act, against rates inequitable to the State of Georgia. As a direct result of this illegal domination and control Georgia is necessarily prevented from enjoying competitive freight rates.

In pursuance of this unlawful purpose to dominate and control freight rates, all defendants have engaged in a continuing combination and concert of action among themselves, the substantial terms of which have been and are that defendants agree:

(a) To coerce, restrain, prevent and hinder any individual carrier from initiating or modifying rates to, from or

within the State of Georgia, in accordance with the provisions of the Interstate Commerce Act, without, as a condition of filing the rates with the Interstate Commerce Commission, first submitting its proposal therefor to the private rate fixing agencies of which the proponent of the rates is a member, even though the rates involved may be local rates applying only between stations located on the same transportation line, or, if joint rates, concurred in by connecting carriers directly involved in performing the service;

(b) To coerce, restrain, prevent and hinder any individual carrier desiring to initiate or modify rates to, from or within the State of Georgia, from putting such rates into effect, in accordance with the provisions of the Interstate Commerce Act, without, as a condition of filing such rates with the Interstate Commerce Commission, first obtaining the consent of the private rate fixing agencies of which the proponent of the rates is a member;

(c) To coerce, restrain, prevent and hinder any individual carrier from initiating or modifying a rate to, from or within the State of Georgia, in accordance with the provisions of the Interstate Commerce Act, even if the change be approved by all other members of the private rate fixing agency of which the proponent is a member without, as a condition of filing such rates with the Interstate Commerce Commission, first obtaining the approval of the chairman, a mere employee of such agency;

(d) To coerce, restrain, prevent and hinder any individual carrier from putting into effect a rate to, from or within the State of Georgia, in accordance with the provisions of the Interstate Commerce Act, even if such rate be approved by the chairman and all members of the private rate fixing agency of which the proponent is a member, without, as a condition of filing the rate with the Interstate Commerce Commission, first obtaining the approval of the chairman of the agency with respect to the effective date for such rate;

(e) To coerce, restrain, prevent and hinder any individual carrier from putting into effect, to, from or within the State of Georgia, an interterritorial rate, in accordance with the provisions of the Interstate Commerce Act, even though all private rate making agencies in Southern Territory concur in its publication and even though the connecting carriers in the destination territory concur, if other members or the chairmen of the connecting carriers' agencies object;

(f) To coerce, restrain, prevent and hinder any individual carrier from putting into effect, to, from or within the State of Georgia, an interterritorial rate, in accordance with the provisions of the Interstate Commerce Act, even though all private rate making agencies in Southern Territory concur in its publication and even though the jurisdiction directly affected in the destination territory concurs, if other jurisdictions in either Official Territory or in the territory situated West of the Mississippi River, known as Western Territory, not directly involved in the rate, object;

(g) To coerce, restrain, prevent and hinder any individual carrier from putting into effect, to, from or within the State of Georgia, an individual rate, in accordance with the provisions of the Interstate Commerce Act, even though all private rate making agencies in Southern Territory concur in its publication, if one or more carriers in Official or Western Territory, not directly concerned in the rate involved, contends publication of such rate will be harmful to it or them;

(h) To coerce, restrain, prevent and hinder any individual carrier transporting freight to, from or within the State of Georgia from requesting the Interstate Commerce Commission, in accordance with the provisions of the Interstate Commerce Act, to suspend a rate published by carriers in Official or Western Territory between points in those territories where the rate so sought to be established would create a situation harmful to Georgia, its industries

and its people whose commodities seek to reach the same market in those territories;

(i) To coerce, restrain, prevent and hinder any individual carrier transporting freight to, from or within the State of Georgia from putting into effect orders of the Interstate Commerce Commission equitable to Georgia by anticipating impending orders of the Commission and by so manipulating the rate structure as to circumscribe and avoid the effect of such order, when issued by the Commission, upon the cost of transporting freight to, from or within Georgia;

(j) To coerce, restrain, prevent and hinder any individual carrier transporting freight to, from or within the State of Georgia from performing its statutory duty under the Interstate Commerce Act to consider proposed rates applicable to its lines, through the usurpation by the Association of American Railroads of the prerogatives of the individual carrier in that regard;

(k) To coerce, restrain, prevent and hinder any individual carrier transporting freight to, from or within the State of Georgia from initiating rates applicable to its own lines by transferring the power to initiate such rates from such individual carrier to other members of the conspiracy in contravention of the explicit statutory provisions of the Interstate Commerce Act;

(l) To coerce, restrain, prevent and hinder any individual carrier desiring to initiate or modify rates to, from or within the State of Georgia from putting such rates into effect, in accordance with the provisions of the Interstate Commerce Act, without, as a condition of filing such rates with the Interstate Commerce Commission, first obtaining the consent of representatives of competitive non-rail modes of transportation who are also members of such individual carrier's private rate fixing agency;

(m) To coerce, restrain, prevent and hinder any individual carrier desiring to initiate or modify rates to, from or within the State of Georgia from putting such rates

into effect, in accordance with provisions of the Interstate Commerce Act, even though all private territorial rate making agencies concur if the Board of Directors of the Association of American Railroads disapproves.

During the period of time covered by this complaint, and for the purpose of performing and effectuating the aforesaid combination and conspiracy to restrain interstate trade and commerce and to monopolize a substantial part of said trade and commerce, the defendants, by agreements and concert of action, have done the things which, as hereinbefore alleged, they agreed and conspired to do and, more particularly, have done among others the following acts and things:

Each of the 20 defendants named herein is a member of the Association of American Railroads and each defendant upon becoming a member of this organization agreed to be bound by its written plan of organization and its rules, resolutions and decisions. The preamble to the written plan of the Association provides:

> In order to promote trade and commerce in the public interest, further improve railroad service and maintain the integrity and credit of the industry, the Railroad Companies of the United States do hereby establish an authoritative national organization which shall be adequately qualified and empowered in every lawful way to accomplish said ends where concert of policy and action are required. For the purpose of facilitating the realization of this constructive object, the Members do hereby declare that these announced policies shall be authoritative and will be supported.

As supreme authority in the hierarchy of private rate fixing agencies created by the combination herein, the Association of American Railroads has sought to prevent erosion of their private rate structure by maintaining complete and arbitrary domination and control over all freight rates. To fortify and perpetuate this domination and control, the Association of American Railroads coordinates and supervises the activities of all of the private rate fixing

agencies above described and constitutes the ultimate sanction compelling compliance on the part of individual carriers with the decisions, articles of organization, resolutions, rules and regulations of such agencies. These articles, resolutions, rules and regulations are deliberately designed to prevent individual carriers from initiating or modifying freight rates, in accordance with the provisions of the Interstate Commerce Act, or from protesting to the Interstate Commerce Commission against rates inequitable to the State of Georgia, in accordance with the provisions of the Interstate Commerce Act, without, as a condition of filing such rates and protests with the Interstate Commerce Commission, first obtaining the approval of such proposed rates or protests by the various private rate fixing agencies. The articles, resolutions, rules and regulations of these private rate fixing agencies provide various modes of appeal from decisions at various levels in the hierarchy of private rate fixing agencies in such fashion that such decisions are subject to review and protest within the agencies in pursuance of a paramount conspiratorial objective. But this private system of judicature, including provisions for limited reviews, culminates in the Association of American Railroads, the plan of organization, rules, regulations, and resolutions of which provide that the Board of Directors of such Association shall be the ultimate arbiter in all controversies between members of the Association. It is further provided in the plan of organization of the Association of American Railroads that the members will accept and carry out any decision of the said Board of Directors, or failing which, they will submit the matter to arbitration, and it is agreed that the award of the arbitrators shall be conclusive and binding upon the parties to the controversy. The contract of membership between the individual carrier and the Association provides that the carrier shall be bound by the provisions of the plan of the Association so long as it remains a member. Failure on the part of any carrier to abide by such contract and these rules and regulations

would necessitate its automatic withdrawal from the Association of American Railroads and would result in a crippling isolation of, and the institution and carrying on of a practical boycott against, such offending member.

Among other rules and regulations, the Association of American Railroads has promulgated a resolution, dated May 17, 1935, providing that no rail carrier will ask the Interstate Commerce Commission to suspend rates of another rail carrier until representatives of both parties shall have first conferred with the representatives of the Association of American Railroads, and that where one group of lines knows of contemplated publication of rates by another group "believed to be harmful to it," there must be a conference with the representatives of the Association of American Railroads in advance of filing such tariffs.

As a result of the means and methods adopted to effectuate the unlawful purposes of the conspiracy, without the sanction of the Interstate Commerce Act and in violation of the antitrust laws, a private government has been established for the railroad industry. An organization, a process of administration, a system of police—all unknown to the law—has been endowed with a power of self-regulation comparable to the government. Every defendant railroad, as a practical matter, must have membership in the Association of American Railroads. Every member of the Association, as a condition of membership, agrees to submit to control by the Association and, in all its rate activities, to conform to the procedures and to employ the hierarchy of bureaus established by concert of action. To accept and to maintain its membership, the individual railroad must, in respect to all that has to do with rate making, surrender its liberty of action. It thus surrenders to the government of the industry all the privileges in respect to the initiation and revision of its rates and all the privileges in respect of protesting to the Commission against rates proposed by other carriers, all being privileges accorded it by the Interstate Commerce Act. It surrenders even the right to com-

plain to the Interstate Commerce Commission against the rates of other carriers and against a veto imposed on its proposals somewhere within the hierarchy of controls. It is thus, through a private rate making process unknown to the law, that a decision is made as to what rate changes are to be filed with, and what are to be withheld from, the official regulatory authority. Such concert of action, constituting an unlawful conspiracy in restraint of trade, interferes with and disrupts the regulatory scheme established by Congress. Such conspiracy restrains, prevents and hinders the initiation and maintenance of rates which are just and reasonable and leaves the interests of the State and the people of Georgia without the protection the law was designed to afford them.

III.

The defendants, in creating and employing the process of rate determination set forth above, wilfully violated the antitrust laws and flouted the procedures provided for in the Interstate Commerce Act. The hierarchy of rate bureaus was so arranged, and was intended to be so arranged, as to give rate making power into the hands of the Northern carriers and to accord a relative advantage to the shippers and to the economic interests in Official Territory, and to discriminate against the State of Georgia, its ports and people and the other States in the Southern Territory. The hierarchy of rate bureaus was so arranged, and was intended to be so arranged, as to take away or impair the power of individual carriers or of connecting carriers, acting independently and in competition, to propose single or joint rates to the Interstate Commerce Commission and to protest to the Commission against rates proposed by other carriers, and thus to deny to the State and to the people of Georgia the use of due process established by law through which its interests were to be served in the making of rates. The defendants wilfully and in full knowledge of the consequences of their acts, organized and utilized a system of

rate making by which power over rates was lodged with the conspirators and rates fixed by them were intended to serve, and did serve, the paramount interests of the conspiracy to the injury and detriment of the economy of Georgia.

IV.

All of the defendants using the private rate making machinery referred to in Exhibit 2 of the amended complaint, and particularly the private rate fixing agencies referred to above, have since or about the year 1932, up to and including the present, used such private rate fixing agencies to prevent competition among railroads, and have actually prevented such competition in both intraterritorial and interterritorial rates.

The complaint of the State of Georgia refers to all rates and proposed rates which, according to the terms of the conspiracy, are submitted to any of the private rate fixing agencies above described for approval, disapproval or modification.

The principal power employed by the Northern Defendants to perpetuate their domination and control of freight rates to, from or within the State of Georgia inheres in their control of transportation to the consuming markets of the North and in their consequent plenary power to refuse to join in any interterritorial rate which fails to advance the purposes of the Northern conspirators.

This plenary power is implemented, among others, by two principal mechanisms:

(a) Any controversy arising out of a failure to adjust to the satisfaction of the Northern Defendants any rate dispute affecting the carriage of freight between Georgia and the North may be referred to the Joint Conference of Contact Committees. In this Conference, there are seven votes, one of which is controlled by the railroads operating in Southern Territory, four of which are controlled by railroads operating in Northern Territory, and two of which

are controlled by railroads operating in Western Territory. In this Conference the North has absolute power to coerce decisions affecting freight rates to, from and within the State of Georgia in whatever fashion the conspirators determine; and

(b) The private rate fixing machinery further provides for an appeal to the Association of American Railroads in the event that some one or more of the interested carriers should desire to take such a course. Here again the voting privileges are so distributed that Georgia and the South are completely dominated by the defendants in the North. The articles of Association of American Railroads provide that a majority vote of the Board of Directors is required for decision. Any member of the Board, however, may declare a question controversial, in which case a vote of three-fourths of the Board is necessary for a decision. Of 18 votes on the Board of Directors, only four, less than one-fourth are controlled by the South, although the rate may be applicable within Georgia alone.

The defendant members of the Association have further agreed that in any controversy over which the Board of Directors has assumed jurisdiction and which it has decided by the affirmative vote of three-fourths or more of its members, they will accept and carry out such decision or, within 20 days, institute arbitration proceedings.

The Articles of Association further provide that the Association of American Railroads shall establish the practice and procedure, and determine the admissibility of evidence, in such arbitration proceeding. The award made by the arbitrators "shall be conclusive and binding upon the parties to the controversy."

XIII.

This amended complaint has reference to all domestic rail, rail-water, water-rail, and import and export rail rates and proposed rates to and from the ports of Georgia which

are submitted to any of the private rate fixing agencies above described for approval, disapproval or modification prior to the time that such rates are filed with the Interstate Commerce Commission.

XIV

This amended complaint has reference to all rates and proposed rates including commodity rates and proposed commodity rates which are submitted to any of the private rate fixing agencies above described for approval, disapproval or modification.

XX.

This amended complaint has reference to all rates and proposed rates including interterritorial, joint interterritorial and intraterritorial rates and proposed rates which are submitted to any of the private rate fixing agencies above described for approval, disapproval or modification.

XXIV.

All of the defendants have by their joint and concerted action in using the illegal methods and classes of acts set forth hereinbefore placed the State of Georgia in an inequitable and disadvantageous position by coercing, restraining, hindering and preventing competition in freight rates among the various carriers whose operations directly affect the State of Georgia.

This amended complaint has reference only to the hereinbefore described conspiracy to fix rates, to prevent changes in rates, to suppress proposed rates and to establish a machinery for controlling and manipulating action affecting rates by coercing railroads into securing the approval of the private rate fixing agencies above described before taking any steps to make new rates, to modify, alter

or change existing rates, or to take any other action affecting rates.

THE STATE OF GEORGIA,

By:

ELLIS ARNALL,
Governor of Georgia,

T. GRADY HEAD,
Attorney General of Georgia,

MARSHALL L. ALLISON,
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Assistant Attorneys General of Georgia,

EDGAR WATKINS,
Deputy Assistant Attorney General of Georgia.
Counsel for Complainant.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 10, ORIGINAL.

STATE OF GEORGIA, *Complainant,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY, *et al., Defendants.*

ANSWER OF SOUTHERN DEFENDANTS.

THOMAS W. DAVIS,
J. J. MCLAUGHLIN,
J. H. MCCHORD,
VERNON W. FOSTER,
J. N. FLOWERS,
W. R. C. COCKE,
ROBT. B. TUNSTALL,
ELMER A. SMITH,
S. R. PRINCE,
WILLIAM H. SWIGGART,
Attorneys for Southern Defendants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 11, ORIGINAL.

STATE OF GEORGIA, *Complainant*,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*, *Defendants*.

ANSWER OF SOUTHERN DEFENDANTS.

Come now Atlantic Coast Line Railroad Company, Carolina, Clinchfield and Ohio Railway, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees, Louisville and Nashville Railroad Company, Illinois Central Railroad Company, Gulf, Mobile and Ohio Railroad Company, The Nashville, Chattanooga and St. Louis Railway, Seaboard Air Line Railway Company, and Southern Railway Company, Defendants in the Bill of Complaint and Amended Bill of Complaint and the Bill of Particulars (which three documents are sometimes hereinafter for brevity referred to merely as the "Complaint"), and herein called for convenience "Southern Defendants", and for answer to the Complaint say:

1. The Southern Defendants deny generally each and every allegation of wrongdoing contained in the Complaint,

and specifically deny each and every charge in the said Complaint that they or any of them have contracted, combined, agreed or conspired to fix railroad rates, fares, charges, classifications or practices (hereinafter for brevity sometimes collectively referred to merely as "rates") to the disadvantage, harm, hurt, prejudice or injury of the State of Georgia, its ports or its people, or any of them, and also deny that they or any of them have coerced others or been coerced by others to fix, make or institute any such injurious rates, and also deny that they have in any way discriminated against the State of Georgia, its ports or its people, or that they have in any way monopolized, attempted to monopolize, or restrained or attempted to restrain, trade or commerce. These defendants further and expressly deny that any rates or charges to which any of them is party applicable to, from or within Georgia or elsewhere are unjust, unreasonable, extortionate, discriminatory or otherwise illegal or unlawful. None of these defendants is a member of or party to any bureau, agency, association or committee having power or authority to make, fix or initiate freight rates applicable on its line of railroad or in its behalf or account, with the single exception noted in section 6 below.

2. The foregoing general and specific denials of the charges in the Complaint will be followed herein by more particularized answers to the allegations thereof, to whatever extent may be possible in view of the meager specifications contained in the Complaint and in the Bill of Particulars filed herein. But the Southern Defendants, in order more adequately and accurately to lay before the Court on a correct factual basis the issues here involved, do now further answer generally the allegations of the Complaint.

3. The Complaint attacks, under the misleading and false designations of "private rate-fixing agencies", "private rate-fixing organizations", or "private rate-fixing machinery", rate conferences providing means and methods of investigation, consultation, and consideration between and

among carriers and shippers which have been employed for nearly half a century, with the full knowledge and frequently expressed approval of public authority, for the purpose of ascertaining the rates that will meet the standards laid down in the Interstate Commerce Act and will best serve the public interest. These organizations, variously styled "conferences", "associations", "committees" or "bureaus", will hereinafter generally be referred to as "rate conferences".

4. Respecting the methods of rate-making in fact employed by these defendants in contradistinction to those alleged in the Complaint, and with particular reference to the charges of discrimination and coercion, the two elements held by the Court to sustain the statement of a cause of action under the anti-trust laws, these defendants say that the methods of rate-making employed by the defendants are essential in order to comply with the duties and obligations placed upon them by the Interstate Commerce Act, including the transportation policy of the United States as set forth therein, and in order to avoid the evils denounced by the very anti-trust laws invoked in the Complaint.

As to discrimination, the methods of making rates adopted by them, so far from resulting in discrimination are in fact necessary to prevent the discrimination condemned by law. As to coercion, so far as the charge is based upon the refusal of the Northern roads to agree upon joint rates—and no other basis of fact was stated by the Court—an allegation, in a situation where, as here, two parties failed to reach an agreement that one of said parties "coerced" the other, is mere assertion; and the assertion will be shown to be untrue in point of fact. The Southern Defendants point out the unusual and indeed extraordinary character of a charge that defendants in an anti-trust case have conspired in effect to deprive themselves of business; for this would be the necessary result of hindering and re-

tarding the transportation of freight to and from the State of Georgia, as charged in the Complaint.

5. If the Complaint means to charge that the rate conferences of which they are members, in and of themselves as organized and conducted constitute an unlawful conspiracy and prove coercion, such averments are denied.

6. As to the work, functions and methods of the rate conferences, with the single temporary exception, limited to the period of the present war emergency, hereinafter in this Section referred to, defendants say with emphasis that in no case does any rate conference ever, as falsely alleged in the Complaint, make, fix or institute rates, fares, charges, classifications or practices. These are in all cases made, fixed and prescribed, as provided by law, either by public authority in the form of the Interstate Commerce Commission or by State Commissions having authority in the premises, or by the carriers themselves acting individually with the approval, when required by law, of such public authority. The function of the rate conferences is primarily informational and consultative. Those to which proposals concerning rates are made in the first instance receive such proposals, submit them to members for consideration and discussion, place them upon a public docket for the information and inspection of shippers, and circulate the views of members and shippers and hold public hearings with respect thereto when requested. They are open to proposals by shippers as well as carriers, and are constantly availed of by shippers for that purpose, sometimes directly and at other times by carriers at the instance of shippers. Their recommendations have no binding effect upon any member, and members are privileged to take, and frequently do take, independent action with respect to proposals concerning rates and other matters made by them. The processes of "appeal", by which is meant reference to other rate conferences generally composed of traffic officers of higher rank, have the purpose of securing the further, and if possible more mature, consideration of proposals, generally

by persons of higher official rank or greater experience, or enjoying a broader contact with the proposal under consideration. The recommendations of those rate conferences to which such "appeals" are taken, have no greater binding effect than in the case of rate conferences considering proposals in the first instance. In the case of every rate conference, including all those named in the so-called Bill of Particulars, the right of independent action is reserved, can be exercised, and, when desired by the carrier involved, is exercised.

Independent action is frequent. In the case of Southern Freight Association, in the 12-year period from 1933 to 1944, inclusive, 19,309 independent notices were filed by members, involving 4,522 separate adjustments of rates, rules or regulations; and of the independent notices filed, 4,205 were filed without following in its entirety the usual procedure of the Association.

The single and only rate conference having power or authority to make, fix or initiate freight rates applicable on the lines of railroad of any of these defendants or in its behalf or account, is a temporary war emergency committee, included in the list of alleged "rate-fixing agencies" on page 2 of the Bill of Particulars filed herein by the State of Georgia and there referred to as "Traffic Executive Chairmen's Committee, Association of American Railroads", established and created in 1942 at the request of the Office of Defense Transportation, with the approval of the Federal Department of Justice, for the sole purpose of facilitating war emergency traffic of the United States by making rate adjustments on war traffic when requested so to do by governmental agencies. The said committee's power to fix rates has been exercised only during, and is limited to, the period of the present war emergency. These defendants are represented thereon by the Chairman of Southern Freight Association. A vice president of the Association of American Railroads presides over the meetings of said Committee but has no vote in the determination of

any matters considered or acted upon. The exception stated in this paragraph is stated with respect to all general averments and denials elsewhere made in this Answer. No act of said committee has violated any provision of the anti-trust laws or of any other law.

7. The utility, the value, and the necessity of such rate conferences have been repeatedly recognized by public authority. The Senate of the United States, by Senate Resolution 194, 67th Congress, Second Session, passed December 15, 1921, authorized and directed the Interstate Commerce Commission to inquire into and report to the Senate upon a number of subjects as to the Trans-Continental Freight Bureau, including the questions whether the bureau's operation in any manner stifled competition, together with any other facts and circumstances which the Commission might deem important and necessary to a full knowledge and understanding of the organization and activities of the bureau.

Accordingly, on January 3, 1922, the Commission, stating that it was acting in the exercise of its powers under the Interstate Commerce Act, instituted a proceeding of inquiry, *In re Trans-Continental Freight Bureau*, 77 I. C. C. 252 (1923). No pains were spared to make the investigation a thorough one. All carriers by railroad subject to the Act were made respondents in the proceeding. Copies of the order were sent to various State Commissions and organizations of shippers, and due publicity was given to the proceeding. A careful examination was made by the Commission of the files and records of the bureau and of the correspondence files of the executive traffic officials of certain respondents. Hearings were held at Chicago, Ill., Salt Lake City, Utah, and Washington, D. C. Responsible officials of the bureau and of the principal respondents were subpoenaed as witnesses. Witnesses from important organizations of shippers as well as from local bodies in nine States appeared and testified.

The organizations of the Bureau and of its various committees were representative in all essential respects of the corresponding features of the rate conferences here involved.

The conclusions of the Commission were summed up in the following paragraph:

> "It is manifest that the Trans-Continental Freight Bureau as at present organized and operated serves many useful purposes, promotes economy and efficiency, and is of advantage to shippers as well as to carriers. The need for some organization of this character in the transcontinental traffic field is demonstrated upon the record. The mitigation or cure of such defects and imperfections in the operation of the bureau as experience has disclosed, or as may develop in the future, should be the object of constant solicitude on the part of those who best know them through their intimate acquaintance with and responsibility for the conduct of its affairs. It is abundantly shown that operation of the bureau tends to obviate or remove the discriminations as between persons and localities which the law condemns."

The Senate of the United States on receiving this Report, took no further action, and these Defendants say that this fact constitutes a clear legislative recognition that the operation of such rate conferences is not in restraint of trade or commerce.

8. The Commission has never retracted or receded from this approval of the rate conference system. One of the most recent, emphatic and authoritative pronouncements by persons holding public office intimately connected with transportation is found in the testimony of the late Joseph B. Eastman, for 25 years a member of the Interstate Commerce Commission, Federal Coordinator of Transportation in 1933-1935, and Director of the Office of Defense Transportation from the creation of that office until his untimely death. In testifying before the Senate Committee on Inter-

state Commerce on June 15, 1943, in connection with a hearing on Senate Bill 942, 78th Congress, First Session, Mr. Eastman stated as follows (Hearings on S. 942, p. 830):

> "The railroads of the country constitute a connected and interlacing system of lines over which freight cars of all ownerships circulate freely, and a very great part of the traffic moves under joint rates in which at least two and often many separate railroads participate. The same is true, although in lesser degree, of the other carriers. It is also true that there is a great interdependence between rates. Where there is more than one route between two points, as a very practical matter the rates must ordinarily be the same over all the routes. Even in the case of rates from widely separated origins to a common market, a change in one of the rates may impel changes in them all. A change in the rate basis on one commodity between certain points may even force changes in the rates on other commodities between different points."

And he added, at pages 875 and 878, respectively:

> "I am wholly convinced that if the carriers of the country are to respond to the duties and obligations imposed upon them by the Interstate Commerce Act, and if the rate structure is to be reasonable, free and unjust discrimination or undue preference and prejudice, as simple and consistent as may be, reasonably stable, and sufficient for the financial needs of private ownership and operation, the carriers must be in a position to consult, confer, and deal collectively with many phases of the matter, and that while the ultimate right of individual action should be scrupulously preserved, it is desirable that such action should not be taken without prior notice to fellow carriers and shippers and an opportunity for them to express their views."
>
> "So far as the rate bureaus and associations are concerned, I know that they are essential to the orderly and economical publication of rates and many other activities of the carriers that must be cooperative and collective."

9. And now relating more specifically the functions of the rate conferences to the duties and obligations imposed upon the defendants by law, referred to by Mr. Eastman, these defendants aver that they and all other railroads subject to the Interstate Commerce Act are guided and controlled in the establishment and initiation of rates by the standards found in Section 1(4), (5), (6), in Sections 2 and 3 (1), (4), in Section 4 (1), in Section 13 (4), Section 15, and in Section 15a of the Interstate Commerce Act, and by the principles of rate making and by the relationships in rates announced by the Interstate Commerce Commission in the application of the said standards in the cases which have come before it since the passage of the Interstate Commerce Act on February 4, 1887.

It is the duty and responsibility of these defendants to initiate and establish such rates as will be just and reasonable; to establish reasonable through routes with other carriers by rail and with common carriers by water subject to Part III of the Interstate Commerce Act, and just and reasonable rates applicable thereto; to establish, observe, and enforce just and reasonable classifications of property (Section 1 (4), (5), (6)); to initiate and establish such rates, fares, and charges as will not result in unjust discrimination (Section 2), as will not cause any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage, and as will not discriminate between connecting lines, or unduly prejudice any connecting lines in the distribution of traffic that is not specifically routed by the shipper (Section 3 (1), (4)); as will not result in greater compensation in the aggregate for the transportation of passengers or a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or in any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of the Act (Section

4 (1)); as will not result in any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other, or in undue, unreasonable, or unjust discrimination against interstate or foreign commerce (Section 13 (4)); as will not be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial (Section 15); and as will take into consideration the effect of rates on the movement of traffic, to the need in the public interest of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable the carriers under honest, economical and efficient management to provide such service (Section 15a), all to the end of carrying out under the regulation by the Interstate Commerce Commission, provided for in the Interstate Commerce Act, the declaration of national transportation policy found in the Transportation Act of 1940 (Act of September 18, 1940, 54 Stat. L. 899).

The railroad rates in this country are now parts of an integral whole, and the railroad rate structure is not, as the Interstate Commerce Commission itself has said, a loose aggregation of separately established rates, but a single entity composed of interrelated rates. The declaration of national transportation policy makes it clear that Congress now contemplates a national rate structure that will aid in the development, coordination and preservation of a national transportation system.

In the initiation and establishment of rates the carriers, as the Interstate Commerce Commission itself has said, must exercise judgment and discretion by a like resort to the existing facts, circumstances, and conditions in the first instance, just as the Commission must later do in the event the rates, fares, and charges are brought into question before it. In aid of their performance of this duty these defendants have set up these various rate conferences that there may be a full development of all the facts, circum-

nces, and conditions which might affect or control the es or the changes therein, and which the Commission, der the principles announced by it, would consider if were called upon to pass on the lawfulness of the said es under the standards laid down in the Interstate Com-rce Act, all to the end that the several carriers may be position to initiate and establish rates that will meet the ndards laid down in the said Act, as those standards e been applied by the Interstate Commerce Commission. Defendants aver that the doing of that which the law uires and which they are directed to do by the Commis-n having jurisdiction over them, is not violative of the i-trust laws.

And now more particularly answering the several sec-ns of the Complaint, as amended by the Bill of Particu-s filed by the Complainant, as amended by the Bill of rticulars filed by the State of Georgia, these defendants r:

0. Answering Section 1 of the Complaint, the conclu-ns of law stated therein are not admitted, and these de-dants will contend that the facts averred in this Answer, to be shown in the proof, do not sustain or support the isdiction of the Court asserted in the Complaint or the ged violation by any of these defendants of the antitrust s or any other law or statute.

1. Answering Section 2 of the Complaint, the averments rein that the officers and individuals whose signatures appended to the Complaint are authorized to bring and ntain this action in the name of the State of Georgia are nitted. These defendants deny that they or any of n have committed or have in any manner been respon-e for any actions or conduct resulting in harm, injury or nage to the State of Georgia or any of those for whom it ports to sue which would sustain this action or entitle State of Georgia to any part of the relief sought. In performance of its duties and responsibility and in the nsaction of its business as a common carrier by railroad

each of the defendants has in all respects acted without violation of the antitrust laws or any other laws, and its several actions and conduct which are the subject of the Complaint have been done and performed in furtherance of and in compliance with the Act to Regulate Commerce, and particularly Sections 1, 2, 3, 4, 13, 15, and 15a thereof.

These defendants deny that any injury, irreparable or otherwise, is threatened to the State of Georgia, its people or citizens, by any acts or conduct, agreement or conspiracy on the part of these defendants or any of them, which would entitle the State of Georgia to maintain this suit or to have relief therein.

12. Answering Section 3 of the Complaint, defendants, say that the political principles stated therein are germane to no issue tendered or invited by the Complaint, and are therefore neither admitted nor denied. The remainder of the averments therein are denied.

13. Answering Section 4 of the Complaint, these defendants deny that the State of Georgia or the people of Georgia have been harmed in their interests, liberties, or properties, or have been impeded in their development, by or as the result of any conspiracy in restraint of trade or commerce to which any of these defendants was or is a party, or for or with which any of them was or is in any way responsible, connected or associated.

These defendants deny the existence of, or their association with, or membership in, any conspiracy, made manifest in freight rates or in the manner or method of their making, or otherwise, designed or intended to injure or prejudice the State of Georgia or its people or any other State or people, or having that result; and these defendants aver that in the making and publishing of freight rates to, from and within Georgia, each of them has preserved and maintained at all times and in each instance its inherent right to act independently of all and every influence and consideration other than the preservation of its own integrity

and solvency as a common carrier railroad, the transportation interests, needs, and requirements of the area served by it, and the public laws, including particularly the Interstate Commerce Act and the rules, regulations, decisions and orders of the Interstate Commerce Commission, by which its existence and operation as a common carrier are controlled and regulated.

These defendants further deny that any of them has conspired or in any way been party to any conspiracy or agreement or policy resulting in a preference of the seaports of any other state over those of Georgia. These defendants do not, by their rates or practices, or otherwise, give preference or advantage in rates on domestic or any other traffic to and from the North Atlantic ports, or any other ports, over the ports of Georgia. None of these defendants has any power or control over the first-class rate referred to in Section 4 of the Complaint, or any other rate from Alton, Illinois, to Baltimore, Maryland, but the rates referred to in the Complaint were fixed by the Interstate Commerce Commission in Eastern Class Rate Investigation, 164 I. C. C., 314, and Southern Class Rate Investigation, 100 I. C. C., 513, and subsequent orders.

The particular illustration of supposed discrimination given in the complaint will be fully and more appropriately dealt with in the proof, but as indicating its incomplete, and therefore misleading, character, these defendants call attention to the fact that in alleging preference to the ports of other States over the ports of Georgia, the Complaint sets forth rates on domestic traffic rather than upon export and import traffic, and contrasts a first class rate on domestic traffic of $1.68 per hundred pounds from Alton, Illinois, to Baltimore, Maryland, with a first class rate of $2.39 from Alton to Savannah, Georgia, but omits to state the fact, more important from the standpoint of port development, that on both export and import traffic the first

class rates between Alton and Savannah are materially lower than the first class rates between Alton and Baltimore.

14. Answering Section 5 of the Complaint, these defendants say the State of Georgia in its proprietary capacity has not suffered wrongs as a result of acts of these defendants or of acts for which they, or any of them, are in any way or degree responsible, and the exercise of no power of this Court is necessary or proper for the redress of wrongs suffered by it or to save it from irreparable injury. The State of Georgia is not threatened with loss or damage by any act or omission in violation of the antitrust laws or other law by these defendants or any of them.

(a) These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph (a) of Section 5 of the Complaint. The State of Georgia has not, however, paid to any of these defendants, and none of these defendants has exacted or received from the State of Georgia, any extortionate or illegal freight rate.

Defendants deny that the relation or amount of the rates referred to in said paragraph (a), or on Exhibit 1 to the Complaint, has directly or consequentially caused or resulted in any damage to the State of Georgia for which it is entitled to any relief in this or any other Court by injunction or award of damages or by any other judicial process.

(b) It is admitted that the State of Georgia is the owner of a line of railroad between Atlanta, Georgia, and Chattanooga, Tennessee, known as the Western and Atlantic Railroad, approximately 136 miles in length, and that said railroad is operated, and has been so operated for many years, as a part of the interstate railroad system of the defendant, The Nashville, Chattanooga & St. Louis Railway, under lease contract dated May 11, 1917, for a term beginning December 27, 1919, and expiring December 27, 1969. Said lease contract was executed on behalf of the State of Georgia

by its Governor, pursuant to the authority of an Act of the General Assembly of the State of Georgia approved November 30, 1915, and Acts amendatory thereof approved respectively on August 4, 1916, and August 19, 1916. The Nashville, Chattanooga & St. Louis Railway has operated the Western and Atlantic Railroad, under successive lease contracts, since 1890.

By the terms of said lease contract The Nashville, Chattanooga & St. Louis Railway assumed an obligation to keep and maintain the leased railroad, during the continuation of the lease term, in a condition equal to that of first-class railroads within the State of Georgia, and adequately equipped to serve the public as a common carrier of freight and passengers. The defendant, The Nashville, Chattanooga & St. Louis Railway, avers that it has fully and properly observed and executed all obligations assumed by it in said lease contract, including the payment to the State of Georgia of a monthly rental of $45,000 and the expenditure of not less than $60,000 per year for additions and betterments.

Neither by the terms of said lease contract nor by the provisions of said statutes, nor otherwise, has the defendant, The Nashville, Chattanooga & St. Louis Railway, assumed or been charged with any special responsibility to the State of Georgia or the people of that State, other than or in any way different from the responsibility of any other common carrier by railroad under and pursuant to the Interstate Commerce Act and other Acts of Congress regulating interstate commerce, in respect to rates applicable on said line of railroad and the relation of such rates to rates applicable on other lines of railroad in Georgia and elsewhere.

No part of the rate system referred to in the Complaint is the result of conspiracy between or among any of the defendants, and defendants deny the charge stated in Section 5(b) of the Complaint that any such conspiracy or rate system has lessened or will lessen the establishment of in-

dustries on the line of the Western and Atlantic Railroad, or the amount of freight handled, or has decreased the rental and sales value of said railroad.

15. Answering Section 6 of the Complaint, these defendants deny each and every averment of fact therein.

16. Answering Section 7 of the Complaint, these defendants do not deny the averments of that section except to say:

(1) The Nashville, Chattanooga & St. Louis Railway is a corporation created by statute of the State of Tennessee and as such is a citizen of that State. By its execution of the lease contract with the State of Georgia for the operation of the Western and Atlantic Railroad, under the provisions of the Act of the General Assembly of the State of Georgia of November 30, 1915, quoted on page 50 of that defendant's return to the rule to show cause herein, to which reference is here made, as that statute has been construed by the Supreme Court of Georgia, said defendant has become the Western and Atlantic Railroad, a Georgia corporation, and as such is a citizen of the State of Georgia in so far as its relations with the State of Georgia are concerned, and is subject to suit by the State of Georgia as such.

(2) Seaboard Air Line Railway Company is a corporation of the State of Georgia as well as of Virginia, and a citizen of Georgia, as appears from its separate Return to the Rule to Show Cause issued by this Court herein on the motion for leave to file, to which Return reference is hereby made and the allegations thereof are made a part hereof as fully as though herein again set out at large.

17. These defendants accept the definition of "Official Territory" and "Southern Territory" as made in Section 8 of the Complaint, for all purposes of reference in this proceeding.

18. Answering Section 9 of the Complaint, these defendants deny all averments and charges therein made.

No citizen or shipper of Georgia or any other person under the sovereign protection of the State of Georgia, nor the State of Georgia itself, has been required to pay or has paid, any freight bill or charge for transporting commodities by any of these defendants other than the charges lawfully published and established, in accord with the Interstate Commerce Act, without combination, contract or conspiracy in restraint of trade or commerce among the several states by any of these defendants. And these defendants further deny that any rates or charges to which any of them is party or participant applicable to, from or within Georgia are arbitrary, noncompetitive, unjust, unresonable, or unduly preferential or discriminatory, or otherwise in any way unlawful or illegal.

And for further answer to the averments and charges of Section 9 of the Complaint these defendants refer to and adopt, to the same extent as if copied here, the averments and statements made in Section 1 of this Answer and hereinafter in answer to Section 11 of the Complaint.

19. Answering Section 10 of the Complaint, these defendants deny the averments thereof. For further answer to Section 10 of the Complaint these defendants refer to and adopt, to the same extent as if copied here, the averments and statements made in Section 1 of this Answer and hereinafter in answer to Section 11 of the Complaint.

20. Answering Section 11 of the Complaint and Sections I, III, IV and XXIV of the Bill of Particulars, these defendants state that none of the associations, committees, conferences, or rate bureaus listed on Exhibit 2 to the Complaint or in the Bill of Particulars was or is established or utilized in furtherance of any conspiracy in restraint of trade or commerce. It is denied that the rate making territories and zones were created or designated for the purpose of creating or furthering any such conspiracy.

Each of these defendants denies that interterritorial rates applicable to traffic moving on its line of railroad must first be approved by any rate conference before publication

by the line or lines of railroad on which such interrritorial rates are to be applied. All that is requisite to the publication of any rate is concurrence therein by the lines over which such rate is applicable. The procedure by which agreement for the publication of joint rates is reached by lines participating in the movement to which such rates are applicable, and the several rate conferences employed by the defendants for the interchange of essential information producing such agreement on joint rates, are necessary and essential to proper compliance with and enforcement of the Interstate Commerce Act, and no such rate conference or the activities or procedure thereof is prohibited by the antitrust acts or any provision thereof. These defendants deny that rates within, to or from the State of Georgia and the South are controlled by them, or any of them, through any such rate conference or committee; and each of these defendants avers that it does not control the fixing or publication of any rate on traffic not moving over a line or lines of railroad operated by it, and that it is not a member of nor participant in any combination, contract or conspiracy to control or having power or purpose to control freight rates of any railroad, section, region or area. Each of these defendants further avers, however, that it is required to have information of and to give consideration to rates suggested or proposed by other lines and the effect thereof on its own rates, in order that its own rates may comply with the provisions of the Interstate Commerce Act and the orders and reports of the Interstate Commerce Commission, for which purpose its membership and participation in rate conferences is absolutely necessary and required.

As hereinabove shown none of the rate conferences of which any of these defendants is a member fixes rates and none of them can properly be designated as "rate-fixing" agencies. On the contrary, all such rate conferences are limited in their powers and functions to a proper exchange of information and the making of necessary investigations and recommendations with respect to existing rates, pro-

posed rate adjustments and changes, and the relation of rates existing and proposed.

The Southern Freight Association is an unincorporated, voluntary association of which all of these defendants are members, as averred in Section 11 of the Complaint.

The members of Southern Freight Association maintain the Southern Freight Tariff Bureau and the New Orleans Freight Tariff Bureau solely as publishing agents. Freight rates compiled and published by those bureaus represent and are the result of the individual views, conclusions, and actions of the lines for the account of which publication is made; and no rates are published in tariff form or otherwise upon the authority of any committee of Southern Freight Association.

Each of these defendants admits and avers that when it desires to suggest a new rate or a change in existing rates, it files a "proposal" therefor with the Southern Freight Association and that copies of such proposals are at once distributed by the Chairman to member lines and to similar associations for distribution to interested lines. Such submission and distribution are for the purpose of eliciting proper information with respect to the effect of the suggested rate or change in rates upon existing rates, and to enable other railroads and shippers and receivers of freight to bring to the attention of the proponent their views and conclusions with respect to the consequences the proposed change would bring about or effect. Each of these defendants, however, has at all times during the period covered by the Complaint reserved the right and from time to time has exercised the right to cause to be published a new rate or a change in existing rates, applicable on its lines of railroad, without first causing its proposal to be filed with the Southern Freight Association or distributed to the members thereof.

The Chairman of the Southern Freight Association is authorized to initiate proposals for new rates or for a change in existing rates on lines operated by any of these

defendants. Such proposals are in fact sometimes made by said Chairman, but the Chairman has no voice or vote on the disposition of any such proposal, and the only purpose or effect thereof is to bring the suggestion made by him to the consideration of the individual railroads.

The rate structure of a single railroad is intricate and complex, and that complexity is multiplied through its participation in joint through rates with other railroads. A suggested change in an existing rate or the initiation of a new rate must be studied and investigated to determine its conformity with the provisions of the Interstate Commerce Act and with outstanding orders and reports of the Interstate Commerce Commission. By its order in Docket 13494, effective in 1928, and subsequent orders, the Interstate Commerce Commission established on its own initiative, a level of class rates in Southern Territory and between Official and Southern Territory; and similar orders were made by the Commission in respect to rates in Official Territory and between Southern Territory on the one hand and Western Trunk Line and Southwestern Territories on the other hand. Approximately 84 per cent of the traffic handled by these defendants moves on rates fixed or approved by the Commission, or on rates not higher than those so fixed or approved.

The organization of Southern Freight Association follows generally the organization of the traffic departments of its member lines. The four members of the Standing Rate Committee, referred to in Section 11 of the Complaint, are full-time employes of the Association, and therefore joint employes of the member lines, and with the aid of rate clerks that Committee subjects a suggested rate or rate change to analysis and study for its legality and effect upon existing rates. The General Freight Committee, charged with the responsibility of investigating and making recommendations with respect to rate proposals as to which adverse recommendations have been made, corre-

sponds to the General Freight Agents of the individual lines, and the Executive Committee of the Association corresponds to the chief traffic officers of the member lines. The action and authority of each of these committees is confined and limited to the expression of the recommendation of its members with respect to the proposal submitted to them. The Chairman of Southern Freight Association has no voice or vote in the formulation or adoption of any recommendation, whether the proposal be one originally submitted by him, a member line or a shipper. The effect of an appeal of the recommendation of one of these committees to the next higher committee is only to require consideration of the proposal by traffic officers of greater responsibility and vested with a greater degree of discretion and authority by the individual lines of which they are officers. As hereinabove stated, the effect of an appeal by the Chairman is only to insure such further consideration of a proposal by representatives of the member lines.

The Traffic Executive Association—Southern Territory is a voluntary association of member roads, including these defendants, who are represented thereon by their respective chief traffic officers, by which association recommendations of the Executive Committee of Southern Freight Association may be reviewed when referred to it by appeal of a member road or by the Chairman of Southern Freight Association. Appeals to that association are taken in and are limited to matters of policy or of major interest.

The Southeastern Presidents' Conference is an informal conference of presidents of Southeastern railroads. Consideration of proposals for changes in freight rates considered by that conference is limited to proposals of general interest and few proposals have been considered by such conference.

Consideration of rate proposals by Southern Freight Association committees does not unduly or unreasonably delay publication of the proposed rate. On the contrary,

the procedure followed generally results in expediting publication by facilitating the concurrence of lines whose participation is necessary to make the proposal effective. In those instances in which a rate proposal remains on the docket of any of the committees of the Association for a longer time than usual, the retention of the proposal on the docket affords opportunity for additional efforts to remove objections to its publication which would not be possible without the aid and means of investigation and discussion provided by the Association and its committees.

When a proposal involves an interterritorial rate, the procedure in Southern Territory is substantially followed in the other territory or territories affected by the proposal. The several committees set up by Southern Freight Association and by these defendants for the consideration of such proposals provide a means whereby such proposal may receive prompt and proper investigation, on the basis of which the participating lines may join or decline to join in the proposed through rate.

In no instance does consideration and investigation by any rate conference coerce or dominate or unduly influence any of these defendents in the determination by it of its participation or non-participation in the proposed rate.

The transportation of coal and coke presents problems which are peculiar to that traffic. Individual lines transporting a substantial volume of coal and coke have special traffic officers to deal with coal and coke rates; and there is a special committee of Southern Freight Association for the consideration of such rates. The recommendations of the coal and coke committee have no binding effect and are accepted as mere recommendations, as are the recommendations of other committees of Southern Freight Association; and all of the averments of the preceding paragraphs asserting the absence of domination, coercion and undue influence and the right of all defendants to act independently of such recommendations are here repeated with

respect to the recommendations of the coal and coke committee.

These defendants are members of some but not all of the rate conferences listed on Exhibit 2 to the Complaint and in Section I of the Bill of Particulars. Full identification and description of all such rate conferences will be made in the proof. No such membership or participation by any of these defendants is intended to control or has the effect of controlling the action or decision of any other defendant or any other railroad in respect to freight rates applicable on its lines or the manner or method of the making of such rates; and none of these defendants is coerced or dominated by any other defendant or by any other railroad, through its membership or participation in any such conference, in respect to its rates or the manner or method of the making of rates applicable on its lines.

These defendants further aver and show that the rate conference plan of considering and investigating rate proposals has been a part of the transportation history of the nation, without concealment or effort at concealment, since long prior to 1932, the date suggested in the Bill of Particulars as the initiation of the alleged conspiracy to which the Complaint is addressed. The proposals submitted to the rate conferences are published in traffic journals and public hearings are held from time to time in which interested members of the public participate. Agencies of the Federal Government have subjected the rate conference plan to investigation from time to time, without disapproval or suggestion that they are violative of the anti-trust laws or any other law of the land.

Included among the rate conferences charged in the Complaint and in the Bill of Particulars as in violation of the anti-trust laws are the Southern Classification Committee and the Consolidated Classification Committee, which latter Committee is composed of classification committees of the three territories. Each of these committees has worked toward the elimination of differences between rate classifi-

cations of the several territories, and the efforts of the State of Georgia have been and are now devoted toward the establishment of a uniform classification throughout the country. Without the concerted effort of the several railroads, including the defendants herein, through the said committees, such classification would be impossible. The Interstate Commerce Commission, in its report of May 15, 1945, in Docket 28310, called upon the defendants and other railroads by collective action to bend their efforts toward such uniform classification.

21. Answering particularly the several paragraphs of Section I of the Bill of Particulars identified by letter designation, and repeating here by reference the averments hereinabove made that no defendant has surrendered or by agreement or combination impaired its right to make any rate adjustment without regard to any contrary action or recommendation by any rate conference, and that none of these defendants has engaged in any combination to hinder or damage the State of Georgia, or to restrain or hinder any carrier in the making or changing of rates, or in any way or degree to restrain trade or commerce, these defendants aver:

(a) The submission of a rate proposal, even though affecting only a local rate or a joint rate agreed to by all participating carriers, to a rate committee of the Southern Freight Association or like association of another territory, serves the double purpose of (1) information to roads serving competing points and to interested shippers, and (2) of study and investigation by such committee of the legality of the proposed rate in its relation to other published rates and the requirements of the Interstate Commerce Act; and no carrier suffers any hindrance, restraint or disadvantage from such practice.

(b) (c) The averments in paragraphs (b) and (c) are denied.

(d) The Chairman of Southern Freight Association, as joint agent of member lines, is authorized as an administra-

tive action to fix the effective date of rates published for the account of member lines which have agreed to them, in order that rates of two or more lines serving competitive points may become effective simultaneously and thereby avoid undue discrimination or preference, and also for reasons of economy to fit the effective date to the date of the issuance of periodic tariff supplements. Other administrative reasons for this practice will be shown in the proof. Each carrier has and preserves at all times the right to fix the effective date for itself and make publication accordingly.

(e) (f) (g) (h) The averments in paragraphs (e), (f), (g) and (h) are denied.

(i) None of these defendants is party to any agreement, effort, desire or intent to in any way coerce, restrain, prevent or hinder itself or any other carrier from observing and putting into effect fully and in good faith any orders of the Interstate Commerce Commission by manipulation of the rate structure so as to circumscribe or avoid the effect of any such order.

(j) The Association of American Railroads has not usurped any of the rate-making prerogatives of these defendants or any of them, and none of these defendants individually or in combination with others has surrendered or granted to the Association of American Railroads or to any agency thereof any power or authority to control, direct, dictate, coerce, restrain, prevent, hinder or unduly influence it in the exercise of its rate-making powers and responsibilities with respect to any rates applicable on its lines or any other rates.

(k) (l) The averments in paragraphs (k) and (l) are denied.

(m) No agreement, contract or understanding to which any of these defendants is party empowers or authorizes the Board of Directors of the Association of American Railroads to coerce, restrain, prevent or hinder any of these defendants or any other carrier in respect to the filing,

publication or putting into effect of any rate applicable on its lines.

22. As the Northern Defendants and the Southern Defendants are all members of the Association of American Railroads, the following paragraphs relating to that Association are substantially the same in both answers:

These defendants aver that no action of the Association of American Railroads has or could have any effect upon the right of an individual carrier to initiate or modify rates, since matters having to do with the initiation of rates are not in any way under or subject to the jurisdiction or control of the Board of Directors of the Association of American Railroads, and no action with respect to rates which an individual carriers desires to take is controlled by any action of the Association of American Railroads.

With particular reference to and answering the fifth, sixth and seventh paragraphs of said Section I of the Bill of Particulars, being the second and third full paragraphs beginning on page 8, and the first full paragraph beginning on page 10 thereof, these defendants admit that each of them is a member of the Association of American Railroads, and that the preamble to the written Plan of Organization of the Association is correctly quoted on page 8 of the Bill of Particulars. These defendants aver that, in becoming members of the Association of American Railroads, they agreed to the said Plan of Organization and thereby became members of the said Association of American Railroads; that the members of said Association have agreed that as long as they remained members of the Association they would be bound by the provisions of the said Plan of Organization; but that each and every one of the said members reserved the right to withdraw from the Association at any time by giving ninety days' notice. These defendants further aver that the purposes of the Association of American Railroads are as stated in the preamble quoted on page 8 of the Bill of Particulars, and that those purposes were and are entirely lawful and that no unlawful

mode of procedure was authorized or has ever been followed in said Association.

Further answering, in order to correctly set forth the scope of the Association, these defendants aver:

The Association came into being on October 12, 1934. The Association is an unincorporated, voluntary association, to which belong most of the Class I railroads in the United States, Canada and Mexico. Prior to the organization of the present Association and running back as far as 1867, there have been organizations of various kinds, many of which were national in scope, maintained by the railroads, as is the present Association, in the public interest and for the mutual benefit of their members and to promote trade and commerce in the public interest.

The first of these was the Master Car Builders' Association, formed in 1867, nearly 80 years ago. The purpose of this organization was to establish standards for freight cars, so that they could move freely from one railroad to another throughout the country, thereby permitting the widest possible distribution of freight traffic. Next in line was the Time Convention formed in 1872, the purpose of which was to establish Standard Time Zones throughout the country to avoid confusion and delays. This original Time Convention was broadened into the General Time Convention, which in 1883 established Standard Time throughout the nation. In 1888 there was organized the Railway Accounting Officers Association, the purpose of which was to encourage uniform methods of railroad accounting, this being a matter of great importance in view of the settlements which railroads were called upon to make one with the other by reason of the transportation of freight from points on one railroad to points on other railroads.

Later on, there was organized the American Railway Association, which dealt largely with operating problems and practices having to do particularly with the interchange of cars among railroads and matters incidental thereto, such as car repairs, demurrage (which is a detention charge),

and the like. The American Railway Association also fostered and encouraged research in the field of engineering and mechanical activities.

There was also, prior to 1934, the Association of Railway Executives, which was an organization for the consideration of general policy questions, particularly those that were affected by legislation. There was also the Bureau of Railway Economics, maintained by the railroads for the purpose of collecting, preserving and using statistics and for the dissemination of statistical information among its members. The railroads also maintained the Railway Treasury Officers Association, by which there were discussed and considered questions of common interest having to do with the collection and disbursement of railroad revenues. There were certain other national organizations, one of which had to do with advice to railroads with respect to patent matters.

In 1934, in the interest of economy and efficiency, all of these organizations were consolidated to form the present Association of American Railroads. In addition to carrying on the activities of the previously existing constituent organizations, the Association broadened its scope somewhat, so as to furnish a forum for discussion of questions of general interest and a medium for giving consideration to programs and procedures in which all railroads were interested and which affected the members of the industry generally and the public as well.

As at present constituted, the Association has a department known as the Operations and Maintenance Department, having seven divisions, one bureau and two special committees. One of these divisions, known as the Operating-Transportation Division, has eight sections, which deal with preparation, revision and interpretation of standard codes of rules for train operation, block signals, interlocking, detour agreements, car service, demurrage and storage, problems peculiar to local freight agents in the performance of station work, rules for the loading of freight,

including packing methods, matters of health affecting railroad employees, general rules or standards for the policing of railroad property, general rules looking toward improving safety conditions, and the like.

There is also in the Association (1) an Engineering Division, engaged principally in research in the nature of critical studies designed and intended to improve engineering practices on the railroads generally; (2) a Mechanical Division, which engages in research and study with reference to improving the equipment of the railroads; (3) a Freight Claim Division, the purpose of which is to avoid injury, as far as possible, to freight in transit; and (4) a Car Service Division, with several sections, the purpose of which is to superintend the exchange of freight and passenger cars among railroads and to adopt and enforce rules governing such exchange. The bureau referred to above, within the said Operations and Maintenance Department, has to do with rules for the safe transportation of explosives, and the special committees referred to above, within the said Department, are concerned with automatic train control, signals and grade crossing protection. This Operations and Maintenance Department of the Association covers work formerly done to a large extent by the American Railway Association. The general purpose of the Department is to improve the service of the railroads through research, study and experimentation and to expedite the interchange of traffic, thereby giving to the public through and uninterrupted service to all parts of the country.

There is another department of the Association known as the Finance, Accounting, Taxation and Valuation Department, which has to do with uniform rules in regard to railroad accounting, the settlement of divisions among the railroads, the handling with the General Accounting Office, with the Interstate Commerce Commission and with the Treasury Department of many questions of a general character which can only be considered in Washington, and with valuation and taxation questions of general interest and importance.

The Bureau of Railway Economics of the Association has in one form or another existed for 35 years; it is essentially a fact-finding agency and constitutes the statistical and economic clearing house for the railroads. It maintains probably the best transportation library in the world, and the members of the staff are engaged constantly in furnishing information to the railroads and to the public with respect to the details of railroad operation.

There is a Law Department, which exists for the purpose of advising other departments of the Association and considering with the railroads legal and legislative questions of common interest to all. This Law Department ordinarily assists in general rate cases before the Interstate Commerce Commission and appears regularly before committees of Congress to discuss legislation which is of interest and importance to the railroads.

There is a Traffic Department, (aided in normal times by an Advisory Committee) which handles a great many matters with Government departments and with the Interstate Commerce Commission and, in the war period, with the Office of Defense Transportation. The Traffic Department also acts in an advisory capacity to the railroads with respect to matters of general interest, such as the publication of tariffs, the simplification of tariff publications, and the like. It serves as a convenient medium for the discussion of general traffic problems, some of which are pending befor the Interstate Commerce Commission. It sometimes receives and transmits to the railroads the views of shippers in regard to suggested rate adjustments and many other questions which affect the service rendered the public.

The Association of American Railroads furnishes a convenient medium for the discussion by the member roads among themselves of important questions of policy. It is in no sense a rate-making agency and has no control over rate conferences, rate associations or rate proceedings. Its Plan of Organization does provide a medium whereby railroads may arbitrate certain of their differences, pro-

vided that, by an affirmative vote of three fourths of the members of the Board of Directors, the matter is considered to be of sufficient importance to authorize action by the Board of Directors. This provision for arbitration is in accord with the policy of the law to favor the settlement of controversies by arbitration rather than by litigation. In the eleven years that the Association has been in existence, the arbitration provision has never been invoked or applied.

The Association's governing body is a Board of Directors, consisting of 18 members, viz., 17 railroad chief executives and the President of the Association. Of these 17 railroad executives, six are from Eastern or Official Classification Territory, four are from Southern Territory, and seven from Western Territoy. These territorial representatives are selected by appropriate local organizations in their respective territories. The Board of Directors holds monthly sessions, at which there is a general discussion of problems having to do with efficiency of operation, proposed legislation, the relation of the railroads to their employees, and generally matters affecting the industry as a whole.

The Plan of Organization was made public at the time the Association was organized, and all of its provisions were submitted to the President of the United States, to the Interstate Commerce Commission, to the Federal Coordinator of Transportation, appointed by the President of the United States under the provisions of the Emergency Railroad Transportation Act of 1933, to the important shipping organizations, and many other groups of individuals interested in transportation matters. Its plans and purposes were expressly approved by the Federal Coordinator of Transportation, who, in numerous reports and public statements, commended the action of the railroads in establishing the Association as being a forward step in the public interest.

In the list of organizations set forth at the beginning of Section I of the Bill of Particulars herein, there is a reference not only to the Association of American Railroads but also to the Board of Directors of the Association of American Railroads. No distinction can be drawn between the Association and its Board of Directors. The Board of Directors in no sense constitutes a separate and distinct organization.

In the said list of committees or organizations, there is mentioned the Traffic Advisory Committee of the Association of American Railroads. This is a committee which was organized for the purpose of providing a medium for the discussion and consideration of traffic questions of general interest to the members of the Association. This Committee ceased to function with the entry of the United States into the Second World War. It had no authority to control the action of any individual railroad or any group of railroads. It did not make or purport to make rates or to interfere with the initiation or establishment of rates by the individual railroads. It was composed of chief traffic officers of the member roads, and at meetings of this Committee various questions were discussed and considered, such as the matter of changes in classification, simplification of tariffs, complaints of shippers in regard to rate adjustments, ratings applicable to articles moving at less-than-carload rates, and matters of a similar nature.

In view of the numerous questions which arose in regard to the movement of war materials and troops, a request was made upon the Association of American Railroads, early in the progress of the war, by the War Department, the Navy Department, and the Office of Defense Transportation for the establishment of some simple and expeditious method of organization whereby the war-making agencies of the Government could secure special rates or effect special arrangements looking toward the expedited movement of traffic, without the necessity of applying to each one of the hundreds of railroads throughout the country.

Many questions arose under Section 22 of the Interstate Commerce Act, which is a section of the law authorizing railroads to make special rates on Government traffic, without the necessity for tariff publication. Accordingly there was established, under the auspices of the Association, the Traffic Executive Chairmen's Committee, hereinbefore mentioned. This arrangement was expressly approved by the Attorney General, and by the Office of Defense Transportation acting for and by authorization of the President of the United States.

These defendants deny that the Association of American Railroads is a supreme authority or any authority in the matter of fixing rates or that it is in any way in or a part of a "hierarchy" of "private rate-fixing agencies." They deny that this Association has sought or has helped to prevent erosion of any private rate structure or any rate structure, by maintaining complete or arbitrary domination or control over freight rates or any control or domination over such rates. These defendants deny that the Association of American Railroads coordinates or supervises the activities of all or any "private rate-fixing agencies," and deny that there is any effort on the part of the said Association to fortify or perpetuate any domination or control of rates. They deny that the said Association constitutes the ultimate or any sanction compelling compliance on the part of individual carriers with the decisions, articles of organization, resolutions, rules or regulations of any agency whatever. They deny that any of the articles, resolutions, rules or regulations of the Association was deliberately designed or designed at all to prevent individual carriers from initiating or modifying freight rates or from protesting to the Interstate Commerce Commission against rates which are inequitable to the State of Georgia or against any rates, or from filing such rates and protest with the Interstate Commerce Commission, without obtaining the approval thereof by any rate conference prior to the filing of said rates or protest with the Interstate Com-

merce Commission or at any time or at all. These defendants aver that the Association of American Railroads has nothing whatever to do with the practices of individual carriers in the matter of initiating or modifying freight rates; that it exerts no control over any rate conference of which these defendants or any of them are members; and that no appeal whatever lies from the action of any rate conference or other railroad organization to the Association of American Railroads with reference to rates. These defendants deny that any article, resolution, rule or regulation of any so-called price-fixing or other agency provides any right or mode of appeal from any decision of any such agency in such fashion that any such decision is subject to review or protest in pursuance of any conspiratorial objective.

These defendants deny that any private system of judicature or any other system or plan includes any provision for any review by the Association of American Railroads of any action taken by any rate conference. They deny that the Plan of Organization of the Association of American Railroads or any of its rules or regulations constitutes the Association of American Railroads as the ultimate arbiter or any arbiter in any controversy as to rates between members of the Association. As heretofore stated, there is a provision in the Plan of Organization for submitting certain matters to arbitration, but this provision has no special reference to rate controversies, and, as stated, no arbitration has ever occurred under the provisions of Section 19 of the Plan of Organization or any other section of such Plan.

There is no provision in the Plan of Organization or in any of the rules or regulations of the Association which prevents a railroad at any time from withdrawing from the Association; and these defendants deny that the action of a railroad in withdrawing from the Association would in any way cripple or isolate the activities of the said railroad or bring about a status which could be described as

a "practical boycott," as alleged in the Bill of Particulars.

Reference is made on page 10 of the Bill of Particulars to a certain resolution of the Board of Directors of the Association of American Railroads bearing date of May 17, 1935. That resolution provides as follows:

> "RESOLVED, That effective June 1, 1935, no further requests for suspension of tariff publications of one group of lines will be filed with the Interstate Commerce Commission by other lines, unless there has first been a conference of representatives of both parties with the officers of this organization; and, further
>
> "RESOLVED, That where one group of lines has knowledge of contemplated publication of tariffs by another group believed to be harmful to it, application for conference with officers of this Association will be made in advance of filing such tariffs."

These defendants further aver that nothing in those resolutions prevents or has ever prevented or was or is intended to prevent the filing of rate changes or of requests for suspension of rate changes as proposed by any individual carrier or carriers, and that the only purpose and effect of the said resolutions was and is that there be notification to and discussion with officers of the Association of American Railroads where requests for suspension are proposed by carriers in one major territory with respect to the rates of carriers in another major territory; and these defendants also aver that no case or instance to which the provisions of the above-quoted resolutions were applicable has arisen for several years, and that no such case or instance in which the interests of the State of Georgia were involved has ever arisen.

23. Defendants deny all and singular the averments of the last paragraph of Section I of the Bill of Particulars.

24. Defendants deny all and singular the averments of Section III of the Bill of Particulars.

25. Answering Section 12 of the Complaint, these defendants deny the averments thereof. Each of these defen-

dants has consistently and continuously maintained and followed a policy in rate making designed and intended, in full compliance with the Interstate Commerce Act and orders of the Interstate Commerce Commission, to encourage, promote, and increase the manufacturing and the buying and selling of articles of commerce in Georgia and in other portions of the Southern Territory served by it, by providing efficient and economical transportation by railroad without discrimination and to the advantage and profit of the people and area so served. And as illustrative of the prosperity of the South, including Georgia, as compared with the remainder of the country as a whole, they set forth the finding of the Interstate Commerce Commission in its report of May 15, 1945, in Docket Nos. 28300 and 28310, *Class Rate Investigation, 1939*, and *Consolidated Freight Classification*, in which the Commission states that "the economic development of the United States by freight rate territories is indicated by the following table showing the value of products of all manufacturing industries," and that the table referred to shows that from 1919 to 1939 the value of such products in Southern territory (including the State of Georgia) increased from $4,517,728,000 in 1919 to $5,685,323,000 in 1939 or 25.6 per cent, while in the United States as a whole it decreased from $62,418,079,000 in 1919 to $56,843,025,000 in 1939, or 8.9 per cent; and that this table is immediately followed in the said report by another showing that the "value added by manufacture" in Southern territory increased from $1,880,330,000 in 1919 to $2,325,207,000 in 1939, or 23.7 per cent, while in the United States as a whole it decreased from $25,041,098,000 in 1919 to $24,082,918,000 in 1939, or 1.4 per cent.

26. Answering Section 13 of the Complaint, these defendants deny that they are generally or in any way dominated or coerced by the Northern Defendants, or any of them. It is true that none of them can publish a joint through rate between Georgia and points in the North when the other carriers over whose lines the movement to which such joint rates apply decline to join therein.

27. Answering Section IV of the Bill of Particulars, these defendants deny the averments thereof, except as hereinafter admitted. The statement of the number of votes by territories comprising the Joint Conference of Contact Committees is correct, but defendants aver that the voting power as stated does not deprive them or any of them of the right of independent action and does not in any way control or coerce any of these defendants. It is further averred that said Joint Conference of Contact Committees has not met or functioned since 1942.

The Joint Conference of Contact Committees was a lawful and proper agency for the establishment of interterritorial rates between the several territories. Its only purpose was to make possible by conference an interchange of views and information, the establishment of joint through routes and joint through rates between the territories as required by the Interstate Commerce Act and in accordance with the standards laid down in that Act.

These defendants deny that any rule, regulation, custom or practice authorizes or provides any appeal through the Association of American Railroads or any of its agencies or officers from the recommendations of any rate conference, referred to in said Section IV erroneously as "private rate fixing machinery." The remainder of the averments of paragraph (b) are denied in so far as the same may be in conflict with the Plan of Organization of the Association of American Railroads and except as heretofore expressly admitted.

The organization of the Association of American Railroads has been described in the preceding paragraphs of this Answer. These defendants deny that any rule or regulation of the Association of American Railroads has the effect of implementing or otherwise giving power to the Northern Defendants to coerce, dominate or control the actions of the Southern Defendants in respect to the making of rates.

28. With respect to the second paragraph of Section IV and Sections XIV and XX of the Bill of Particulars, defen-

dants show that the said paragraph and sections are not responsive to the Motions of the defendants for Bill of Particulars or to the order of the Court directing the filing of the Bill of Particulars, but constitute an effort by the State of Georgia to broaden and extend the scope of the Complaint and the inquiry called for therein; and no further answer thereto is required.

29. Answering Section XXIV of the Bill of Particulars, these defendants deny all averments of fact contained therein.

30. Answering Section 14 of the Complaint, these defendants state that the rates for the transportation of some commodities between points in the North and points in Georgia which are approximately 39 per cent higher than the rates for the transportation of like commodities for like distances between points in the North are confined to first class rates; that only a small volume of traffic moves under the said class rates; that the said class rates were fixed not by these defendants, but by the Interstate Commerce Commission in *Southern Class Rate Investigation,* 100 I. C. C. 513 and supplemental reports, 109 I. C. C. 300; 113 I. C. C. 200 and 128 I. C. C. 567. By the order of the Interstate Commerce Commission of May 15, 1945 in *Class Rate Investigation 1939,* 262 I. C. C. 447, in which the State of Georgia was a party, the Interstate Commerce Commission required an ad interim reduction of ten per cent in such rates within Southern territory and between Southern territory and the North and a ten per cent increase in rates within Northern territory; and it provided a revised uniform class rate scale applicable within and between Southern and Northern territories to take effect on the establishment of a uniform classification.

These defendants further aver that the reference to some rates between points in the North and points in Georgia as being thirty-nine per cent higher than the rates for like distances in Northern territory is misleading. The gen-

eral revenue level of rates in Southern territory, including rates to and from Georgia, is not more than five per cent higher than the general level in the North.

31. Answering Section 15 of the Complaint, these defendants deny the averments of that Section. For further answer, they say that each of them gives due consideration, among other factors, to the effect of rates on the movement of traffic over its lines of railroad and that the rates are made in accordance with the standards laid down in the Interstate Commerce Act.

32. Answering Section 16 of the Complaint, aside from the inaccuracies therein, which will be shown at the hearing, these defendants deny that the rate comparisons in Exhibit 3 illustrate any unlawfulness of the practices and rates of defendants, and deny that they are illustrative of the general situation referred to in said section.

33. Answering Section 17 of the Complaint, the Southern Defendants repeat their denial of the existence of the conspiracy alleged in the Complaint, and further deny and put in issue the averment that the parties defendant are not citizens of Georgia insofar as the defendants Seaboard Air Line Railway Company and The Nashville, Chattanooga & St. Louis Railway are concerned.

It is shown in answer to Section 7 of the Complaint that each of the said two defendants is, for all purposes of this case, by necessary operation of law a citizen of the State of Georgia. The suit is therefore not one of which this Court has original jurisdiction under the Constitution of the United States, and the absence of jurisdiction is pleaded by and in behalf of all Southern Defendants.

34. Answering Section 18 of the Complaint, these defendants deny all averments of fact contained therein. For further answer they say that the conclusion of law asserted that no administrative remedy is open to the State of Georgia, is denied; and they aver that the administrative remedy created by law and hereinafter set out in this sec-

tion is not only open but is a remedy expressly provided by law, among others, for the cause of action stated in the Complaint, as amended by the Bill of Particulars filed herein by the State of Georgia.

At the time of the institution of this suit and the filing of this Answer, and continuously since March 20, 1943, there was and is in full effect Certificate No. 44 issued by Donald M. Nelson, Chairman, War Production Board, copy of which is set out in full in the Answer of the Northern Defendants and made a part hereof by reference. Each of the rate bureaus or rate conferences, defined in the regulations annexed to and made a part of said Certificate No. 44, to which any of these defendants was or is a party, was duly registered with the Interstate Commerce Commission prior to April 15, 1943, as provided in said regulations, and has in every respect complied therewith; and all joint action by any of these defendants since said date, through any of the rate bureaus, rate conferences, or other committees or organizations named or referred to in the Complaint, in the initiation, consideration and establishment of rates, fares, and charges, has been in strict compliance with said certificate and regulations.

Rule 10 of said regulations provides: "These rules are subject to modification, change and addition as the need therefor may be shown." On the date of the filing of the Complaint herein and continuously since March 20, 1943, nothing has impeded or impaired the right of the State of Georgia or any of its citizens to seek modification, change or alteration of said regulations by the Interstate Commerce Commission or jointly by said Commission and the Chairman of the War Production Board, or the withdrawal of said certificate, to any extent necessary or proper for the protection of any right or interest of the State of Georgia.

The Complaint, as supplemented by Bill of Particulars, charges and seeks injunctive relief from matters and things certified in said Certificate No. 44 as requisite to the prose-

cution of the war. No acts of coercion or discrimination are charged except as the alleged inherent result of joint action through all or some of said duly registered rate conferences.

Section 12 of Public Law No. 603, 77th Congress, 2nd Session (56 Stat. 357) enacted June 11, 1942, provides that acts, things or omissions approved in such certificate shall be deemed in the public interest and no "civil action shall be commenced with reference thereto under the antitrust laws of the United States."

This action for injunction was brought contrary to and in violation of said statute and is therefore a suit prohibited by law. The illegality of the suit is inherent in the fact that it was prohibited on the date it was filed, and no subsequent termination of the war or withdrawal of said certificate can remove such prohibition or make legal or permit any adjudication or injunctive relief herein with respect to any action done or omitted within the scope and approval of said certificate.

The Complaint, as amended by the Bill of Particulars, and as restricted by the opinion of this Court of March 26, 1945, on the State of Georgia's Motion for Leave to File, is limited to an invocation of judicial action restraining and preventing action approved by and within the scope of said Certificate No. 44, and the relief prayed, as well as the institution of the suit, is barred and prohibited by the said Act of Congress of June 11, 1942.

35. Answering Section 19 of the Complaint, these defendants repeat the denial hereinbefore made and repeated that no conspiracy to which any of them is a party, directly or by implication or association, exists with respect to freight rates on any railroad with which any of the defendants has any control, connection or relation, and no rights or interests of the State of Georgia or its citizens are affected, prejudiced, injured or threatened by any such conspiracy or combination; and further aver that when the

evidence is fully adduced, it will appear that the cause of action alleged in the Complaint as supplemented by the Bill of Particulars is not of a justiciable but is of an administrative character.

36. Answering Section 20 of the Complaint, defendants say that no facts are alleged in said section of the Complaint, and the conclusions of law therein made have been hereinbefore answered insofar as answer is required.

37. Answering Section 21 of the Complaint, these defendants say that the opinion of the Court of March 26, 1945, on the State of Georgia's Motion for Leave to File the Complaint excludes from the Complaint the averments of money damage in the four paragraphs of said section.

These defendants deny that the State of Georgia or those for whom it professes to sue, have sustained damage in any amount by reason of, or as the result of, any wrongful action, conduct, omission, combination or conspiracy on the part of any of them.

38. These defendants deny that the State of Georgia or those for whom it sues is or are entitled to any of the relief prayed in Section 22 of the Complaint or any other relief herein.

And now, having fully answered, these defendants respectfully pray the judgment of the Court that the Com-

plaint be dismissed at the cost of the State of Georgia, and that they and each of them be discharged without day.

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IN THE

Supreme Court of the United States

No. ~~11,~~ 10 Original—October Term, 1944.

THE STATE OF GEORGIA, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., Defendants.

ANSWER OF NORTHERN DEFENDANTS.

JOHN DICKINSON,
ANTHONY P. DONADIO,
ROBERT W. PURCELL,
HORACE L. WALKER,
K. L. RICHMOND,
B. G. STACKHOUSE,
W. T. PIERSON,
THOMAS P. HEALY,
D. LYNCH YOUNGER,
E. RANDOLPH WILLIAMS,
JOSEPH A. McCLAIN, JR.,
PAUL S. PARSONS.
Counsel for Northern Defendants.

OCTOBER 1, 1945.

ALLEN, LANE & SCOTT, DES MOINES

IN THE

Supreme Court of the United States

No. 11, ORIGINAL—OCTOBER TERM, 1944.

The State of Georgia, Complainant,

v.

The Pennsylvania Railroad Company et al., Defendants.

ANSWER OF NORTHERN DEFENDANTS.

In view of the extremely broad and informal character of the plaintiff's Amended Complaint (including the Bill of Particulars), these defendants believe that they are not only entitled but required to preface their specific responses to the allegations of that complaint by an equally broad general denial of all the allegations of wrongdoing therein contained. In particular, they deny that they have in any way combined or conspired to the disadvantage, harm, hurt, prejudice or injury of the State of Georgia, or its people, and also deny that they, or any of them, have coerced others, or been coerced by others, with respect to the fixing, making or initiating of railroad rates to, from or between points in Georgia or any other points in the United States or elsewhere. They deny generally

and at the outset all charges of discrimination and coercion contained in the amended complaint and in the bill of particulars filed by the plaintiff, or in either of them. They deny that they have committed any acts or engaged in any conduct which has restrained or monopolized, or attempted to monopolize, trade among the several States or with foreign countries contrary to the anti-trust laws or the common law, and they deny that the State of Georgia, its ports or people, have been in any way harmed, injured, prejudiced or discriminated against by these defendants or any of them in the matter of making, filing, initiating or charging railroad rates, or otherwise or at all.

Furthermore, these defendants aver that consultation among themselves and with other carriers and shippers is essential for the proper performance of the duties and obligations imposed upon these defendants and other carriers by the Interstate Commerce Act and related Acts, and that the employment of rate bureaus and committees for the purpose of making such consultation and conference possible is made necessary by the said duties and obligations of carriers under the said Acts. These defendants further aver that the use by them of rate bureaus and committees and the procedures thereof for such consultation and conference has not in any way deprived and does not deprive these defendants or any of them of their entire and complete right of independent action or of their freedom to initiate, establish or maintain rates and charges on their own lines regardless of and in the face of contrary views or action on the part of any such rate bureau or committee or any member or officer thereof.

1. Answering Section 1 of the Complaint: these defendants aver that the averments set forth in said Section purport to state legal conclusions, and these defendants are therefore not required to answer the said aver-

ments; but these defendants deny that there is any basis for the Complaint or for any of its several counts either in the common law prohibition against conspiracy or in the common law against torts or in the anti-trust laws of the United States or in any other law or laws, and these defendants reserve the right to urge the defense that this Court is without jurisdiction to entertain this Complaint or any of its counts.

2. Answering Section 2 of the Complaint: these defendants admit that the plaintiff herein is the State of Georgia and that the said State of Georgia is one of the original States of the Union, but these defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that this suit is brought pursuant to the written order to the Attorney General by the Governor of Georgia as authorized by the laws of the State of Georgia; and, further answering said Section 2 of the Complaint, these defendants admit that the said Complaint of the State of Georgia is brought in four separate and distinct counts and that the said State of Georgia purports to sue in a different capacity in respect to each of said counts, but these defendants deny that the said State of Georgia has any standing or is entitled to sue or to be granted any of the relief sought either in its alleged capacity as a sovereign or in its alleged capacity as a quasi-sovereign or as agent or protector of its people or in its alleged capacity as a proprietor and owner of a railroad and owner and operator of various institutions maintained by it, or in its alleged capacity as protector and in behalf of a large general class of its citizens, or in any other capacity; and, further answering said Section 2 of the Complaint, these defendants deny that any wrong has been done by them to the people of Georgia as an organized community or otherwise or to the State of Georgia as the owner of a railroad or as the owner

and operator of various institutions maintained by the said State or otherwise, and these defendants further deny that any large general class of citizens of the said State of Georgia, or any of its citizens, has been damaged by any of the acts of which complaint is made in the said Complaint or by any acts done by these defendants, or any of them, and deny that the sovereignty of the State of Georgia or the interests of its people or the rights of its citizens are in need of protection against irreparable injury or any injury from continuing or threatened acts or any acts on the part of these defendants or any of them, and deny that any acts done by these defendants or any of them are in conflict with the rights of the said State of Georgia or of the people of the said State as an organized community or otherwise or with the proprietary interests of said State, or any large general class of citizens of said State or any citizens thereof.

3. Answering Section 3 of the Complaint: these defendants aver that the averments set forth in the first paragraph and in the immediately following paragraphs marked (*a*), (*b*), and (*c*) of said Section 3 purport to state legal conclusions and therefore these defendants are not required to answer the said averments; and, to the extent that these defendants may be required to answer the said averments, these defendants aver that they are without knowledge or information sufficient to form a belief as to the truth thereof; and, answering the remainder of said Section 3 of the Complaint, these defendants deny that the State of Georgia is hindered or harassed in the discharge of any of its powers, rights or obligations of sovereignty by any conspiracy in which these defendants or any of them are or have been participants, in violation of the common law against conspiracy or of the anti-trust laws of the United States or of any other law or laws, as recited in Sections 9 to 16 of the Complaint herein or in any other Section of said

Complaint or in any other manner or at all; deny that these defendants or any of them have conspired to establish or maintain freight rates which are unjust or unfair or harmful to the State of Georgia or the people thereof; and deny that any rates fixed by or with the concurrence of these defendants or any of them are so fixed as (*a*) to deny to any of Georgia's products equal access with those of other states to the national market, or (*b*) to limit Georgia's economy to staple agricultural products or in any other way, or to restrict or curtail opportunity for Georgia or its people in manufacturing, shipping or commerce, or in any other respect, or to prevent the full or complete or any utilization of the natural wealth of Georgia, or (*c*) to frustrate or counteract any measures taken by Georgia to promote a well-rounded agricultural program or any agricultural program, to encourage manufacturing or shipping, to provide full or any employment, or to promote the general progress and welfare of the people of Georgia, or (*d*) to hold the Georgia economy in a state of arrested development; and, further answering said Section 3 of the Complaint, these defendants deny that any acts done by them, individually or jointly or in combination with other persons or other carriers, have caused a barrier to exist between any measures taken by the State of Georgia to promote its agriculture, industry or commerce, or to shape the pattern of its state economy, and the objectives which such measures are intended to reach, or have caused the State of Georgia to be impeded or distrained in the lawful exercise of its police power or in any other manner; and these defendants admit that the State of Georgia purports to bring this action for the alleged protection of certain rights which it claims to have, but these defendants deny that there is any basis, in Count One of the Complaint or otherwise, for this action either for the purpose of the maintenance by the State of Georgia of its alleged right to discharge its obligations and sovereignty or for any other purpose.

4. Answering Section 4 of the Complaint and particularly the first paragraph of said Section 4: these defendants deny that the State of Georgia has any standing or is entitled to maintain this suit either in its quasi-sovereign capacity or as agent or protector of the people of Georgia or as representative of the public or on behalf of the people of Georgia as an organized community or otherwise or in any other capacity, and these defendants also deny that either Georgia or its people have been harmed in their interests or impeded in their development by any conspiracy, as alleged in the Complaint, or by any act or acts done by these defendants or any of them, and further deny that these defendants have in any way acted in violation of the anti-trust laws of the United States or in violation of the common law prohibition of torts or in violation of the common law against conspiracy or in violation of any other law or laws; and these defendants admit the remaining averments set forth in the first paragraph of said Section 4.

Further answering said Section 4 of the Complaint and particularly the second paragraph of said Section 4: these defendants aver that the averments in said second paragraph as to the right of the people of Georgia to enjoy the conditions of prosperity and to share equally with other States in the opportunities which the progress of the nation brings, purports to state legal conclusions, and therefore need not be answered; but these defendants deny that the people of Georgia as an organic entity or otherwise have at any time been harmed in their liberties, properties, or estates or in any other respect by any act or acts done by these defendants or any of them, as alleged in the Complaint or otherwise, and these defendants deny the existence of any conspiracy as alleged in Section 3 or Sections 9-16 or any other Section of the Complaint. These defendants further deny that any act or acts done by them or any of them have caused any markets to be put beyond the reach of Georgia citizens or

corporations or anyone else or have resulted in crops not having been grown, factories not having been built, funds not having been invested, employment not having been created, resources not having been exploited, or the economy of the State of Georgia or any other State, geared to the national economy or otherwise, not having been developed as otherwise it would have been. These defendants further deny that any freight rates for which these defendants or any of them are or have been responsible have been originated in collusion or perpetuated by private bodies acting without the sanction of legal authority, and deny that any of the freight rates for which these defendants or any of them are responsible have been or are unfair or prejudicial to Georgia or any of its citizens.

Further answering said Section 4 of the Complaint, and particularly the third paragraph of said Section 4: these defendants deny that they or any of them have participated in any conspiracy, either as alleged in the Complaint or otherwise; deny that anything done by them or any of them retards or has retarded the development of the economy of Georgia, or constitutes or has constituted a wrong against or has harmed Georgia or any of its people, and deny that anything done by these defendants or any of them has caused any opportunities to have been foregone or lost to Georgia or any of its people or has caused the economy of Georgia to have become less adequate than otherwise it would have been to the needs of the people of Georgia; and these defendants further deny that the State of Georgia has any standing or capacity to maintain this suit on behalf of its people or otherwise.

Further answering said Section 4 of the Complaint and particularly the fourth paragraph of said Section 4: these defendants deny the existence of any conspiracy in which they or any of them have been or are participants, either as alleged in Sections 9-16 of the Complaint or

otherwise; deny that the people of Georgia have been injured or distrained by any act or acts done by these defendants or any of them; and deny that any rates maintained or participated in by these defendants or any of them or any other acts done by them or any of them result or have resulted in any preference to the seaports of other states over those of Georgia. These defendants admit that there are located in the State of Georgia the ports of Savannah and Brunswick and that those ports are of such size and character as to permit vessels to enter and transport commodities in interstate and foreign commerce thereto and therefrom. But these defendants deny that they, by any of their rates or practices or otherwise, make or give or have made or given any undue, unreasonable, or unlawful preference or advantage in rates on domestic traffic to or from the North Atlantic ports of Baltimore, Philadelphia, New York, Boston or any other related ports over the ports of Savannah or Brunswick, and deny that the relation of rates to or from the ports of Savannah or Brunswick to the rates to or from the North Atlantic ports or any of them causes or results or has caused or resulted in any injury or prejudice to the State of Georgia or to any of the citizens therein. These defendants admit that on domestic shipments from Alton, Illinois, to Baltimore, Maryland, the first class rate is $1.68 per one hundred pounds, while to Savannah, Georgia, the rate is $2.39, but these defendants aver that on shipments from Alton to Savannah for export to Europe, Africa, or the East Coast of South America, the first class rate is $1.38, and for export to other countries is $1.41, per one hundred pounds, while the rate from Alton to Baltimore for export is $1.68 per one hundred pounds. These defendants also aver that on import traffic shipped from Savannah to Alton, when from Europe, Africa, and the East Coast of South America, the first class rate is $1.44 per one hundred pounds, and when from other foreign countries is $1.54,

while on all such import traffic the rate from Baltimore to Alton is $1.68 per one hundred pounds. These defendants further aver that the domestic first class rates between Alton and Savannah and between Alton and Baltimore are those established and maintained pursuant to the decisions and orders of the Interstate Commerce Commission in *Southern Class Rate Investigation*, 100 I. C. C. 513; 109 I. C. C. 300; 113 I. C. C. 200; 128 I. C. C. 567; *Eastern Class Rate Investigation*, 164 I. C. C. 314; 171 I. C. C. 481, and *15 Percent Case 1937-1938*, 226 I. C. C. 41.

5. Answering Section 5 of the Complaint: these defendants deny that the State of Georgia is entitled to bring or maintain this suit in its proprietary capacity or otherwise; deny that Georgia has suffered any wrongs or any injuries, irreparable or otherwise, from or as a result of any of the acts of these defendants or any of them; and deny that redress for any wrongs alleged to have been suffered by Georgia is within the jurisdiction of this Court to grant.

Further answering Section 5 of the Complaint and particularly the paragraph thereof marked (*a*), including Exhibit 1 referred to therein: these defendants are without knowledge or information sufficient to enable them to form a belief as to the truth of the averments that the State of Georgia has built and owns and operates state hospitals, experimental farms, penal and educational institutions, various public administration buildings and plants, and that Georgia constructs roads and bridges and has bought and sold and buys and sells commodities shipped from or to Georgia, to or from other states, including the commodities listed in the said paragraph of said Section 5. These defendants deny that any of the freight rates established or maintained by them or any of them or with the concurrence of any of them to or from Georgia, whether paid by Georgia or not, are extortionate or illegal, and deny that Georgia has suffered any damage, irreparable or otherwise, from any of the freight

rates to or from Georgia established or maintained or participated in by them or any of them, from payment by Georgia of any of said freight rates. These defendants admit that with minor and unimportant exceptions the rates shown in Exhibit 1 attached to the Complaint are correct, but these defendants aver that, except for the rates on automobiles and on tires and the carload rates on blades or cutting edges, as shown in the said Exhibit 1, all the rates shown therein are class rates, or are made with percentage relation to the class rates, either by exception to the governing classification or by commodity rate publication; and aver that the rates to or from Georgia shown in said Exhibit 1, measured in terms of percentage of first class rates, are (*a*) on the same basis as that for the corresponding rates shown in the said Exhibit 1 under the designation "Official Basis", with respect to "Heaters, Tank Cars, Carload," "Empty Tin Cans, Carload," "Tractors, Steam or Internal Combustion, C. L.," "Tractors and Mowers Combined, Other than Lawn, with Cutter Bars Attached, Carload," "Graders and Tractors Combined, Carload," "Blades or Cutting Edges, Grader or Scraper, L. C. L.," and "Manufactured Iron and Steel Articles, Less Carload:" (*b*) on a lower basis than that for the corresponding rates shown in the said Exhibit under the designation "Official Basis," with respect to "Agricultural Implements, viz: Disc Harrows; Grain Drills, C. L.:" and (*c*) on a slightly higher basis than that for the corresponding rates shown in the said Exhibit 1 under the designation "Official Basis," with respect to "Paints, Stains or Varnishes, NOIBN., Carload." and "Canned, Preserved or Prepared Foodstuffs, C. L.," the rates on the former item, viz., "Paints," etc., being on the basis of 40% of first class from Cleveland to Atlanta and 35% of first class within Official territory, and the rates on the latter item, viz., Canned, etc., Foodstuffs, disregarding the general increases made under the authority of *Fifteen Percent Case, 1937-1938*, 226 I. C. C. 41, being 35% of first

class, as found reasonable by the Interstate Commerce Commission (*Canned Goods in Southern Territory*, 179 I. C. C. 77), from points in Official Territory to Athens, Ga., 25% of first class from Newport, Tenn., to Athens, Ga., and 32% of first class from Cumberland, Wisc., to Athens, Ga., and between points within Official Territory: and these defendants further aver that the rates to or from Georgia shown in the said Exhibit 1 with respect to "Automobiles, Carload," under the designation "Normal Basis" are on the same basis as those shown under the designation "Official Basis," viz., first class in the case of "Passenger Automobiles" and second class in the case of "Freight Automobiles," but that the rates actually in effect and applicable on shipments of Automobiles, carload, to Atlanta, Ga., are those shown in the said Exhibit 1 under the designation "Truck Competitive Basis," and those rates are specific commodity rates and, in the case of "Passenger Automobiles," are on a basis lower than first class, and, in the case of "Freight Automobiles," are on a basis lower than second class and, as shown in said Exhibit, are also lower in amount than the rates shown in said Exhibit under the designation "Official Basis;" aver that the rate to Atlanta, Ga., on "Blades, or Cutting Edges, Grader or Scraper, C. L.," shown in said Exhibit 1, is a specific commodity rate, while the rate shown in said Exhibit 1 under the designation "Official Basis" is also a specific commodity and is made on the basis prescribed by the Interstate Commerce Commission in *Iron and Steel Articles*, 155 I. C. C. 517; and aver that the rates on "Tires, Pneumatic, Carload," shown in said Exhibit 1 under the designation "Official Basis" is made on the basis of 37% of first class, while the rates on "Tires, Pneumatic, Carload," from Akron, O., to Atlanta, Ga., shown in said Exhibit 1, are combination rates consisting of factors of (*a*) 37% of the Official first class rate from Akron to Cincinnati and (*b*) 37% of the Southern

first class rate from Cincinnati to Atlanta, in the case of a 20,000 pound minimum weight, or 30% of the Southern first class rate from Cincinnati to Atlanta, in the case of a 30,000 pound minimum weight, said rates from Akron to Atlanta having been approved by the Interstate Commerce Commission in *Tires Between Points in the South*, 243 I. C. C. 767, 772.

Further answering, these defendants aver that the disparity between the rates to Georgia and the corresponding rates on the Official basis as indicated in these examples, and as shown generally in said Exhibit 1, is due to the different levels of the systems of class rates prescribed by the Interstate Commerce Commission for application within and to and from the South in *Southern Class Rate Investigation*, 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, 128 I. C. C. 567, or in *Western-Southern Class Rates*, 231 I. C. C. 315, and within Official territory in *Eastern Class Rate Investigation*, 164 I. C. C. 314, 171 I. C. C. 481.

Further answering, these defendants are without knowledge or information sufficient to enable them to form a belief as to the truth of the averments relating to the making or the details of the alleged shipment of two Road Graders from Bucyrus to Atlanta (East Point), but they deny that any of the rates paid by the State of Georgia, whether or not mentioned in said paragraph marked (*a*) of said Section 5 or in Exhibit 1 referred to therein, were or are unjust, unreasonable, extortionate, excessive, or otherwise unlawful. Further answering, these defendants deny that Georgia has suffered any damage, direct or consequential or otherwise, from any of said rates, and deny that Georgia is in need of any remedy in this Court or elsewhere for protection against damages from any of said rates. Further answering, these defendants deny that this Court has any jurisdiction to require any change in any of the rates mentioned in said paragraph marked (*a*) of said Section 5 or in Exhibit 1 referred

to therein, but on the contrary these defendants aver that, if any unlawfulness inheres in any of the said rates, the sole remedy of the State of Georgia lies in invoking the jurisdiction of the Interstate Commerce Commission. Further answering said Section 5 of the Complaint and particularly the paragraph thereof marked (*b*): these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in said paragraph of said Section 5, except that these defendants deny that there is or has been any conspiracy in which they or any of them have been or are participants, and deny that any rate system established or maintained or participated in by them is the result of any conspiracy on their part, and deny that any such rate system has lessened or will lessen the establishment of industry on any line of railroad owned or operated by Georgia or has lessened or will lessen the amount of freight handled on any such line or has decreased or will decrease the rental or sale value of any railroad owned or operated by Georgia, and deny that Georgia has suffered any injury or damage, irreparable or otherwise, from any acts done by these defendants or any of them.

6. Answering Section 6 of the Complaint: these defendants deny that the State of Georgia has any standing or is entitled to bring or maintain this suit on behalf of any general class of its citizens or any of its citizens or as *parens patriae* or trustee or guardian or representative of all or any of its citizens or in any other capacity; deny that the citizens of Georgia or any of them have been caused by these defendants or any of them to pay extortionate charges for freight carriage; deny that there is or has been any conspiracy in which these defendants or any of them have been participants; deny that any acts done by these defendants or any of them have caused injury to the citizens of Georgia or any of them or have resulted in denying to any of said citizens the opportunity

to expand their businesses or have prevented the enhancement of the general welfare of all or any of the citizens of the State of Georgia or have caused all or any of said citizens to suffer pecuniary damage; deny that any acts done by these defendants or any of them have resulted, through the maintenance or charging of railroad rates or otherwise, in violation of the common law against torts or the common law against conspiracy or the anti-trust laws of the United States or any other law or laws.

Further answering said Section 6 of the Complaint, and particularly the second paragraph of said Section 6: these defendants deny the existence of the conspiracy alleged in any or all of the four counts of the Complaint or of any conspiracy in which they or any of them have been or are participants, and deny that any alleged conspiracy as referred to in the Complaint has been continuous or cumulative in its incidence or effect.

7. Answering Section 7 of the Complaint: these defendants admit the averments set forth in said Section 7 in so far as the said averments relate to these defendants; and these defendants aver that the residence and citizenship of the other defendants named therein, viz., the Southern defendants, is as stated in the answer filed herein on behalf of the said Southern defendants.

8. Answering Section 8 of the Complaint: these defendants admit that the averments set forth in said Section 8 are substantially correct.

9. Answering Sections 9, 10, 11, and 12 of the Complaint, and referring to and answering the Bill of Particulars filed by the State of Georgia herein, and more especially Sections I and III thereof, these defendants aver that Sections I and III of the Bill of Particulars are so framed as to refer to and amplify each and all of Sections 9, 10, 11, and 12 of the Complaint, and that said

sections of the Complaint must accordingly be read together and in conjunction with and in the light of Sections I and III of the Bill of Particulars; and therefore these defendants beg leave to answer the said sections of the Complaint and the said sections of the Bill of Particulars in the following form and manner:

First, with particular reference to and answering Section 9 of the Complaint: these defendants deny that they or any of them, by the use of any one or more of the rate bureaus, committees, conferences, associations, or any other agencies listed or referred to in Exhibit 2 attached to said Complaint or elsewhere in said Complaint, hereinafter for convenience referred to as "rate committees" or "committees," or by the use of any other agencies or by any other means or in any other manner, have entered into or engaged in any unlawful or wrongful contracts, combinations, agreements or conspiracies in restraint of trade or commerce among the several states or in or among any of them, or have monopolized any part of such trade or commerce; deny that they have fixed or established by concerted action or collusion or otherwise any arbitrary or non-competitive or unlawful rates or charges for transportation of freight by railroad in said trade or commerce; deny that they or any of them have so fixed the rates or charges on transportation to or from the State of Georgia as to prefer the ports of other states over the ports of Georgia; deny that they or any of them, by their rates or practices or otherwise, have exacted from the State of Georgia as owner of state institutions or otherwise or from shippers in Georgia, for transporting commodities, charges which were or are unjust, unreasonable, arbitrary, non-competitive, or preferential or favorable to localities, ports, or shippers outside of Georgia; and deny that they or any of them have in any way acted or intended to act to the disadvantage, harm, hurt, prejudice or injury of the State of Georgia,

its ports, or shippers therein. These defendants further deny that any of the said rate committees referred to in the Complaint or any other committees or agencies in the activities of which these defendants or any of them participate or have participated, are rate-fixing agencies.

Second, with particular reference to and answering the first paragraph of Section 10 of the Complaint: these defendants deny that they have unlawfully conspired or combined or confederated or agreed, jointly or otherwise, by use of the committees or agencies named in Exhibit 2 of the Complaint or in any other manner or at all: and deny that they or any of them have adopted or do adopt arbitrary or non-competitive rates or charges for transportation of commodities among the several states, or that any such rates or charges have been or are collected by or for the account of any of them in whole or in part by any rail carrier engaged in commerce among the several states or by any other rail carrier. These defendants further deny that every or any proposal to change rates or charges for transportation in such commerce must be considered or acted upon by some or any of such committees or agencies, and deny that as to any proposal considered or acted upon by any of such committees or agencies there is power in the highest thereof or in any of them finally to decide whether such proposal shall be accepted or rejected. These defendants aver that the right of each individual carrier to establish and maintain rates and charges on its own lines regardless of and in the face of opposition to the establishment or maintenance of such rates from any other carrier or carriers or from any committee, and the right of carriers participating in joint rates, with the concurrence of the necessary participating carriers, to establish and maintain such joint rates regardless of and in the face of opposition to the establishment or maintenance of such rates from any other carrier or carriers or from any committee, are expressly reserved

and retained under the procedures and practices of all of the committees in the activities of which these defendants or any of them participate. Answering the averment that "no line can change joint through rates without the approval of the private rate-fixing agencies created by defendants," these defendants deny said averments, and these defendants aver that a joint through rate can be changed by voluntary action of the lines which are parties to the said joint through rate and can be changed without the approval of any or all of the committees mentioned or referred to in the Complaint or any other committee or agency. Further answering the averments set forth in the said first paragraph of the said Section 10 of the Complaint, these defendants deny the existence of any conspiracy in which they or any of them are or have been participants, and deny that the committee or conference methods employed by them for the consideration of proposed rates, or any other acts done by them, operate so as unjustly or oppressively to increase or augment any rates or charges or to counteract the effect of competition on the facilities or rates of transportation, or to establish or maintain arbitrary or non-competitive rates, or to prevent any one or more of said defendants or any other carrier or carriers from reducing rates, or to exact or collect from the State of Georgia or its people any sums of money in excess of just, reasonable, non-discriminatory or non-prejudicial or otherwise lawful rates or charges.

Third, with particular reference to and answering the second paragraph of said Section 10 of the Complaint: these defendants deny that they or any of them have put into effect or kept in force upon their several lines of railroad or any of said lines any arbitrary or non-competitive rules, regulations, rates or charges for moving or carrying or transporting freight; deny that the rules, regulations, rates and charges, or any of them, which

they have established or maintained or do maintain were or are the result of any conspiracy in which these defendants or any of them are or have been participants or were or are fixed or established collusively by them or any of them; deny that they or any of them have declined or refused to establish or maintain on their railroads rates or prices for the carrying of freight based upon the cost of construction and maintenance of their several lines of railroad and the costs of service and such other elements as should or may lawfully be considered in the establishment of railroad rates; deny that Georgia or its people have been or are compelled to pay arbitrary or non-competitive freight rates or to submit to any arbitrary rules or regulations established or maintained by these defendants or any of them; deny that these defendants or any of them have established or maintained or do maintain any such arbitrary or non-competitive rates, rules or regulations, collusively or otherwise; deny that Georgia or its people have been or now are deprived of any of the benefits of competition between lines of transportation or communication, or have been or now are deprived by defendants or any of them of cheaper rates flowing from such competition; deny that Georgia or its people would enjoy more advantageous rates or rate relationships if the conference or committee method used by the defendants in their consideration of rate proposals were not employed; and further deny that these defendants or any of them have monopolized or restrained or hindered or injured or retarded interstate trade, traffic or commerce to or from the State of Georgia by means of any conspiracy as alleged or by means of any of the committees or agencies named in Exhibit 2 of the Complaint or by any means or at all.

Fourth, with particular reference to and answering the first and second paragraphs of Section 11 of the Complaint: these defendants aver that they are severally

members of one or more, but not of all, of the rate committees listed in Exhibit 2 of the Complaint, but these defendants deny that said committees or any of them are rate-fixing agencies, or constitute "other private machinery for fixing rates", and further deny the existence of any conspiracy or unlawful concert of action in which they or any of them are or have been participants. They deny that any of the committees, conferences, or associations referred to in the Complaint or in Exhibit 2 thereof, functioned or were established or are maintained by these defendants or any of them, in whole or in part, for the purpose of the conspiracy alleged in the Complaint or any other conspiracy. Further answering, these defendants aver that the Southern Classification Committee considers proposals for changes in the Southern Classification, which has application within Southern territory and to certain interritorial domestic rates (as distinguished from export and import rates) between Southern and Official territories. The Southern Classification Committee and the Consolidated Classification Committee, which is composed of the chairmen of the several regional classification committees, have worked and are working toward the elimination of differences in the classification ratings in the several territories. Without the concerted effort of the several railroads, including the defendants herein, through the said Classification committees or substantially identical organizations, the establishment of a uniform classification as sought by the State of Georgia and various other Southern States before the Interstate Commerce Commission in its Docket28310, *Consolidated Freight Classification*, would be impossible. In its report therein, dated May 15, 1945, *Class Rate Investigation, 1939*, 262 I. C. C. 447, the Commission at page 511 thereof called upon respondents therein, including these defendants, to initiate a uniform classification by their own collective action and to advise the Commission whether they would undertake to make and tender to it a classification based upon the findings therein made.

In response thereto the respondents, including these defendants, advised the Commission that they would undertake so to do, and they are now engaged in that task. The Interstate Commerce Commission has recognized the usefulness and desirability in the public interest of such committees and the necessity for the rate conference plan here under attack in the enforcement of the Interstate Commerce Act and as a means of compliance with the said Act by the several railroads, and by such recognition and otherwise and has indicated its view that the operation of the rate conference plan and the participation therein by the several railroads of the country is necessary and proper in the furtherance and promotion of trade and commerce. These defendants, other than The Chesapeake and Ohio Railway Company and Norfolk and Western Railway Company, are without knowledge or information sufficient to enable them to form a belief as to the truth of the remaining averments set forth in the said first and second paragraphs of Section 11.

Fifth, with particular reference to and further answering the first and second paragraphs of Section 11 of the Complaint, defendants The Chesapeake and Ohio Railway Company and Norfolk and Western Railway Company, herein termed "these two defendants", severally and separately state as follows:

Each of these two defendants has some of its lines of railroad in Southern territory, as described in Section 8 of the amended complaint, and each of them is a member of the Southern Freight Association referred to in said Section 11.

The Southern Freight Association is an unincorporated, voluntary association. The members of Southern Freight Association maintain the Southern Freight Tariff

Bureau and the New Orleans Freight Tariff Bureau solely as publishing agents. Freight rates compiled and published by those bureaus represent and are the result of the individual views, conclusions, and actions of the lines for the account of which publication is made; and no rates are published in tariff form or otherwise upon the authority of Southern Freight Association or of any committee, bureau, or agency thereof.

Each of these two defendants admits and avers that when it desires to suggest a new rate or a change in existing rates, it files a "proposal" therefor with the Southern Freight Association and that copies of such proposals are distributed by the Chairman to member lines and to similar associations representing interested lines. Such submission and distribution are for the purpose of eliciting proper information with respect to the effect of the suggested rate or change in rates upon existing rates, and to enable other railroads and shippers and receivers of freight to bring to the attention of the proponent their views and conclusions with respect to the consequences upon other rates or the rate structure which the proposed change would bring about or effect.

The Chairman of the Southern Freight Association is authorized to initiate proposals for new rates or for a change in existing rates on lines operated by any of these defendants. Such proposals are in fact sometimes made by said Chairman, but the Chairman has no voice or vote on the disposition of any such proposal, and the only purpose or effect thereof is to bring the suggestion made by him to the consideration of the individual railroads.

The rate structure of a single railroad is intricate and complex, and that complexity is multiplied through its participation in joint through rates with other railroads. A suggested change in an existing rate or the initiation of a new rate must be studied and investigated to determine its conformity with the provisions of the Interstate Commerce Act and with outstanding orders and reports of the Interstate Commerce Commission.

By its orders, entered from time to time, the Interstate Commerce Commission has required the establishment of systems of class rates, and rates on numerous commodities, within and between Southern territory and other territories. By many of such orders the rate relationships between particular origins and destinations are fixed, and other such orders give effect to the "long and short haul clause" and the "aggregate of intermediate rates" clause of Section 4 of the Interstate Commerce Act.

The organization of Southern Freight Association follows generally the organization of the traffic department of its member lines. The four members of the Standing Rate Committee, referred to in the first paragraph of Section 11 of the Complaint, are full-time employes of the Association, and therefore joint employes of the member lines, and they, with the aid of rate clerks, subject each proposed rate or rate change to analysis and study for its conformity to the provisions of the Interstate Commerce Act and to outstanding orders of the Commission, particularly in the light of its relationship to existing rates. The General Freight Committee is charged with the responsibility of investigating and making recommendations with respect to rate proposals, as to which a difference of opinion develops among member lines, and corresponds to the General Freight Agents of the individual lines; and the Executive Committee of the Association corresponds to the chief traffic officers of the member lines. The action and authority of each of these committees is confined and limited to the expression of the recommendation of its members with respect to the proposal submitted to them. The Chairman of Southern Freight Association has no voice or vote in the formulation or adoption of any recommendation, whether the proposal be one originally submitted by him, a member line, or a shipper. The effect of an appeal of the recommendation of one of these committees to the next higher committee is only to require consideration of

the proposal by traffic officers of greater responsibility and vested with a greater degree of discretion and authority by the individual lines of which they are officers. The effect of an appeal by the Chairman is only to insure such further consideration of a proposal by representatives of the member lines.

The Traffic Executive Association—Southern Territory is a voluntary association of member roads, which are represented therein by their respective chief traffic officers, by which association recommendations of the Executive Committee of Southern Freight Association may be considered when referred to it by appeal of a member road or by the Chairman of Southern Freight Association. Appeals to that association are rare and are limited to matters of policy or of major interest.

The Southeastern Presidents Conference is an informal conference of presidents of Southeastern railroads. Consideration of proposals for changes in freight rates considered by that conference is limited to proposals of general interest, and few such proposals relating to rates have ever been considered by such conference.

Consideration of rate proposals by Southern Freight Association committees does not delay, but expedites, the establishment of the proposed rates.

When a proposal involves an interterritorial rate the procedure in Southern Territory is substantially followed in the other territory or territories affected by the proposal. The several committees set up by Southern Freight Association and by these defendants for the consideration of such proposals provide a means whereby such proposal may receive prompt and proper investigation, on the basis of which the participating lines may join or decline to join in the proposed through rate.

In no instance does consideration and investigation by any of the associations or committees of which these two defendants are members or in which they participate coerce or dominate any defendant in the determination by

it of its participation or non-participation in the proposed rate.

The transportation of coal and coke presents problems which are peculiar to that traffic. Individual lines transporting a substantial volume of coal and coke have special traffic officers to deal with coal and coke rates; and there is a special committee of Southern Freight Association for the consideration of such rates. The recommendations of the coal and coke committee have no binding effect and are intended to be and are mere recommendations, as are the recommendations of other committees of Southern Freight Association; and all of the averments of the preceding paragraphs asserting the absence of coercion and domination and the right of each defendant to act independently of such recommendations are here repeated with respect to the recommendations of the coal and coke committee.

Sixth, with particular reference to and answering the third paragraph of said Section 11 of the Complaint: these defendants deny that the approval of any of the rate committees referred to in the Complaint must be obtained with respect to any interterritorial rate either before said rate may be published or at any other time, and deny that any of the said committees are rate-fixing agencies or organizations. Further answering, these defendants aver that the Joint Conference of Contact Committees was formed to consider some but not all proposals for changes in interterritorial rates, and that this Conference has not functioned in recent years.

Seventh, with particular reference to and answering the fourth paragraph of said Section 11 of the Complaint: these defendants deny that the rate committees, or any of them, of which they severally are members, constitute "private rate-fixing machinery", and deny that said committees or any of them are not sanctioned by the Inter-

state Commerce Act or are prohibited by the Anti-Trust Acts or any other law or laws, and these defendants further deny that any of the rates within, to or from the State of Georgia or the South are controlled by them or any of them, effectively or otherwise. Further answering said paragraph of said Section 11 of the Complaint, these defendants aver that no participation by them or any of them in any of the bureaus, committees, associations, conferences, or other organizations referred to in the Complaint, is intended to control or coerce, or has the effect of controlling or coercing the action or decision of any of the defendants or any other railroads in respect of freight rates applicable on or over its lines or in the manner or method of making or proposing of such rates; and none of these defendants is coerced or dominated by any other defendant or by any other railroads, through its membership or participation in any such rate conference, association, committee, bureau, or similar organization, in respect to its rates or the manner or method of the making or proposing of rates applicable on or over its lines. Further each of these defendants avers that it has at all times been free and uncoerced in respect of its right to make and publish rates applicable on its own lines of railroad without regard to any action or recommendation of any of the committees, associations, bureaus, conferences, or other similar organizations in which it has membership or participation, and it has from time to time exercised its right of independent action in respect thereto.

Eighth, with particular reference to and answering Section 12 of the Complaint: these defendants deny that they or any of them have participated or do participate in any monopolistic practices; deny that the committee procedures followed by them in the consideration of proposed rates were or are intended to be or were or are effective in giving manufacturers, sellers, or other shippers in the North any advantage over manufacturers, shippers,

sellers, or buyers in the State of Georgia, to the prejudice, disadvantage, or damage of Georgia or its citizens or any of them. These defendants also deny that they or any of them have committed any illegal acts, or have engaged in any concerted actions or practices of an illegal character; deny that any acts, actions or practices done, participated in or made possible by them or any of them burden or continue to burden interstate commerce in any way, or prevent, lessen, or burden trade, industry, or manufacturing in Georgia, or injure or damage the State of Georgia or any of its citizens; deny that any of their acts has resulted in or continues to be a restraint on the development of Georgia by preventing Georgia or its citizens from utilizing their natural resources, or in any other manner; and deny that these defendants or any of them, have participated or do participate in any injury or damage to Georgia or any of its citizens, or have laid or lay a burden upon commerce from or to Georgia to or from points in other states.

Ninth, with particular reference to and answering the first paragraph of Section I of complainant's Bill of Particulars: these defendants deny the existence of any illegal combination or conspiracy in which they or any of them are or have been participants. These defendants aver that they severally are members of certain of the rate committees included in the list set forth at pages 2, 3, and 4 of the Bill of Particulars, but none of these defendants is a member of all said committees, and many of said committees do not include among their membership any of these defendants; and these defendants deny that any of said committees are rate-fixing bodies or agencies.

Tenth, with particular reference to and answering the second paragraph of said Section I of the Bill of Particulars: these defendants deny the existence of any

illegal combination in which they or any of them are or have been participants; deny that any of the committees referred to are rate-fixing agencies; deny that these defendants or any of them have entered into or participate in any combination, with the object or purpose to dominate or control all or any freight rates by preventing individual carriers from initiating competitive freight rates in accordance with the provisions of the Interstate Commerce Act to, from, or within the State of Georgia, or by preventing individual carriers engaged in transporting freight to, from or within the State of Georgia from protesting to the Interstate Commerce Commission against rates inequitable to the State of Georgia, or by any other means or at all. These defendants further deny the existence of any domination or control by them, illegal or otherwise, over the freight rates to or from Georgia; deny any intention, object or purpose on the part of these defendants or any of them to dominate or control the freight rates to or from Georgia; and deny that Georgia is prevented from enjoying competitive freight rates.

Eleventh, with particular reference to and answering the third paragraph of said Section I of the Bill of Particulars, including subparagraphs (*a*) to (*m*), inclusive, thereof: these defendants deny that any of the committees referred to in said Section I of the Bill of Particulars, of which they or any of them are members, are rate-fixing or rate-making agencies. These defendants further deny that they or any of them have engaged in any combination or concert of action, with or for the purpose of dominating or controlling freight rates, or for any other purpose or in any manner or with any object or result as alleged in subparagraphs (*a*) to (*m*), inclusive, of the said third paragraph of said Section I of the Bill of Particulars. Further answering the averments contained in said subparagraphs (*a*) to (*m*), inclusive,

these defendants deny that they or any of them have engaged in any combination or concert of action or have agreed among themselves:

(*a*) to coerce, restrain, prevent, or hinder any individual carrier from initiating or modifying rates to, from or within the State of Georgia in accordance with the provisions of the Interstate Commerce Act. These defendants aver that proposals for changes in rates are customarily referred to the appropriate committee for docketing and for publicization, prior to the publication and filing of tariffs embodying the proposed changes with the Interstate Commerce Commission, even though the rates involved are local rates applying only between stations located on the same transportation line, or, if joint rates, are concurred in by the connecting carriers directly involved in performing the service, and these defendants also aver that such procedure is essential to the observance of defendants' duties under the provisions of the Interstate Commerce Act, which, among other things, require the establishment of reasonable rates including reasonable joint rates, and forbid the making or giving of any undue or unreasonable preference or advantage to any person, locality, or particular description of traffic or the subjecting of any person, locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and the causing of any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and these defendants further aver that the committee procedures and the publicization of proposed rate changes resulting from those procedures make possible the avoidance of undue or unreasonable preferences or prejudices, in violation of the said Act.

(*b*) to coerce, restrain, prevent, or hinder any individual carrier desiring to initiate or modify any rate to, from or within the State of Georgia, from putting such rate into effect, in accordance with the provisions of the Interstate Commerce Act, without obtaining the consent of one or more of the committees of which the proponent of the rate is a member, either before or as a condition of the filing of such rate with the Interstate Commerce Commission, or at any time or at all. These defendants aver that no member of any committee is obliged in any way to obtain at any time the consent of any committee or any member or members or officer or officers thereof prior to the filing of a rate with the Interstate Commerce Commission or at any other time, and each member of a committee retains the full right of independent action which it may exercise regardless of the consent or non-consent of any committee or any member or members thereof or any officer or officers of said committee; and these defendants further aver that these defendants and each of them have on many occasions exercised their said right of independent action.

(*c*) to coerce, restrain, prevent, or hinder any individual carrier from initiating or modifying any rate to, from or within the State of Georgia, in accordance with the provisions of the Interstate Commerce Act, without obtaining the approval of the chairman of the committee to which the proposal was submitted, either before or as a condition of the filing of such rate with the Interstate Commerce Commission, or at any time or at all.

(*d*) to coerce, restrain, prevent, or hinder any individual carrier from putting into effect any rate to, from or within the State of Georgia, in accordance with the provisions of the Interstate Commerce Act, without obtaining the approval of the chairman of the committee to which the proposal was submitted, with respect to the effective date for such rate, either before or as a condi-

tion of the filing of such rate with the Interstate Commerce Commission, or at any time or at all.

(*e*) to coerce, restrain, prevent, or hinder any individual carrier from putting into effect to, from or within the State of Georgia, any interterritorial rate, in accordance with the provisions of the Interstate Commerce Act, with the concurrence of the carriers in Southern territory and the connecting carriers in the destination territory, if any other member or the chairman of any of the committees in the destination territory or in any other territory object.

(*f*) to coerce, restrain, prevent, or hinder any individual carrier from putting into effect, to, from or within the State of Georgia, any interterritorial rate, in accordance with the provisions of the Interstate Commerce Act, if any committee or committees in territories not directly involved in the rate, or in any territory, object. These defendants aver that proposals for changes in rates sometimes require, in order to insure the disposition thereof consistently with the requirements of the Interstate Commerce Act, that consideration be given to the effect such changes would have upon other rates which have been made with relation thereto, and that it may transpire that a particular proposal for a change in an interterritorial rate may meet with the concurrence of the members of the particular committees in each territory immediately affected, but that such change if made might create undue prejudice or preference of persons or localities in other territories or undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and that in order to guard against violation of the Interstate Commerce Act in such a case it is necessary to afford affected shippers and carriers in other territories appropriate opportunity to consider such proposals, through the docketing thereof with the appropriate committees of such other territories, prior to the actual filing of the proposed changed rates with the Interstate

Commerce Commission. These defendants further aver that the carriers directly involved retain the right of independent action, and, despite the views or action of any of the members of any committee or committees, remain free to put rates into effect upon their own initiative in accordance with the provisions of the Interstate Commerce Act.

(*g*) to coerce, restrain, prevent, or hinder any individual carrier from putting into effect to, from or within the State of Georgia, any individual rate, in accordance with the provisions of the Interstate Commerce Act, with the concurrence of all carriers in Southern territory, if one or more carriers in Official or Western territory, not directly concerned in the rate involved, contends that publication of such rate will be harmful to it or to them. These defendants aver that it may transpire that a proposal to change an individual rate in one territory should be publicized for the information and consideration of shippers and carriers in other territories, through the docketing of such proposal with appropriate committees in such other territories, in order to make possible the effective protection of the rights and the effective discharge of the obligations of shippers and carriers under the provisions of the Interstate Commerce Act. These defendants further aver that the carrier or carriers proposing the changed individual rate retain the full right of independent action even though one or more carriers, not directly concerned or participating in the rate involved, may contend that publication of such rate will be harmful to it or them.

(*h*) to coerce, restrain, prevent, or hinder any individual carrier transporting freight to, from, or within the State of Georgia, from requesting the Interstate Commerce Commission, in accordance with the provisions of the Interstate Commerce Act, to suspend any rate published by carriers in Official or Western Territory between points in those territories where the rate so sought to

be established would create a situation harmful to Georgia, its industries or its people, as alleged.

(*i*) to coerce, restrain, prevent, or hinder any individual carrier transporting freight to, from, or within the State of Georgia from putting into effect orders of the Interstate Commerce Commission equitable to Georgia by anticipating impending orders of the Commission or by so manipulating the rate structure as to circumscribe or avoid the effect of such order, when issued by the Commission, upon the cost of transporting freight to, from or within Georgia, or by any other means or at all.

(*j*) to coerce, restrain, prevent, or hinder any individual carrier transporting freight to, from or within the State of Georgia from performing any statutory duty it may have under the Interstate Commerce Act to consider proposed rates applicable to its lines, through the usurpation by the Association of American Railroads of the prerogatives of the individual carrier in that regard, or by any other means or at all.

(*k*) to coerce, restrain, prevent, or hinder any individual carrier transporting freight to, from, or within the State of Ge rgia, from initiating rates applicable to its own lines by transferring the power to initiate such rates from such individual carrier to any other carrier or carriers in contravention of any provisions of the Interstate Commerce Act or by any other means or at all.

(*l*) to coerce, restrain, prevent, or hinder any individual carrier desiring to initiate or modify rates to, from, or within the State of Georgia, from putting such rates into effect, in accordance with the provisions of the Interstate Commerce Act, without obtaining the consent of representatives of competitive non-rail modes of transportation who with such individual carrier may also be members of a committee, either before or as a condition of the filing of such rates with the Interstate Commerce Commission or at any time or at all.

(*m*) to coerce, restrain, prevent, or hinder any individual carrier desiring to initiate or modify rates to, from or within the State of Georgia, from putting such rates into effect in accordance with provisions of the Interstate Commerce Act, even though all committees involved concur, if the Board of Directors of the Association of American Railroads disapproves. These defendants aver that no action of the Association of American Railroads has had or could have any effect upon the right of an individual carrier to initiate or modify rates, that matters having to do with the initiation or modification of rates are not in any way under or subject to the jurisdiction or control of the Board of Directors of the Association of American Railroads; and that no action with respect to rates which an individual carrier desires to take is or has been or can possibly be controlled by any action of the Association of American Railroads.

Twelfth, with particular reference to and answering the fourth paragraph of said Section I of the Bill of Particulars, being the first full paragraph beginning on page 8 thereof, these defendants deny that, in the period of time covered by the Complaint or at any time, or for the purpose of performing or effectuating any combination or conspiracy to restrain interstate trade or commerce or to monopolize a substantial or any part of such trade or commerce, they or any of them have, by any agreement or concert of action or otherwise, done anything which is unlawful or in restraint of trade.

Thirteenth, with particular reference to and answering the fifth, sixth and seventh paragraphs of said Section I of the Bill of Particulars, being the second and third full paragraphs beginning on page 8, and the first full paragraph beginning on page 10 thereof, these defendants admit that each of them is a member of the Association

of American Railroads, and that the preamble to the writtten Plan of Organization of the Association is correctly quoted on page 8 of the Bill of Particulars. These defendants aver that, in becoming members of the Association of American Railroads, they agreed to the said Plan of Organization and thereby became members of the said Association of American Railroads; that the members of said Association have agreed that as long as they remained members of the Association they would be bound by the provisions of the said Plan of Organization; but that each and every one of the said members reserved the right to withdraw from the Association at any time by giving ninety days' notice. These defendants further aver that the purposes of the Association of American Railroads are as stated in the preamble quoted on page 8 of the Bill of Particulars, that those purposes were and are entirely lawful, and that no unlawful mode of procedure was authorized or has ever been followed in said Association.

The Association came into being on October 12, 1934. It is an unincorporated, voluntary association, to which belong most of the Class I railroads in the United States, Canada and Mexico. Prior to the organization of the present Association and running back as far as 1867, there have been organizations of various kinds, many of which were national in scope, maintained by the railroads, as is the present Association, in the public interest and for the mutual benefit of their members and to promote trade and commerce in the public interest.

The first of these was the Master Car Builders' Association, formed in 1867, nearly 80 years ago. The purpose of this organization was to establish standards for freight cars, so that they could move freely from one railroad to another throughout the country, thereby permitting the widest possible distribution of freight traffic. Next in line was the Time Convention formed in 1872,

the purpose of which was to establish Standard Time Zones throughout the country to avoid confusion and delays. This original Time Convention was broadened into the General Time Convention, which in 1883 established Standard Time throughout the nation. In 1888 there was organized the Railway Accounting Officers Association, the purpose of which was to encourage uniform methods of railroad accounting, this being a matter of great importance in view of the settlements which railroads were called upon to make with one another by reason of the transportation of freight from points on one railroad to points on other railroads.

Later on, there was organized the American Railway Association, which dealt largely with operating problems and practices having to do particularly with the interchange of cars among railroads and matters incidental thereto, such as car repairs, demurrage (which is a detention charge), and the like. The American Railway Association also fostered and encouraged research, particularly in the field of engineering and mechanical activities.

There was also, prior to 1934, the Association of Railroad Executives, which was an organization for the consideration of general policy questions, particularly those that were affected by legislation. There was also the Bureau of Railway Economics, maintained by the railroads for the purpose of collecting, preserving and using statistics and for the dissemination of statistical information among its members. The railroads also maintained the Railway Treasury Officers Association, at which there were discussed and considered questions of common interest having to do with the collection and disbursement of railroad revenues. There were certain other national organizations, one of which had to do with advice to railroads with respect to patent matters.

In 1934, in the interest of economy and efficiency, all of these organizations were consolidated to form the present Association of American Railroads. In addition

to carrying on the activities of the previously existing constituent organizations, the Association broadened its scope somewhat, so as to furnish a forum for discussion of practically all questions of general interest and a medium for giving consideration to programs and procedures in which all railroads were interested and which affected the members of the industry generally and the public as well.

As at present constituted, the Association has a department known as the Operations and Maintenance Department, having seven divisions, one bureau and two special committees. One of these divisions, known as the Operating-Transportation Division, has eight sections, which deal with preparation, revision and interpretation of standard codes of rules for train operation, block signals, interlocking, detour agreements, car service, demurrage and storage, problems peculiar to local freight agents in the performance of station work, rules for the loading of freight, including packing methods, matters of health affecting railroad employes, general rules or standards for the policing of railroad property, general rules looking toward improving safety conditions, and the like.

There is also in the Operations and Maintenance Department (1) an Engineering Division, engaged principally in research in the nature of critical studies designed and intended to improve engineering practices on the railroads generally; (2) a Mechanical Division, which engages in research and study with reference to improving the equipment of the railroads; (3) a Freight Claim Division, the purpose of which is to avoid injury, as far as possible, to freight in transit; and (4) a Car Service Division, with several sections, the purpose of which is to superintend the exchange of freight and passenger cars among railroads and to adopt and enforce rules governing such exchange. The bureau referred to above, within the said Operations and Maintenance Department, has to do with rules for the safe transportation of explosives, and the special

committees referred to above, within the said Department, are concerned with automatic train control, signals and grade crossing protection. This Operations and Maintenance Department of the Association covers work formerly done to a large extent by the American Railway Association. The general purpose of this Department is to improve the service of the railroads through research, study and experimentation and to expedite an interchange of traffic, thereby giving to the public through and uninterrupted service to all parts of the country.

There is another department of the Association known as the Finance, Accounting, Taxation and Valuation Department, which has to do with uniform rules in regard to railroad accounting, the settlement of divisions among the railroads, the handling with the General Accounting Office and the Treasury Department of the United States Government and with the Interstate Commerce Commission of many questions of a general character which can only be considered in Washington, and with valuation and taxation questions of general interest and importance.

The Bureau of Railway Economics of the Association has in one form or another existed for 35 years; it is essentially a fact-finding agency and constitutes the statistical and economic clearing house for the railroads. It maintains probably the best transportation library in the world, and the members of the staff are engaged constantly in furnishing information to the railroads and to the public with respect to the details of railroad operation.

There is a Law Department, which exists for the purpose of advising other departments of the Association and considering with the railroads legal and legislative questions of common interest to all. This Law Department ordinarily assists in general rate cases before the Interstate Commerce Commission and appears frequently before committees of Congress to discuss legislation which is of interest and importance to the railroads.

There is a Traffic Department, aided in normal times by an Advisory Committee, which handles a great many matters with Government departments and with the Interstate Commerce Commission and, in the war period, with the Office of Defense Transportation. The Traffic Department also acts in an advisory capacity to the railroads with respect to matters of general interest, such as the publication of tariffs, the simplification of tariff publications, and the like. It serves as a convenient medium for the discussion of general traffic problems, many of which are pending before the Interstate Commerce Commission.

The Association of American Railroads furnishes a convenient medium for the discussion by the member roads among themselves of important questions of policy. It is in no sense a rate-making agency and has no control over rate conferences, rate associations or rate proceedings. Its Plan of Organization does provide a medium whereby railroads may arbitrate certain of their differences, provided that, by an affirmative vote of three-fourths of the members of the Board of Directors, the matter is considered to be of sufficient importance to authorize action by the Board of Directors. This provision for arbitration is in accord with the policy of the law to favor the settlement of controversies by arbitration rather than by litigation. In the eleven years that the Association has been in existence, the arbitration provision has never been invoked or applied.

The Association's governing body is a Board of Directors, consisting of 18 members, viz., 17 railroad chief executives and the President of the Association. Of these 17 railroad executives, six are from Eastern or Official Classification Territory, four are from Southern Territory, and seven from Western Territory. These territorial representatives are selected by appropriate local organizations in their respective territories. The Board of Directors holds monthly sessions, at which there is a

general discussion of problems having to do with efficiency of operation, proposed legislation, the relation of the railroads to their employes, and generally matters affecting the industry as a whole.

The Plan of Organization was made public at the time the Association was organized, and all of its provisions were submitted to the President of the United States, to the Interstate Commerce Commission, to the Federal Coordinator of Transportation appointed by the President of the United States under the provisions of the Emergency Railroad Transportation Act of 1933, to the important shipping organizations, and many other groups of individuals interested in transportation matters. Its plans and purposes were expressly approved by the Federal Coordinator of Transportation, who, in numerous reports and public statements, commended the action of the railroads in establishing the Association as being a forward step in the public interest.

In the list of organizations set forth at the beginning of Section I of the Bill of Particulars herein, there is a reference not only to the Association of American Railroads but also to the Board of Directors of the Association of American Railroads. No distinction can be drawn between the Association and its Board of Directors. The Board of Directors in no sense constitutes a separate and distinct organization.

In the said list of committees or organizations, there is mentioned the Traffic Advisory Committee of the Association of American Railroads. This is a committee which was organized for the purpose of providing a medium for the discussion and consideration of traffic questions of general interest to the members of the Association. This Committee ceased to function with the entry of the United States into the Second World War. It had no authority to control the action of any individual railroad or any group of railroads. It did not make or

purport to make rates or to interfere with the initiation or establishment of rates by the individual railroads. It was composed of chief traffic officers of the member roads, and at meetings of this Committee various questions were discussed and considered, such as the matter of changes in classification, simplification of tariffs, complaints of shippers in regard to rate adjustments, ratings applicable to articles moving at less-than-carload rates, and matters of a similar nature.

In view of the numerous questions which arose in regard to the movement of war materials and troops, a request was made upon the Association of American Railroads, early in the progress of the war, by the War Department, the Navy Department, and the Office of Defense Transportation for the establishment of some simple and expeditious method of organization whereby the war-making agencies of the Government could secure special rates or effect special arrangements looking toward the expedited movement of traffic, without the necessity of applying to each one of the hundreds of railroads throughout the country. Many questions arose under Section 22 of the Interstate Commerce Act, which is a section of the law authorizing railroads to make specially low rates on Government traffic, without the necessity for tariff publication. Accordingly there was established, under the auspices of the Association, a Traffic Executive Chairmen's Committee, consisting of four men, namely, the Traffic Vice-President of the Association and the chairmen of the three important regional traffic associations, Eastern, Western and Southern. This arrangement was expressly approved by the Attorney General, and by the Office of Defense Transportation acting for and by authorization of the President of the United States.

These defendants deny that the Association of American Railroads is a supreme authority or any authority in the matter of fixing rates or that it is in any way a part of a "hierarchy" of private rate-fixing agencies.

They deny that this Association has sought or has helped to prevent erosion of any private rate structure or any rate structure, by maintaining complete or arbitrary domination or control over freight rates or any control or domination over such rates. These defendants deny that the Association of American Railroads coordinates or supervises the activities of all or any private rate-fixing agencies, and deny that there is any effort on the part of the said Association to fortify or perpetuate any domination or control of rates. They deny that the said Association constitutes the ultimate or any sanction compelling compliance on the part of individual carriers with the decisions, articles of organization, resolutions, rules or regulations of any agency whatever. They deny that any of the articles, resolutions, rules or regulations of the Association was deliberately designed or designed at all to prevent individual carriers from initiating or modifying freight rates or from protesting to the Interstate Commerce Commission against rates which are inequitable to the State of Georgia or against any rates, or from filing such rates and protest with the Interstate Commerce Commission, without obtaining the approval thereof by any so-called private rate-fixing agency or any other agency prior to the filing of said rates or protest with the Interstate Commerce Commission or at any time or at all. These defendants aver that the Association of American Railroads has nothing whatever to do with the practices of individual carriers in the matter of initiating or modifying freight rates; that it exerts no control over any rate committee of which these defendants or any of them are members; and that no appeal whatever lies from the action of any rate committee or other railroad organization to the Association of American Railroads with reference to rates. These defendants deny that any article, resolution, rule or regulation of any so-called price-fixing or other agency provides any right or mode of appeal from any decision

of any such agency in such fashion that any such decision is subject to review or protest in pursuance of any conspiratorial objective.

These defendants deny that any private system of judicature or any other system or plan includes any provision for any review by the Association of American Railroads of any action taken by any rate committee. They deny that the Plan of Organization of the Association of American Railroads or any of its rules or regulations constitutes the Association of American Railroads as the ultimate arbiter or any arbiter in any controversy as to rates between members of the Association. As heretofore stated, there is a provision in the Plan of Organization for submitting certain matters to arbitration, but this provision does not refer to rate controversies, and, as stated, no arbitration has ever occurred under the provisions of Section 19 of the Plan of Organization or any other section of such Plan.

There is no provision in the Plan of Organization or in any of the rules or regulations of the Association which prevents a railroad at any time from withdrawing from the Association; and these defendants deny that the action of a railroad in withdrawing from the Association would in any way cripple or isolate the activities of the said railroad or bring about a status which could be described as a "practical boycott," as alleged in the Bill of Particulars.

Reference is made on page 10 of the Bill of Particulars to a certain resolution of the Board of Directors of the Association of American Railroads bearing date of May 17, 1935. That resolution provides as follows:

> "Resolved, That effective June 1, 1935, no further requests for suspension of tariff publications of one group of lines will be filed with the Interstate Commerce Commission by other lines, unless there has first been a conference of representatives of both parties with the officers of this organization; and, further

"RESOLVED, That where one group of lines has knowledge of contemplated publication of tariffs by another group believed to be harmful to it, application for conference with officers of this Association will be made in advance of filing such tariffs."

These defendants further aver that nothing in those resolutions prevents or has ever prevented or was or is intended to prevent the filing of rate changes or of requests for suspension of rate changes as proposed by any individual carrier or carriers and that the only purpose and effect of the said resolutions was and is to require that there be notification to and discussion with officers of the Association of American Railroads where requests for suspension are proposed by carriers as a group in one major territory with respect to the rates of carriers as a group in another major territory; and these defendants also aver that no case or instance to which the provisions of the above-quoted resolutions were applicable has arisen for several years, and that no such case or instance in which the interests of the State of Georgia were involved has ever arisen. These defendants aver that the sole purpose of the said resolution was to make certain that all parties in interest understood the issues involved; and aver that there was no effort or intent to control action beyond steps looking toward full and free discussion of the whole matter among the parties directly interested, and that any assertion or intimation in the Bill of Particulars that this resolution has interfered or interferes with the independent action of individual lines is unwarranted.

Fourteenth, with particular reference to and answering the last paragraph of said Section I of the Bill of Particulars: these defendants deny the existence of any conspiracy as alleged; deny that they or any of them have adopted any means or methods to effectuate the

purpose of any such conspiracy; deny that the committees for the consideration of rate proposals of which they or any of them are members, are without the sanction of the Interstate Commerce Act or are in violation of the anti-trust laws; deny that the several committees of which they, or any of them, are members or the procedures, processes or actions of any of said committees, are in any way unlawful or constitute an organization or process of administration or system of police which is unknown to the law or which has been endowed with a power of self-regulation comparable to the government; and deny that any of these defendant railroads or any other railroad is under any obligation to have membership in the Association of American Railroads. Further answering, these defendants aver that to characterize conduct on the part of members of an industry as constituting the exercise of self-regulation or self-government, as is suggested in the said last paragraph of said Section I of the Bill of Particulars, does not condemn said conduct as unlawful, and that an effort on the part of an industry to work out its own problems through conference and consultation among members of the industry is not unlawful, so long as the right of independent action is reserved, and that the need and importance of conference and consultation among members of an industry is particularly apparent in the case of the railroad industry, in view of the obligations and duties imposed on the members of that industry by the Interstate Commerce Act and related Acts, as hereinbefore recited. Further answering, these defendants aver that the consideration of the rate proposals by carrier representatives on the several committees of which they, or any of them, are members, is essential, under the scheme of regulation provided by the Interstate Commerce Act and related acts administered by the Interstate Commerce Commission, to the discharge of their duties and obligations under such statutes, and to the attainment of the objectives of

the national transportation policy of the Congress as declared in the Act approved September 18, 1940. These defendants further aver that their membership and participation in the procedures of the rate committees of which they or any of them are members is entirely voluntary and without any surrender of their right of independent action regardless of and despite the views or action of any other member or members of one or more of the said committees or of a majority of the members of any one or more of said committees. They deny that every member or any member of the Association of American Railroads, as a condition of membership or otherwise, agrees or has agreed to submit to control by the Association or by any of its procedures or the procedures of any committee or committees. They deny that they, or any of them, by membership in the Association of American Railroads or in any rate committee or committees surrender or have surrendered their liberty of action or any of the privileges in respect of the initiation or revision of their rates or any of their rights to protest to the Commission against rates proposed by other carriers, or the right to complain or protest to the Interstate Commerce Commission against the rates of other carriers. They deny that any veto is imposed by any committee or any member or members or officer or officers thereof on any rate proposal, and deny that the committee method for the consideration of rate proposals is unlawful, or that the conclusions of the members of such committees can be or are conclusive as to what rate changes are to be filed with or are to be withheld from any official regulatory authority. They deny that their consideration of rate proposals by committee procedure constitutes an unlawful conspiracy in restraint of trade, or interferes with or disrupts the regulatory scheme established by Congress. On the contrary, these defendants aver that consideration of rate proposals by carriers and shippers through the procedures of the rate committees

is essential, under the scheme of regulation provided by the Interstate Commerce Act and related Acts administered by the Interstate Commerce Commission, in order to make possible the proper discharge of their duties under such Acts and the attainment of the objectives of the national transportation policy of the Congress as declared in the Act approved September 18, 1940. Further answering, these defendants deny the existence of, or any participation by them or any of them in, any unlawful concert of action or any conspiracy as alleged, and deny that carrier consideration of rate proposals through committee procedures restrains, prevents, or hinders the initiation or maintenance of rates which are just and reasonable, or leaves the interests of the State or people of Georgia without the protection contemplated by law. On the contrary, these defendants aver that carrier consideration of rate proposals by committee procedures has operated and continues to operate to the benefit and well-being of the State and the people of Georgia.

Fifteenth, with particular reference to and answering Section III of the Bill of Particulars: these defendants deny the averments set forth therein. Further answering, they deny that they or any of them, in considering rate proposals by the committee procedures or in creating or otherwise employing those procedures or in any other manner or at all, have wilfully or otherwise violated or do violate the anti-trust laws or have wilfully or otherwise flouted or do flout the procedures provided for in the Interstate Commerce Act. On the contrary, these defendants aver that resort by them to rate committees and conferences is essential to the discharge of their obligations and duties under the Interstate Commerce Act and related Acts administered by the Interstate Commerce Commission. Further answering, these defendants deny that the rate committee procedures were or are so arranged, or were or are intended to be so arranged,

as to give rate-making power into the hands of the Northern carriers or to accord a relative advantage to the shippers or to the economic interests in Official territory or to discriminate against the State of Georgia, its ports or people, or other States in Southern territory. They further deny that the rate committee procedures were or are so arranged, or were or are intended to be so arranged, as to take away or impair the power of individual carriers or of connecting carriers, acting independently and in competition, to propose single or joint rates to the Interstate Commerce Commission, or to protest to the Commission against rates proposed by other carriers, or by any means or in any manner to deny to the State or the people of Georgia the use of due process established by law in respect of the making of rates. These defendants deny that they have wilfully or otherwise organized or utilized a system of rate-making by which power over rates was or is lodged with them, or with any of them, or that rates fixed by them, or any of them, were intended to serve, or did or do serve, any conspiracy having as its purpose the injury or detriment of the economy of Georgia or any other conspiracy; and deny that there is or has ever been any intent on the part of these defendants or any of them to injure or harm or inflict damage upon Georgia or its ports or people, by or through rates between Georgia and points in the North or rates between points within the North or by or through any other rates or in any other manner or at all. Further answering, these defendants aver that the consideration by carriers of rate proposals through committee procedures has operated to the advantage and benefit of the State and people of Georgia, and that, under the present scheme of regulation as provided by the Interstate Commerce Act and related acts administered by the Interstate Commerce Commission, the discontinuance or disuse of such procedures would result to the disadvantage and harm, rather than to the benefit, of the State and people of Georgia.

10. Answering Section 13 of the Complaint, as modified, amplified, and particularized by Section IV of the Bill of Particulars:

First, with particular reference to and answering Section 13 of the Complaint: these defendants deny that the Southern defendants, or any of them, are dominated or coerced by the Northern defendants, or any of them. These defendants aver that under the provisions of the Interstate Commerce Act no carrier may lawfully publish joint through rates without the concurrence of the other carriers which participate in said rates, but they deny that a refusal so to concur or join in such a joint through rate constitutes domination or coercion of the carrier proposing its publication and establishment; and these defendants aver that every carrier has the right, under the Interstate Commerce Act, subject to such jurisdiction and authority as the Interstate Commerce Commission may lawfully exercise thereunder, to determine for itself whether or not it will join in a joint through rate proposed by another carrier, and that any carrier, in exercising said right and refusing to join in a joint through rate proposed by another carrier, is not in any way dominating or coercing such other carrier, and any such proposing carrier may at any time apply to the Interstate Commerce Commission for prescription of a joint through rate, in accordance with the applicable provisions of the Interstate Commerce Act.

Second, with particular reference to and answering the first, second and third paragraphs of Section IV of the Bill of Particulars: these defendants deny that they or any of them have at any time used, or do use, the rate committees of which they are members, or any of the said committees, for the purpose of preventing competition among railroads, or have actually prevented such competition in either intraterritorial or interterritorial

rates; deny that the rate committees of which they are members or any of them constitute rate-fixing agencies; deny that they or any of them have participated or do participate in any conspiracy as alleged or otherwise; deny that they or any of them have or employ any power to dominate or control, or that they have dominated or controlled or do dominate or control, freight rates to, from or within the State of Georgia, or that they control or have at any time controlled transportation to the consuming markets of the North; and deny that they have or have ever had any power, plenary or otherwise, to refuse to join in any interterritorial rate which the standards of the Interstate Commerce Act would require.

Third, with particular reference to and answering subparagraph (*a*) of the fourth paragraph of Section IV of the Bill of Particulars:

(*a*) These defendants deny the averments set forth in said subparagraph (*a*). Further answering, they aver that the Joint Conference of Contact Committees was formed to consider proposed rate adjustments having nationwide or widespread effect or application, but that this Conference has not functioned in recent years. These defendants deny that in the said Conference either these defendants or the Official territory railroads generally had or have power, absolute or otherwise, to coerce decisions affecting freight rates to, from or within the State of Georgia, or that they have ever exercised any such power. These defendants further deny that they or any of them are conspirators as alleged. Further answering, these defendants deny that the majority vote of the said Conference was or is effective to control freight rates to, from or within the State of Georgia as against the opposition of Southern territory carriers; on the contrary, these defendants aver that the Southern territory carriers retain the full and complete right of independent action

to establish rates in accordance with the provisions of the Interstate Commerce Act and with the rules and regulations as to tariff publication prescribed by the Interstate Commerce Commission under the provisions of said Act. These defendants further aver that, whatever the action of the Joint Conference of Contact Committees, each member thereof retains the full and complete right of independent action, and at any time the jurisdiction of the Interstate Commerce Commission may always freely be invoked for the purpose of determining what basis of rates does or will comply with the standards provided by the Interstate Commerce Act.

Fourth, with particular reference to and answering subparagraph (*b*) of the fourth paragraph, and the fifth and sixth paragraphs, of Section IV of the Bill of Particulars: These defendants deny that any so-called "private rate fixing machinery", or any plan of committee procedure followed or used by these defendants or any of them, provides for an appeal to the Association of American Railroads in the event that some one or more of the interested carriers desires to take such a course or in any other event or at all. These defendants aver that there is no provision in the Plan of Organization or in the rules or regulations of the Association of American Railroads or in the rules or regulations of any individual railroad or in the rules or regulations of any rate committee for any appeal to the Association of American Railroads. These defendants admit that the Plan of Organization of the Association provides that a decision in ordinary matters may be made by a majority vote of the Board of Directors of the Association, but aver that this rule is only the ordinary rule for the government of bodies of this character, which usually speak through a majority vote. These defendants admit that there are 18 votes on the Board of Directors of the Association and that only 4 are from Southern territory, but aver that,

as previously pointed out, 7 of these votes are in Western Territory, and only 6 of them are in Eastern Territory. They deny that, either in the distribution of votes in the Association or otherwise, Georgia or the South is dominated, completely or at all, by these defendants or any of them.

11. Answering Section 14 of the Complaint: these defendants deny the averments set forth therein. Further answering, these defendants aver that the distance scale of first class rates prescribed by the Interstate Commerce Commission in *Southern Class Rate Investigation,* 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, 128 I. C. C. 567, for use within Southern territory averages about 39 percent higher than the distance scale of first class rates prescribed by it in *Eastern Class Rate Investigation,* 164 I. C. C. 314, 171 I. C. C. 481, for use within portions of Official territory, but that the first class rates prescribed between points in the North and points in Georgia following the Commission's orders in the *Southern Class Rate Investigation* are generally less than would be arrived at by the use of the said distance scale of first class rates so prescribed in the *Southern Class Rate Investigation.* These defendants further aver that a great many of the rates on which commodities actually move between points in the North and points in Georgia are not 39% higher, but on the contrary are very little if at all higher, and in many instances are substantially lower, than the rates and charges for transportation of like commodities for like distances between points in the North, and that a comparison between the abstract or "paper" rates assigned to the various classes in the Southern classification, with those assigned to classes in the Official classification, such as is suggested by the averments of the said Section 14 of the Complaint, is meaningless and without significance, for the reason that neither the number of

classes of rates nor the percentage relation of the classes to the first class rates is the same in the structure of class rates prescribed by the Commission in *Southern Class Rate Investigation*, as in that prescribed by the Commission in *Eastern Class Rate Investigation*, and frequently articles are assigned different classification ratings in the Southern classification from those assigned to the same articles in the Official classification, and for the further reason that, by means of exceptions voluntarily published by the carriers, the classification ratings are in many instances made inapplicable on particular articles of freight and, instead, lower classification ratings and lower class rates are applied thereon. These defendants further aver that, on the great volume of freight moving between Georgia and points in Official territory, class rates are not applicable, but in lieu thereof lower rates on the specific articles, termed commodity rates, are made applicable, and that in many instances commodity rates within the South are on a lower basis than rates on the same commodities in Official territory. These defendants also aver that there is little actual difference in the general levels of the rate structures in the South and in the North. In its report of May 15, 1945, in *Class Rate Investigation, 1939*, 262 I. C. C. 447, 604-607, the Interstate Commerce Commission found that the Southern revenue level per revenue ton-mile was "somewhere between 3 and 5 percent" higher than the Official (Eastern District plus Pocahontas Region) level. These defendants further aver that the present structure of rates, class and commodity, maintained within and to and from Georgia and the South is not harmful to the general economy of Georgia and the South, but on the contrary is beneficial to the said economy and to Georgia and its people.

12. Answering Section 15 of the Complaint: these defendants deny the existence of or participation in any

illegal combination among or on the part of these defendants or any of them, and deny that they or any of them make rates on the principle that charges for transportation should be determined by considering what the traffic will bear, as alleged. Further answering, these defendants aver that the rates in which they or any of them participate are determined and established on the basis of and in accordance with the standards and principles prescribed for that purpose by the Interstate Commerce Act and related Acts and by decisions of the Interstate Commerce Commission thereunder; and these defendants further aver that the element of the value of the service is one of the elements which they take into account and which may properly be taken into account in the making of freight rates, along with the element of cost of service and other elements proper for such purpose, under the standards for rate-making prescribed in the Interstate Commerce Act and related Acts, as interpreted and applied by the Interstate Commerce Commission in its decisions in *Rate Structure Investigation, Part III—Cotton*, 165 I. C. C. 595, 602, *Mountain-Pacific Oil Cases*, 192 I. C. C. 599, 636, *Westbound Rates on Meats*, 210 I. C. C. 13, 34-35, *Proposed Lake Erie-Ohio River Canal*, 235 I. C. C. 755, 761, and in numerous other decisions of the said Commission.

13. Answering Section 16 of the Complaint, including Exhibit 3 of the Complaint referred to therein: these defendants deny the averments set forth therein. Further answering, they deny that the rates or rate relationships therein shown or referred to are in any way unlawful, or that any practices of defendants or any of them are unlawful as alleged. Further answering, they deny that the rate comparisons set forth in Exhibit 3 are illustrative of the general situation as alleged. Further answering, and more particularly with respect to the rate data contained in Exhibit 3, these defendants aver as follows:

Wine, carload: The rate of 86¢ from Atlanta, Ga., to Grand Rapids, Mich., is not a published rate, but is the amount which would be charged on a carload weight of 40,000 pounds on the basis of 44 percent of first class for the first 20,000 pounds, and 35 percent of first class for the weight in excess thereof. The rate shown from New York to Grand Rapids is on the basis of 44 percent of first class. The actual rates are arrived at in both instances by applying the applicable percentages to the appropriate first class rates resulting from the requirements of the Commission in *Southern Class Rate Investigation* and in *Eastern Class Rate Investigation.* The 86-cent rate approximates 40% of the published first-class rate prescribed from Atlanta to Grand Rapids.

Lead Pipe, Carload: The rate shown from Atlanta is a combination rate, made up of a specific commodity rate of 42 cents from Atlanta to Cincinnati and the fifth class rate, on the basis of 35 percent of first class, from Cincinnati to Grand Rapids. The rate shown from New York is likewise on the fifth class basis of 35 percent of first class, which basis was found not to be unreasonable by the Interstate Commerce Commission in *Federated Metals Corp.* v. *S. Ry. Co.*, 146 I. C. C. 470. In that case the Commission approved the sixth class basis, which is 40 percent of first class, for shipments, including interterritorial shipments, governed by the Southern Classification, but the combination rate of 76 cents per 100 pounds from Atlanta to Grand Rapids is 10 cents lower than the sixth class rate of 86 cents from Atlanta to Grand Rapids.

Work Clothing, Less Carload: The rates shown for this item are all on the basis of 70 percent of first class. In *Cotton, Woolen, and Knitting Factory Products*, 211 I. C. C. 692, the Interstate Commerce Commission prescribed 78 percent of first class on dry goods, including cotton clothing, from the South to Official territory, but the applicable rate basis was later voluntarily reduced by the carriers to 70 percent of first class. In *Cotton Cloth-*

ing in Official Territory, 248 I. C. C. 738, the Interstate Commerce Commission approved rates on this commodity in Official territory on the basis of 70 percent of first class.

Shoes, Carload: The rate shown from Atlanta to Chicago is on the basis of Class 55, which is 55 percent of first class as published in exceptions to the Southern Classification. The rates from Endicott, N. Y., and Boston, Mass., are specific commodity rates. The Boston rate was made to meet motor truck competition.

Canned Vegetables, Carload: The northbound rate shown from Griffin, Ga., to Chicago is on the basis of Class 30, which is 30 percent of first class, which basis was found not unlawful by the Interstate Commerce Commission in *State of Alabama* v. *New York Central R. Co.,* 235 I. C. C. 255. The southbound rate from Baltimore, Md., to Winston-Salem, N. C., is on the basis of Class 35, which is 35 percent of the first class rates prescribed by the Interstate Commerce Commission in *North Carolina Corp. Comm.* v. *Akron, C. & Y. Ry. Co.,* 213 I. C. C. 259. The rate from Baltimore to Chicago is on the basis of Class 32, which is 32 percent of the first class rates prescribed in *Eastern Class Rate Investigation,* 164 I. C. C. 314, 171 I. C. C. 481. The rate from Milledgeville, Ga., to Winston-Salem, N. C., is on the basis of 35 percent of the first class rates prescribed by the Interstate Commerce Commission in the *Southern Class Rate Investigation,* 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, 128 I. C. C. 567. All the said rates presently include the general increases authorized by the Interstate Commerce Commission in *Fifteen Percent Case,* 1937-1938, 226 I. C. C. 41.

Drugs, Carload: The rate shown on drugs from Atlanta to Lima, Ohio, is on the Southern fifth class basis, which is 45 percent of first class. The rate from Philadelphia to Lima is on the Official territory Class 40 basis, which is 40 percent of first class. The tariff naming the latter rate indicates that it was issued to meet motor carrier and water carrier competition.

Comparison of First Class Rates Shown on Page 2 of Exhibit 3: The rates from stations in Georgia shown on page 2 of Exhibit 3 to the Complaint, are on the Commission-prescribed Southern Class Rate basis. The rates shown between the compared points are on the Commission-prescribed Eastern Class Rate Basis. Further answering the averments contained in the said Section 16 of the Complaint, including Exhibit 3 thereof, these defendants deny that any unlawfulness inheres in any of the rates therein referred to, or in the manner of their establishment, and deny that this Court has any jurisdiction to require any change therein or to pass upon the reasonableness or lawfulness thereof, and these defendants aver that if any unlawfulness inheres in any of the said rates the sole remedy of the State of Georgia or its people lies in invoking the jurisdiction of the Interstate Commerce Commission.

14. Answering Section 17 of the Complaint: these defendants deny the existence of any conspiracy in which they or any of them are or have been participants; these defendants admit that none of them is a citizen of Georgia, but aver that the citizenship of the other defendants herein, viz., the Southern defendants, is as stated in the answer filed herein on behalf of the said Southern defendants; and these defendants further aver that the remaining averments set forth in said Section 17 of the Complaint purport to state conclusions of law and therefore need not be answered.

15. Answering Section 18 of the Complaint: these defendants deny that no administrative remedy is open to the State of Georgia, and beg leave to refer to the proceedings of the Interstate Commerce Commission and its report dated May 15, 1945, in Dockets No. 28300 and 28310, *Class Rate Investigation, 1939*, and *Consolidated Freight Classification*, 262 I. C. C. 447, as constituting an

instance of resort by the State of Georgia to an administrative remedy and of the obtaining by it of relief which it sought thereby and of substantially the same character as that which it seeks herein; deny that the Complaint alleges actions which constitute a common law tort or are contrary to the common law against conspiracy or violate the anti-trust laws or any other law or laws; deny that these defendants or any of them have committed any tort or are or have been participants in any conspiracy; deny that they or any of them have at any time done any act which has operated or will operate to the harm, injury or detriment of the State of Georgia or the citizens thereof; deny that these defendants or any of them have at any time promulgated rates by collusive agreement or exercised any collusive power or done anything, in concert or otherwise, which has frustrated or would frustrate any action sought to be taken by administrative process or otherwise to redress any grievance from which the State of Georgia allegedly suffers or may suffer; and deny that the Interstate Commerce Commission is without jurisdiction to afford the relief which complainant seeks. Further answering, these defendants aver that the only standards of lawfulness with which rates established for application to interstate or foreign commerce must conform are those prescribed in the Interstate Commerce Act and related Acts and that the only remedy provided by law which is open to Georgia, its ports or its people, to secure the correction of any want of conformity to such standards is by complaint to the Interstate Commerce Commission. Further answering, these defendants aver that the power and authority of the Interstate Commerce Commission, under the Interstate Commerce Act and related Acts, are entirely adequate and ample not only to correct any want of conformity to such standards of lawfulness as may exist at a given time, but also by order to require the maintenance for the future of such rates or rate relationships as shall insure the maintenance of

just and reasonable rates and charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices, in accordance with the provisions of the Interstate Commerce Act and related Acts administered by the Interstate Commerce Commission and in accordance with the objectives of the national transportation policy as declared by Congress in the said Acts; and these defendants therefore aver that the only remedy lawfully or properly open to Georgia with respect to the acts of which Georgia purports to complain herein lies with the Interstate Commerce Commission, in the exercise of its said power and authority under the Interstate Commerce Act and related Acts. Further answering, these defendants aver that the remaining averments set forth in the said Section 18 of the Complaint purport to state conclusions of law and therefore need not be answered.

16. Answering Section 19 of the Complaint: these defendants deny that the issues allegedly presented here constitute a justiciable question under the decision of the Court in this case; deny that these defendants or any of them have been or are participants in any conspiracy or have been or are operating without legal warrant or have been or are imposing any wrong on the State of Georgia or its citizens; deny that they have done or are doing any act in violation of the common law against tort, the common law against conspiracy, or the anti-trust laws of the United States, or any other law or laws; deny that any of the freight rates for which these defendants or any of them have been or are responsible are prejudicial to the interests of the State of Georgia or the citizens thereof; deny that these defendants or any of them have been or are participants in any unlawful or collusive action for the fixing of railroad rates or for any other purpose; deny that they or any of them have done any acts which result or have resulted in imposing unjust or unreasonable

charges for transportation, or impeding or distraining the State of Georgia in the exercise of its sovereignty in developing its resources, encouraging its industry or commerce, insuring adequate employment of its citizens, protecting its people by the exercise of its police power, or gearing its economy to the national economy, or in any other manner or at all, or in injuring or hindering citizens, as individuals or as a people or in any manner or at all; deny that the law entrusts controversies of the character alleged herein to the courts of the United States; deny that Georgia has shown or can show that it has been or is being harmed or distrained by any conspiracy in which these defendants or any of them have been or are participants; and deny that the causes of action herein set forth are of a justiciable, as distinguished from an administrative, character. Further answering, these defendants deny that complainant is not attacking a specific rate structure by its Complaint herein, but on the contrary they aver that the Complaint either constitutes an attack on the rate structure or on particular rates or is an attack upon a mere phantom or abstract conception, described in the said Section 19 as a "continuing situation," which is without concrete significance unless embodied in the rate structure or in particular rates. Further answering, these defendants aver that the remaining averments set forth in the said Section 19 of the Complaint purport to state conclusions of law and therefore need not be answered.

17. Answering Section 20 of the Complaint: these defendants deny that they or any of them have been or are participants in any conspiracy. Further answering, these defendants aver that the remaining averments set forth in the said Section 20 of the Complaint purport to state conclusions of law and therefore need not be answered.

18. Answering Section 21 of the Complaint: these defendants deny that the State of Georgia, either (*a*) in its

alleged sovereign capacity or (*b* in its alleged capacity as a quasi-sovereign or representative of the public or of the people of Georgia as an organized community or otherwise, or (*c*) in its alleged proprietary capacity, as a shipper of goods and commodities, or (*d*) in its alleged capacity as protector or in behalf of a particular general class of its citizens or any of its citizens, or in any capacity or at all, has any standing or is entitled to recover any damages from these defendants or any of them; deny that, as a result of any act or acts done by these defendants or any of them the State of Georgia in its alleged sovereign capacity has suffered damages in the amount of $5,000,000 or in any other amount or at all, or that the State of Georgia in its alleged quasi-sovereign capacity has suffered damages in the amount of $5,000,000 or in any other amount or at all, or that the State of Georgia in its alleged proprietary capacity has suffered damages in the amount of $250,000 or in the amount of $750,000 or in any other amount or at all, or that the State of Georgia in its alleged capacity as a protector of a general class of its citizens or any of its citizens has suffered or is entitled to claim damages on behalf of such class of such citizens in the amount of $2,000,000 or in any other amount or at all; deny that any act or acts done by these defendants or any of them are or have been illegal; deny that these defendants or any of them are or have been participants in any conspiracy; deny that any of the freight rates for which they or any of them are or have been responsible are unjust to Georgia or its people, as an organized community or otherwise, or to anyone else; and deny that any act or acts done by these defendants or any of them result or have resulted in the unlawful exaction of monies from shippers, farmers, merchants or manufacturers in Georgia or elsewhere or have prevented trade or the use or development of commerce among the several states or between Georgia and northern and eastern states or in any other manner or at all. Fur-

ther answering, these defendants aver that the remaining averments as set forth in the said Section 21 of the Complaint purport to state conclusions of law and therefore need not be answered.

19. Answering Sections XIII, XIV, XX, and XXIV of the Bill of Particulars filed by the State of Georgia herein: these defendants deny that the rate committees or any of them of which these defendants or any of them are members are "private rate-fixing agencies"; deny that any of the rates referred to in the complaint have been or are required to be submitted, for approval, disapproval or modification, to any rate committee or committees of which defendants or any of them are members; deny that these defendants or any of them have used or are using any illegal methods or have done or are doing any illegal acts; deny that these defendants or any of them have by joint or concerted action or in any other manner or at all placed the State of Georgia in an inequitable or disadvantageous position by coercing, restraining, hindering, or preventing competition in freight rates among the various carriers whose operations directly affect the State of Georgia, or in any other manner or at all; and deny that these defendants or any of them have been or are participants in any conspiracy to fix rates, to prevent changes in rates, to suppress proposed rates, or to establish a machinery for controlling or manipulating action affecting rates by coercing railroads into securing the approval of any private rate-fixing agency or any other committee or agency before taking any steps to make new rates, to modify, alter or change existing rates, or to take any other action affecting rates or in any other manner or at all, or have been or are participants in any conspiracy.

20. For a further and separate defense, these defendants aver as follows: the employment by these defend-

ants of rate committees and conferences for the publication, discussion and consideration on the part of these defendants and other carriers and shippers of proposed changes in the rates, regulations, and practices of these defendants and each of them, is essential for the proper performance and fulfillment by these defendants and each of them of their duties and obligations under the Interstate Commerce Act and other related Acts, and for the establishment and maintenance of just and reasonable rates, regulations, and practices with respect to transportation services and for the avoidance of unjust discriminations, undue prejudices or preferences or advantages, or unfair or destructive competitive practices, all as directed and required by the provisions of the Interstate Commerce Act and related Acts, including the declaration of the national transportation policy (54 Stat. L. 899) as embodied in said Interstate Commerce Act; and that without resort to rate committees and conferences, it would as a practical matter be impossible for these defendants or any of them to preserve in their rate structures the conformity to the prescribed standards of lawfulness which rate committees and conference procedures make possible. Furthermore, no one of the rate committees or conferences of which these defendants or any of them are members is endowed, by either its constitution or its by-laws or its practices or procedures, or in any other manner, with any right or authority or power, nor has any one of the said rate committees or conferences ever in fact asserted or claimed or attempted to exert any right or authority or power, to exercise any veto with respect to any change in rates, regulations or practices proposed by these defendants or any of them, or to prevent or restrain these defendants or any of them from initiating and establishing on their own lines a change in rates, regulations or practices regardless of the opposition of any other member or members or any other officer or officers of the said committee or committees, or to compel

or coerce these defendants or any of them to put into effect on their own lines a change in rates, regulations or practices proposed by any other carrier or carriers, or in any other manner to fix or determine what rates, regulations or practices shall be effective upon the lines of these defendants or any of them; on the contrary, each of these defendants, notwithstanding its membership in any one or more of the rate committees or conferences, retains and reserves for itself the full and complete right of independent action and has on many occasions exercised said right of independent action.

21. For a further and separate defense, these defendants aver as follows: at no time has there been any intention or object or purpose or plan, on the part of these defendants or any of them, and at no time have these defendants or any of them done any act or engaged in any course of conduct, to prejudice or discriminate against or place at a disadvantage or impair or retard the economy of or in any other way injure or harm or inflict damage upon or "distrain" the State of Georgia or any of its ports or any of its people or citizens, either through or by the use of rate committees or conferences or any of the procedures thereof or through or by the use of the Association of American Railroads or any other Association or through or by the use of the intraterritorial or interterritorial rates charged, or the regulations or practices made applicable, or any of them, or in any other manner or at all. On the contrary, these defendants and each of them have at all times taken and are at the present time taking all steps possible to insure that the rates, regulations and practices in which they or any of them participate, whether applicable intraterritorially or interterritorially, shall be fair, just, reasonable, non-discriminatory, non-prejudicial, non-preferential and in all other respects in accordance with the standards of lawfulness fixed with respect thereto by the Interstate Commerce Act and related Acts and by the Interstate

Commerce Commission in the lawful exercise of its authority and jurisdiction thereunder, and shall give due and proper regard to the interests of all shippers and receivers of freight and other persons and all ports and localities and regions, including shippers and receivers of freight and persons and ports and localities in Georgia and the State of Georgia itself, who are or may be affected by such rates, regulations and practices. If, notwithstanding these and other efforts on the part of these defendants and each of them, the State of Georgia or any of its ports or people should feel aggrieved as the result of any of the rates, regulations or practices established or maintained by these defendants or any of them, or as the result of any of the procedures followed by these defendants or any of them with respect to the establishment or maintenance of any of the rates, regulations or practices, the proper and lawful course for Georgia, its ports and its people to pursue, and which Georgia, its ports and its people have in the past pursued, and which will provide Georgia, its ports and its people with a complete and adequate remedy, is to resort to the Interstate Commerce Commission and to request it to exercise its authority and jurisdiction under the Interstate Commerce Act and related Acts for the purpose of requiring the establishment and maintenance of lawful and proper rates, regulations and practices for Georgia, its ports and its people, and affording them such other relief as may be appropriate and lawful.

22. For a further and separate defense, these defendants aver as follows: it is wholly false, misleading and deceptive to represent or to suggest, as has been represented and suggested throughout the Complaint herein, that the economic or industrial or commercial or other development or progress of the South has been or is being obstructed or retarded or frustrated by any of the rates or the rate structure referred to in the complaint. As illustrative of the rapid and substantial

economic and industrial growth and development of the South, compared with the United States as a whole, these defendants beg leave to refer to and adopt as their own the statements of the Interstate Commerce Commission in its report of May 15, 1945, in Dockets No. 28300 and 28310, *Class Rate Investigation, 1939* and *Consolidated Freight Classification*, 262 I. C. C. 447, to the effect that the economic development of the United States by freight rate territories is indicated by the table on page 546 of that report which shows the value of products of all manufacturing industries and according to which the value of such products in Southern territory increased from $4,517,728,000 in 1919 to $5,685,323,000 in 1939, or 25.8%, while in the United States as a whole the value of such products decreased from $62,418,079,000 in 1919 to $56,843,025,000 in 1939, or 8.9%, and these defendants also beg leave to refer to and adopt as their own the figures shown in another table set forth on page 546 of the said report, according to which the "value added by manufacture" in Southern territory increased from $1,880,300,000 in 1919 to $2,325,207,000 in 1939, or 23.7%, while in the United States as a whole it decreased from $25,041,098,000 in 1919 to $24,682,918,000 in 1939, or 1.4%. These defendants also beg leave to refer to the said report of the Interstate Commerce Commission, as representing a decision in which the Commission, at the request of the State of Georgia and other Southern states and for the purpose of granting relief sought by those states, held that class rates within Southern territory and between Southern territory and other territories should be reduced by 10% while class rates within Official territory should be increased by 10%, and as therefore illustrating that the State of Georgia, contrary to its allegations in the Complaint herein, not only can and should obtain, but has in fact sought and obtained, from the Interstate Commerce Commission the relief which it claims for the wrongs

alleged to have been inflicted upon it by the rates and the rate structure referred to in the Complaint.

23. For a further and separate defense, these defendants aver as follows:

(*a*) On March 20, 1943, the Chairman of the War Production Board, pursuant to Section 12 of Public Law No. 603, 77th Congress (56 Stat. 357, 50 U. S. C. §1112), certified to the Attorney General of the United States in writing as follows:

"War Production Board

Certificate No. 44

Interstate Commerce Commission Rate

Conference Regulations

The Attorney General: Pursuant to the provisions of Section 12 of Public Law No. 603, 77th Congress (56 Stat. 357), I hereby approve joint action by common carriers or freight forwarders, or their respective representatives, through rate bureaus, rate conferences, or other similar carrier or forwarder organizations, in the initiation and establishment of common carrier and freight forwarder rates, fares, and charges, and carrier and forwarder regulations and practices pertaining thereto:

Provided, That such action is taken subject to and in compliance with certain regulations for rate conferences formulated by the Interstate Commerce Commission a copy of which is hereunto annexed and made a part hereof, and after consultation with you, I hereby find and so certify to you that the doing of any act or thing, or the omission to do any act or thing, by any person in compliance with my approval herein expressed, is requisite to the prosecution of the war.

Donald M. Nelson,
Chairman.

March 20, 1943.

REGULATIONS FOR RATE CONFERENCES.

Rule 1. *Definitions as used in these rules.*—(a) The term 'rate conference' means any two or more common carriers or any two or more freight forwarders who consult together, either directly or by employees or representatives, for the purpose of considering or agreeing upon rates to be charged by them or of providing for the publication of tariffs containing such rates.

(b) The term 'publishing agent' means a person or corporation controlled directly or indirectly by a rate conference which publishes and files freight or passenger tariffs.

(c) The term 'rates' includes fares, charges and classifications and all rules, regulations, and practices affecting the charges made for the transportation of freight or passengers and services incidental to such transportation.

(d) The term 'carrier' means a common carrier or a freight forwarder.

Rule 2.—Any carrier performing service of the type and within the territorial and organizational scope of a rate conference's rate activities shall be eligible for membership in such rate conference upon application and upon payment of charges applicable to other members of the same class. When a rate conference consists of two or more rate conferences or their representatives, eligibilty for membership in any of the rate conferences shall be considered compliance with this rule.

Rule 3.—On or before April 15, 1943, each rate conference shall register with the Interstate Commerce Commission and shall file with the Commission a copy of its bylaws, the names and addresses

of its officers and of the members of rate and other committees (except special or subcommittees created for temporary functioning), the rules of procedure followed by it, a copy of any agreement or other document which in any way provides for, governs, or affects such procedure, and schedules of its charges, to members or, where expenses are divided among the members, statements showing how the expenses are divided; and, if a corporation, a copy of its articles of incorporation. A copy of each change in any of the above shall be filed within 30 days of the effective date of the change.

Rule 4.—A publishing agent, upon request of any member of the rate conference for which the publishing agent publishes rates and upon payment of the charges, if any, applicable to carriers of that class, shall include the member as a participating carrier in its agency tariffs and publish rates therein for the individual or joint account of such member, except that this shall not require the publishing agent to publish joint rates for the account of carriers who indicate their non-concurrence therein.

Rule 5.—Each member of a rate conference may propose to such conference the initiation of or change in rates to be published in the tariffs of the publishing agent for application over the proponent's line or over the lines of other members of the conference performing the service for which the rates are proposed.

Rule 6.—No rule or practice of a rate conference shall prohibit any member from publishing or having published for his account any rate or rule after ninety days from the date the rate was proposed by him, except that, in the case of a joint rate, the pub-

lishing agent shall not publish the rate for application over the line of any carrier who does not join in the request for its publication.

Rule 7.—Membership in a rate conference shall not preclude a carrier, after rejection of the proposal or after 90 days from the date of the proposal, from filing individual tariffs or from participating in tariffs published by other carriers or other rate conferences. Upon the filing of such individual tariffs or upon participation in tariffs published by other carriers or other rate conferences, the rate conference or conferences in whose tariffs the earlier rates were published shall immediately provide for the removal of any conflicting or duplicating rates in its or their tariffs.

Rule 8.—No boycott or other means of coercion or intimidation shall be employed by a rate conference, directly or indirectly, to restrain a carrier either a member or a nonmember, from taking independent action, consistent with these rules, to establish rates other than those approved by a rate conference.

Rule 9.—Each rate conference shall maintain accounts, records, and memoranda showing its assets, liabilities, income, and expenses; and shall maintain a file for each rate proposal which shall contain the rate proposal, all protests and memoranda submitted respecting the proposed rates, and minutes of any oral hearing which may be held. The accounts, records, memoranda, files, and all correspondence of a rate conference shall be open to inspection by duly authorized representatives of the Interstate Commerce Commission.

Rule 10.—These rules are subject to modification, change, and addition as the need therefor may be shown."

(*b*) On or before April 15, 1943, pursuant to and in conformity with said certificate and the regulations annexed thereto, each of the rate bureaus, committees and associations which had been established by agreements between and among these defendants or by agreements to which any of these defendants were parties and which have actively functioned and are still actively functioning, registered as a "Rate Conference" with the Interstate Commerce Commission, and then complied with, and at all times thereafter has complied with, said regulations governing rate conferences and each and all the rules embraced in said regulations, and has observed and obeyed the same. All joint rate action, if any, taken by these defendants or any of them since April 15, 1943, through such rate bureaus, committees and associations has been taken in accordance with said rate conference regulations and was and is in the public interest, and was and is approved by, and in compliance with, said Certificate No. 44.

(*c*) In their consideration of rate proposals through rate bureaus, committees and associations, these defendants or any of them have not and do not employ or exert any coercion as against any other member or members thereof, and none of them has in any way combined to discriminate against Georgia, its people, or its ports, or against any region or any place or person of any state in the rates, regulations or practices which are established or maintained.

(*d*) Any joint action in which these defendants or any of them may have been or may be participants, in the initiation and establishment of rates, fares and charges, and carrier regulations and practices pertaining thereto, has been taken subject to, and in compliance with, said Certificate No. 44, and with the said "Regulations for Rate Conferences" annexed to and made a part of said Certificate No. 44, and, to the extent that the present suit is directed to and complains of such alleged joint

rate action, it may not be commenced under the anti-trust laws of the United States by reason of the express prohibition against the same contained in Section 12 of said Public Law No. 603, and therefore this Court is without jurisdiction of the said suit, and complainant is without capacity or standing to sue herein.

24. For a further and separate defense, these defendants aver as follows: this Court, for the purpose of determining whether or not it should accept jurisdiction and permit the filing of the Complaint herein, has in its opinion of March 26, 1945, herein, accorded to the Complaint an unusual degree of liberality of construction, described by the Court in its opinion as "that liberality accorded the Complaint of a sovereign State." As thus liberally construed, the Court held that the Complaint alleged coercion and discrimination against Georgia and therefore stated a cause of action. The Court accordingly determined that it would accept jurisdiction, and permitted the Complaint to be filed. The occasion for unusual liberality of construction has therefore passed. When the time comes for Georgia to attempt to prove its case against these defendants, the seriousness of the charges made and the extreme character of the relief sought should impel this Court to require that Georgia adhere to strict standards of adequate proof. Tested by such standards, or by any appropriate and lawful standards, Georgia's case will fail to show (*a*) that any of the rate committees or conferences referred to in the Complaint or any other rate committee or conference has at any time fixed or established, or coerced or compelled these defendants or any of them to fix or establish or to refrain from fixing or establishing, any rate, regulation or practice, or (*b*) that these defendants or any of them have at any time coerced or compelled the Southern defendants herein or any of them to fix or establish or to refrain from fixing or establishing any rate, regulation or practice, or (*c*) that these defendants or any of them have at any time

conspired or planned or intended, or have at any time acted, to discriminate against or obstruct the development of or in any other way injure or harm Georgia, its ports or its people, through the employment of rate committees or the fixing of rates, regulations or practices or otherwise, or (*d*) that these defendants or any of them are or have been responsible for any coercion or any discrimination with respect to Georgia or its ports or people in any respect. In the absence of such a showing, Georgia's case will fail to establish a cause of action against these defendants or any of them, within the scope of its Complaint herein, as liberally construed by this Court in its aforesaid opinion, or otherwise.

25. The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, having fully answered, these defendants respectfully pray the judgment of the Court that the prayers for relief in the Complaint of the State of Georgia be denied, that the said Complaint be dismissed at the cost of the State of Georgia, and that they and each of them be discharged of all liability in the premises.

Respectfully submitted,

JOHN DICKINSON,
1740 Broad Street Station Building,
Philadelphia 4, Pennsylvania.
Counsel for all above-named Northern Defendants,

ANTHONY P. DONADIO,
Counsel for The Baltimore and Ohio Railroad Company,

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HORACE L. WALKER,
Counsel for The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company,

K. L. RICHMOND,
Counsel for Chicago and Eastern Illinois Railroad Company,

B. G. STACKHOUSE,
Counsel for L. F. DeRamus and Holman D. Pettibone, Trustees of Chicago, Indianapolis and Louisville Railroad Company,

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JOSEPH A. MCCLAIN, JR.,
Counsel for Wabash Railroad Company,

PAUL S. PARSONS,
Counsel for Western Maryland Railway Company.

OCTOBER 1, 1945.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946

No. 11, Original.

THE STATE OF GEORGIA, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., Defendants.

CERTIFICATE OF SERVICE ON MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE PETITION OF INTERVENTION, PETITIONS OF INTERVENTION AND BRIEF.

THE STATE OF ALABAMA,

By:

JAMES E. FOLSOM,
Governor of Alabama,

A. A. CARMICHAEL,
Attorney General of Alabama,

CLAUD D. SCRUGGS,
Assistant Attorney General of Alabama,

KENNETH GRIFFITH,
Assistant Attorney General Alabama.

Walker Printing Company, Montgomery, Alabama

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CLAUD D. SCRUGGS,
Assistant Attorney General of Alabama,

KENNETH GRIFFITH,
Assistant Attorney General Alabama.

Walker Printing Company, Montgomery, Alabama

I, A. A. Carmichael, Attorney General of the State of Alabama, hereby certify that I have served a copy of the motion of the State of Alabama for leave to file petition of intervention, petitions of intervention and brief upon the following counsel of record by causing a copy thereof to be mailed, postage prepaid, to each of said counsel:

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Department of Justice,
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CLAUDE SHAW, JR.,
Assistant Attorney General,
State of Georgia,
State Capitol,
Atlanta, Georgia

JULIAN EUGENE COOK,
Attorney General,
State of Georgia,
State Capitol,
Atlanta, Georgia

WILLIAM L. McGOVERN,
820 13th Street, N. W.,
Washington, D. C.

I further certify that I have served a copy upon the State of Georgia by causing a copy thereof to be mailed, postage prepaid, to Honorable M. E. Thompson, Governor of the State of Georgia, and Honorable Herman Talmadge, Governor of the State of Georgia, both at the State Capitol, Atlanta, Georgia.

I further certify that I mailed said motion, petition and brief on February 10, 1947 and that additional copies were mailed to the following, who have not acknowledged receipt thereof as yet, on February 27, 1947:

HORACE L. WALKER,
General Solicitor,
Chesapeake & Ohio Railway Company,
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Baltimore 1, Maryland

THOMAS P. HEALY,
Counsel,
New York Central Railroad Company,
New York City

PAUL S. PARSONS,
Counsel,
Western Maryland Railway Company,
Baltimore 2, Maryland

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M. E. THOMPSON, Governor,
State of Georgia,
State Capitol,
Atlanta, Georgia

HERMAN TALMADGE, Governor,
State of Georgia,
State Capitol,
Atlanta, Georgia

A. A. CARMICHAEL,
Attorney General of Alabama.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ~~11~~ 10, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE PETITION OF INTERVENTION. PETITIONS OF INTERVENTION AND BRIEF.

THE STATE OF ALABAMA,
By:

JAMES E. FOLSOM,
Governor of Alabama,

A. A. CARMICHAEL,
Attorney General of Alabama,

CLAUD D. SCRUGGS,
Assistant Attorney General of Alabama,

KENNETH GRIFFITH,
Assistant Attorney General of Alabama.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, Original.

THE STATE OF GEORGIA, *Complainant,*

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

MOTION FOR LEAVE TO FILE PETITION OF THE STATE OF ALABAMA FOR LEAVE TO INTERVENE AND BECOME A PARTY PLAINTIFF.

Now comes the State of Alabama, one of the States of the United States, by James E. Folsom, Governor of Alabama, A. A. Carmichael, Attorney General of Alabama, Claud D. Scruggs, Assistant Attorney General of Alabama, and Kenneth Griffith, Assistant Attorney General of Alabama, and moves the Court for leave to file the attached petition of the State of Alabama for leave to intervene and become a party plaintiff in the above-entitled cause.

Attached to this motion is a brief thereon. All parties to the cause have been notified of the motion and petition by mailing a true copy thereof to counsel of record for each of said parties, and to the Governor and Attorney General of the State of Georgia.

Respectfully submitted,

THE STATE OF ALABAMA,
By: JAMES E. FOLSOM,
Governor of Alabama,
A. A. CARMICHAEL,
Attorney General of Alabama,
CLAUD D. SCRUGGS,
Assistant Attorney General of Alabama,
KENNETH GRIFFITH,
Assistant Attorney General of Alabama.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

PETITION OF THE STATE OF ALABAMA FOR LEAVE TO INTERVENE AND BECOME A PARTY PLAINTIFF.

Now comes the State of Alabama, one of the States of the United States, and prays this Honorable Court for leave to intervene and become a party plaintiff in the above-entitled cause, and in support of its said petition alleges and shows to the Court as follows:

1. The State of Alabama is one of the States of the United States, and as such is entitled to participate as a party plaintiff in litigation within the original jurisdiction of this Court in accordance with the provisions of the Constitution of the United States.

2. The above-entitled cause is a suit duly brought by the State of Georgia, invoking the said original jurisdiction of this Court, as heretofore ascertained by this Court's decision of March 26, 1945, reported in 324 U. S. 439, and

the said suit, with respect to the merits, is now pending and undetermined.

3. Your petitioner, the State of Alabama, adopts as its own and as applicable to it the allegations contained in the amended complaint heretofore filed in the said cause by the State of Georgia, as fully and to the same extent as if petitioner had originally been named in and a signatory thereto. Petitioner also adopts the evidence offered by the State of Georgia during the course of this litigation and accepts and relies upon the record as it now stands. Petitioner makes no request for reopening of the proceedings for the purpose of further hearing or the taking of further testimony.

4. The amended complaint and the evidence in the above cause set forth an unlawful combination and conspiracy among the defendants to eliminate competition and restrain trade and commerce among the several States of the United States, by establishing and maintaining through private rate-fixing machinery, under the control and domination of defendants, railroad freight rates for transportation in such commerce which are detrimental and burdensome to the commerce, the people, and the economy of petitioner, the State of Alabama, as well as of the State of Georgia and other Southern states, which rates have been and now are established and maintained by defendants through the use of collusive, discriminatory, restrictive, coercive, and other unlawful means, in violation of the laws of the United States and of the legal rights of petitioner.

5. Petitioner, as well as the State of Georgia and other Southern states, is injured by the continued existence of the illegal combination and conspiracy complained of in the said suit. Such violation by defendants of petitioner's legal rights and the precise nature and extent of petitioner's justiciable interest in the pending case or controversy within the original jurisdiction of this Court will appear and are fully established by the pleadings and evidence

heretofore received of record during the pendency of this cause wherein the State of Georgia has heretofore been the sole plaintiff. Accordingly, petitioner's intervention in this cause will facilitate and not impede the due administration of justice and the orderly course of judicial proceedings within the original jurisdiction of this Court.

WHEREFORE, Petitioner prays that this Honorable Court grant this petition of the State of Alabama to intervene and become a party plaintiff in the said cause, adopting as applicable to petitioner the amended complaint and evidence of the State of Georgia and accepting and relying upon the record as it now stands in the present posture of the case, and to participate in all future steps and proceedings in the cause as fully as if it had been a party plaintiff from the institution of the suit, including, but without limitation, the right to receive notices and copies of pleadings and other documents hereafter filed, and to file briefs and to participate in oral argument, and to enjoy all the rights, powers, and privileges of a party plaintiff in the said cause.

THE STATE OF ALABAMA,

By: JAMES E. FOLSOM,
Governor of Alabama,

A. A. CARMICHAEL,
Attorney General of Alabama,

CLAUD D. SCRUGGS,
Assistant Attorney General of Alabama,

KENNETH GRIFFITH,
Assistant Attorney General of Alabama.

AFFIDAVIT.

UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA, *ss.*

A. A. Carmichael, being first duly sworn according to law, deposes and says:

That he is Attorney General of the State of Alabama; that he is duly authorized to pray leave to file, and to file, the foregoing petition of the State of Alabama for leave to intervene and become a party plaintiff; that he has read the said petition and that the facts contained therein which are within his own knowledge are true and correct and that the facts averred upon information received from others are based upon information received from reliable sources and which facts he believes are true; and that a true copy of the said petition has been served by mail upon counsel of record for each and every party to the cause, and upon the Governor and the Attorney General of the State of Georgia.

A. A. CARMICHAEL,
Attorney General of Alabama.

Subscribed and sworn to before me by the said A. A. Carmichael this 7th day of February, 1947.

EDNA W. HERBERT,
(Seal) *Notary Public.*

My commission expires the 31st day of July, 1951.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 11, Original.

THE STATE OF GEORGIA, *Complainant,*

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants.*

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION OF THE STATE OF ALABAMA FOR LEAVE TO INTERVENE AND BECOME A PARTY PLAINTIFF.

On March 26, 1945, this Court granted leave to the State of Georgia to file its amended bill of complaint in the instant cause. *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439. That decision adjudicated preliminary objections raised by the defendants herein regarding the right of the State of Georgia to invoke the original jurisdiction of this Court as established by the provisions of the Constitution of the United States, and held that the claim asserted by the State in its complaint, both as *parens patriae* as well as in its proprietary capacity, was in accord with the standards of justiciability established in the jurisprudence of this Court with respect to the application of those constitutional provisions. The same decision of this Court also disposed of preliminary objections wherein it

was contended that the complaint failed to state a cause of action. (324 U. S. at 452)

Petitioner, the State of Alabama, as one of the States of the United States, stands upon an equal footing with the State of Georgia, as well as all other States of the Union, with respect to its right to invoke the original jurisdiction of this Court.

Accordingly, this Court's decision of March 26, 1945, is a conclusive adjudication with respect to the right of the State of Alabama to participate as a litigant in the instant cause under the original jurisdiction of this Court.

Inasmuch as the State of Alabama adopts as its own and as applicable to it the allegations of the pleadings heretofore filed in the cause by the State of Georgia, and also adopts the evidence offered by the State of Georgia during the course of the litigation, and accepts and relies upon the record as it now stands in the present posture of the case, and makes no request for reopening of the proceedings for the purpose of further hearing or the taking of further testimony, it is clear that there are no procedural obstacles which might preclude the granting of the State of Alabama's petition for leave to intervene. Granting of the petition will facilitate and not impede the due administration of justice and the orderly course of judicial proceedings in the exercise of this Court's original jurisdiction.

Upon the record as it now stands and upon which petitioner relies, the facts and circumstances appear and are established which constitute petitioner's cause of action and justiciable interest in the pending controversy. The pleadings and evidence already of record set forth an unlawful combination and conspiracy which affects and violates the legal rights of the State of Alabama, as well as of the present plaintiff, the State of Georgia, and other Southern states. The record shows that defendants have eliminated competition and restrained trade and commerce among the several states of the United States by the use of collusive, discriminatory, restrictive, coercive, and other unlawful

means, in violation of the laws of the United States and of the legal rights of petitioner. The record also shows that the burdensome and detrimental effects of the rates unlawfully established through the private rate-fixing machinery under the control and domination of defendant railroads affect the commerce, the people, and the economy of the State of Alabama.

Accordingly, since petitioner's justiciable interest in the pending controversy clearly appears, and the unlawful combination and conspiracy affect petitioner and they violate petitioner's legal rights, it follows that petitioner should be permitted to become a party plaintiff in the case and that the petition for leave to intervene should be granted. The due administration of justice and the vindication of petitioner's legal rights and justiciable claims in accordance with the procedure established by the Constitution require that the State of Alabama be permitted in this proceeding to secure appropriate relief in the constitutionally appointed forum.

THE STATE OF ALABAMA,

By: JAMES E. FOLSOM,
Governor of Alabama,

A. A. CARMICHAEL,
Attorney General of Alabama,

CLAUD D. SCRUGGS,
Assistant Attorney General of Alabama,

KENNETH GRIFFITH,
Assistant Attorney General of Alabama.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 11 Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

MEMORANDUM IN OPPOSITION TO THE MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE A PETITION OF INTERVENTION.

JOHN DICKINSON,
ROBERT V. FLETCHER,
HUGH B. COX,
ANTHONY P. DONADIO,
K. L. RICHMOND,
B. G. STACKHOUSE,
W. T. PIERSON,
THOMAS P. HEALY,
D. LYNCH YOUNGER,
E. RANDOLPH WILLIAMS,
JOSEPH A. McCLAIN, JR.,
PAUL S. PAESONS,
Counsel for Northern Defendants (except The Chesapeake and Ohio Railway Company and The New York, Chicago & St. Louis Railroad Company)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 11 Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

MEMORANDUM IN OPPOSITION TO THE MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE A PETITION OF INTERVENTION.

This memorandum is filed on behalf of the following defendants who are hereinafter collectively referred to as "the Northern Defendants": The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Chicago and Eastern Illinois Railroad Company, Chicago, Indianapolis and Louisville Railway Company, Erie Railroad Company, The New York Central Railroad Company, Norfolk and Western Railway Company, Richmond, Fredericksburg and Potomac Railroad Company, Wabash Railroad Company, and Western Maryland Railway Company.

The Northern Defendants are willing to meet on the

merits any valid cause of action that the State of Alabama may assert at an appropriate time and in appropriate form, and they do not intend to interpose any merely technical objections to Alabama's motion for leave to intervene; nor do they intend to raise again any of the preliminary issues that were decided by this Court in granting the State of Georgia leave to file its amended bill of complaint. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439.

The Northern Defendants believe, however, that both because of the substantive defects of Alabama's motion and because of the time of its filing they are obliged to object to the proposed intervention and to point out to this Court the unfortunate consequences that will follow if the motion is granted.

The State of Alabama has no absolute right to intervene in this litigation; its application is addressed to the discretion of the Court. Compare Rule 24(a) (b) of the Rules of Civil Procedure for the District Courts of the United States; and see *Credits Commutation Co.* v. *United States*, 177 U.S. 311; *Pipe Line Co.* v. *United States*, 312 U.S. 502, 506; *Allen Co.* v. *Cash Register Co.*, 322 U.S. 137. A denial of the motion will not finally adjudicate the rights of Alabama which will be free to assert at another time and in another form any cause of action that it may have. *Credits Commutation Co.* v. *United States*, 177 U.S. 311.

In exercising its discretion this Court should consider whether the proposed intervention will interfere with the orderly conduct of this litigation and whether it will unduly delay or prejudice the adjudication of the rights of the original parties. See Rule 24(b) of the Rules of Civil Procedure. The Northern Defendants submit that the granting of Alabama's motion for leave to intervene will prejudice the rights of the parties, cause delay and otherwise interfere with the conduct of this litigation and that accordingly the motion should be denied. In support of their opposition to the motion, the Northern Defendants call the Court's attention to the following points:

1. *Alabama's petition for leave to intervene does not properly inform the Court or the defendants of the nature of the alleged cause of action or of the issues of law and fact that the defendants will be expected to meet.*

Alabama's motion is not accompanied by a pleading that sets forth the claim or cause of action for which intervention is sought. Paragraph 3 of the petition that accompanies the motion merely alleges that the State "adopts as its own and as applicable to it the allegations contained in the amended complaint heretofore filed in the said cause by the State of Georgia, as fully and to the same extent as if petitioner had originally been named in and a signatory thereto." The failure to accompany the motion with a pleading that sets forth Alabama's alleged cause of action disregards a basic and necessary requirement in intervention procedure and is itself a reason for denying the motion. See Rule 24(c) of the Rules of Civil Procedure; *Chandler Co.* v. *Brandtjen, Inc.*, 296 U.S. 53, 56; *Miami County National Bank* v. *Bancroft*, 121 Fed. (2d) 921 (C.C.A. 10th, 1941).

In the circumstances of this case, the failure to accompany the motion with a pleading setting forth the alleged cause of action is more than merely a formal defect. In the absence of a pleading, the Court is not informed of the nature of the cause of action that Alabama intends to assert, and the defendants are not informed of the issues of law and fact that they must meet. The general allegation that Alabama adopts the amended complaint filed by the State of Georgia does not supply that information. The allegations of the amended complaint are directed specifically to the alleged grievances and injuries of the State of Georgia. Numerous allegations of the amended complaint appear on their face to be inapplicable and impertinent to any claim that Alabama might conceivably assert. For example, paragraph 4 of the amended bill of complaint alleges that the defendants have preferred certain North Atlantic ports over the Ports of Savannah and Brunswick; para-

graph 5 of the amended bill of complaint incorporates by reference an exhibit showing specific rates to particular points in Georgia and further alleges that the State of Georgia owns the Western and Atlantic Railroad, whose value is asserted to have been impaired by the activities of the defendants. Other allegations of Georgia's amended bill of complaint do not disclose on their face whether they are or can be applicable to the asserted claim of Alabama and the defendants have no way of telling which of these allegations are believed to be pertinent to the alleged cause of action and which are not.

Alabama does not propose to offer evidence with respect to its alleged cause of action and it does not specify any particular parts of the present record on which it intends to rely. Alabama merely asserts generally in paragraph 3 of its petition that it "adopts the evidence offered by the State of Georgia during this litigation and accepts and relies upon the record as it now stands." It is not clear from this allegation whether the State of Alabama regards itself as bound by the arguments and admissions heretofore made by the State of Georgia and whether the evidence offered by the defendants is to be regarded as binding upon the State of Alabama to the same extent and in the same way that it may be binding upon the State of Georgia. The failure of Alabama to specify the evidence believed to support its claim leaves the defendants in the dark as to the issues of fact that are now raised for the first time by the proposed intervention.

2. *The petition for leave to intervene is not timely.*

Georgia's motion for leave to file its original bill of complaint was filed in this Court on June 19, 1944. Georgia's motion for leave to file the amended bill of complaint was filed on September 20, 1944. Georgia's motion for leave to file the amended bill of complaint was granted on March 26, 1945. A Special Master was appointed by this Court to take testimony on December 17, 1945. The taking

of testimony before the Special Master began on March 18, 1946, was adjourned to June 3, 1946, and continued from June 3rd, with interruptions, until August 20th, 1946. Briefs and proposed findings of fact will be submitted by the parties to the Special Master on some date in April, 1947 and it is expected that oral arguments before the Master will take place some time in May, 1947.

The motion papers advance no reason for Alabama's delay in seeking admittance to the litigation. As the case now stands Alabama's petition for leave to intervene comes either too late or too early. Had Alabama's petition been filed at the outset of the case, or had Alabama filed a separate suit that could have been consolidated for hearing with the suit filed by Georgia, the evidence relating to the two States might have been taken at the same time, and the defendants could have conducted their case so as to answer the contentions made by the State of Alabama. As a result of Alabama's delay, the defendants have presented their evidence to the Special Master without regard to the cause of action now asserted for the first time by the State of Alabama. It would be unfair to the defendants, whose testimony has been directed to features of the case alleged to affect Georgia, to permit the State of Alabama to rely upon testimony offered by Georgia covering conduct which may be asserted to affect Alabama injuriously, when the defendants have never had an opportunity to offer testimony in explanation or reply.

The motion is too early in the sense that it is made before the Special Master has submitted his report and before the evidence has been presented to this Court. The application of the State of Alabama, therefore, comes at a time when it is not possible for this Court to determine whether any of the evidence is of a nature to support the general and undefined cause of action that Alabama now asks leave to assert.

3. The granting of Alabama's motion will delay the litigation.

The transcript of the proceedings before the Special Master now consists of more than 6000 typewritten pages, contained in seventeen quarto volumes. The exhibits that have been offered in evidence comprise an additional seventeen quarto volumes.

Because of the size of the record and the complexity of the issues, the preparation of briefs and proposed findings of fact is a task that requires considerable time. For the convenience of the parties, it has been necessary three times to extend the time for the filing of briefs and proposed findings of fact with the Master. The Northern Defendants in preparing their briefs and proposed findings of fact have directed their attention to the cause of action and to the contentions advanced by the State of Georgia. If Alabama is to be allowed to intervene it will be necessary for the defendants to re-examine the entire record to determine whether any of the evidence that it contains is pertinent to the cause of action now asserted by Alabama and to revise the briefs and proposed findings of fact that are now in process of preparation. This examination and revision will have to be made without the benefit of an opening statement or of a trial brief from Alabama. The defendants can hardly be expected to perform this task in the time now allotted for the preparation of briefs and proposed findings. A further extension of time will doubtless be necessary.

4. To grant Alabama's petition for leave to intervene would be to set a precedent that would permit intervention by other States or persons who assert a general interest in the litigation, with the result that the litigation would be unnecessarily complicated and delayed.

In asking the Court for leave to intervene, without filing a pleading and without offering any proof on its own behalf, the State of Alabama seems to assume that this

is a kind of litigation-in-gross, and that its issues are so amorphous and so unrelated to particular persons or to specific issues of fact and law that any plaintiff may properly attach himself to the lawsuit merely by alleging generally that he adopts the pleading and the proof of the original complainant. If Alabama is entitled to intervene on this basis, all other Southern states are entitled to do likewise. In fact, Alabama asserts its right to intervene in words that expressly apply to all other Southern states. In Paragraph 4 of its petition Alabama alleges that the alleged conspiracy establishes and maintains freight rates that "are detrimental and burdensome to the commerce, the people, and the economy of petitioner, the State of Alabama, as well as of the State of Georgia and other Southern states," and in Paragraph 5 it alleges that the "petitioner, as well as the State of Georgia and other Southern states is injured by the continued existence of the illegal combination and conspiracy complained of in the said suit."

The fact that Alabama has not accompanied its motion with a pleading and does not propose to offer evidence shows that Alabama's presence in the litigation is not necessary either to assist the Court or to protect the rights of the State. No suggestion is made that the State of Georgia has not adequately presented the contentions that are supposed to support its cause of action. In these circumstances to permit Alabama and other Southern states to intervene would multiply the parties to the litigation without accomplishing any useful purpose. In *Allen Co.* v. *Cash Register Co.*, 322 U.S. 137, 141-142 this Court said:

> "It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court."

For the reasons that have been stated above, the Northern Defendants submit that the motion of the State of Alabama for leave to file a petition of intervention should be denied.

Respectfully submitted,

JOHN DICKINSON,
ROBERT V. FLETCHER,
HUGH B. COX,
ANTHONY P. DONADIO,
K. L. RICHMOND,
B. G. STACKHOUSE,
W. T. PIERSON,
THOMAS P. HEALY,
D. LYNCH YOUNGER,
E. RANDOLPH WILLIAMS,
JOSEPH A. MCCLAIN, JR.,
PAUL S. PARSONS,
Counsel for Northern Defendants (except The Chesapeake and Ohio Railway Company and The New York, Chicago & St. Louis Railroad Company).

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. ~~11~~ 10, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

REPLY OF SOUTHERN DEFENDANTS TO MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE PETITION OF INTERVENTION.

WILLIAM L. GRUBBS,
J. N. FLOWERS,
ELMER A. SMITH,
W. R. C. COCKE,
WILLIAM H. SWIGGART,
S. R. PRINCE,

Counsel for Southern Defendants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 11, Original.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

REPLY OF SOUTHERN DEFENDANTS TO MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE PETITION OF INTERVENTION.

For reply to the motion of the State of Alabama for leave to intervene, come Atlantic Coast Line Railroad Company; Carolina, Clinchfield and Ohio Railway, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, lessees; Illinois Central Railroad Company; Gulf, Mobile and Ohio Railroad Company; Louisville and Nashville Railroad Company; The Nashville, Chattanooga and St. Louis Railway; Seaboard Air Line Railway Company; and Southern Railway Company, collectively referred to as "Southern Defendants", and show unto the Court:

The motion, addressed to the discretion of the Court, does not sufficiently comply with Rule 24 of the Rules of Civil Procedure governing interventions, in that—

1. The motion is not timely (Par. (b) of Rule 24).

2. It is not accompanied by a pleading sufficiently setting forth the cause of action or claim of intervener (Par. (c) of Rule 24).

3. If allowed it will unduly delay the adjudication of the rights of the original parties (Par. (b) of Rule 24).

4. If allowed it will prejudice these defendants.

As To Timeliness:

The situation is that the motion of Georgia to file its original bill of complaint was filed June 19, 1944; the motion to file the amended bill was filed September 20, 1944 and granted March 22, 1945. Motion by defendants to make more specific and for a bill of particulars was filed May 26, 1945, and allowed June 18, 1945.

A special master was appointed December 17, 1945 by this Court to take testimony, find the facts specially and state separately his conclusions of law, etc. Acting thereunder the master began the taking of testimony on March 18, 1946, and continued with interruptions until August 20, 1946. The transcribing of the record was completed November 11, 1946, and consists of some 6,190 pages with 17 volumes of exhibits received December 5, 1946. April 14, 1947 is the date set for filing of briefs and May 13, 1947 for argument.

All of the evidence in the record was directed toward establishing or refuting Georgia's complaint and none of it was directed toward proving or disproving or answering the cause of action, if any, now asserted for the first time in the petition executed for the State of Alabama by James E. Folsom, Governor of Alabama.

Alabama does not offer as excuse for its delay that it had only recently gained knowledge of the pendency of the suit.

This it could hardly do, since it is a matter of public knowledge and no recent case has had wider publicity. It is true that Governor Folsom was inaugurated as Governor of Alabama in January, 1947, but this is not a personal suit and the knowledge attributable to the State through its former officers for a period of two years and seven months is controlling and shows lack of due diligence. To ask to come into a case as far advanced as is this one would be unjust to the parties to the original action.

There is no hard and fast rule as to what is timely application within which to intervene—that is left to the sound discretion of the court.

> *Simms* v. *Andrews*, 118 F. (2d) 803, 805.
> *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit*, 112 F. (2d) 669.

If this be a timely intervention, it is difficult to visualize one that would be untimely.

Insufficiency of the Pleading Accompanying the Motion:

In Section 3 of Alabama's motion the following appears:

> "3. Your petitioner, the State of Alabama, adopts as its own and as applicable to it the allegations contained in the amended complaint heretofore filed in the said cause by the State of Georgia, as fully and to the same extent as if petitioner had originally been named in and a signatory thereto."

Rule 24(a) provides in part:

> "The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

This must necessarily mean that the complaint shall be sufficient to advise the defendants of the nature of the claim advanced. Alabama's motion does not sufficiently advise defendants. It must be borne in mind that this is not a class suit. In the case of *Mullins* v. *DeSoto Securities Co.*, 6 Fed. Rules Service 374, there will be found a general discussion of the holdings under Rule 24.

If we examine the complaint Alabama has adopted, w find that it has adopted a pleading which sets forth "Th Grievances of the State of Georgia". Georgia charges tha defendants "have conspired to establish and maintai freight rates which are unjust, unfair and harmful to th State and the people of *Georgia*" (pp. 7 and 8, amende complaint).

Georgia avers, as it was compelled to do, that it and it citizens had been damaged and are threatened with damag by the rates which were so fixed as (a) to deny to many o Georgia's products equal access with those of other State to the national market; (b) to limit Georgia's economy (c) to frustrate the measures taken by Georgia to encour age manufacture; (d) to hold Georgia's economy in a stat of arrested development (p. 8, amended complaint), etc.

The charge is that the rates have been so fixed as t prefer the ports of other states (Mobile, Alabama, is one of the ports of another state) over the ports of Georgia (p. 15, amended complaint). Georgia also illustrates (Ex. 1 to amended complaint) with rates to Georgia points which it says are illegal and discriminatory (p. 11, amended complaint).

There was no averment in the amended complaint of damage or threatened damage to Alabama. This Court construed the amended bill filed by Georgia "to charge a conspiracy among defendants to use coercion in the fixing of joint through rates and to discriminate against Georgia in the rates which are fixed" (*Georgia* v. *Penna. R. R. et al.*, 324 U. S. 439, 462). To permit intervention by Alabama would, we submit, be contrary to the well known rule that issues tendered by or arising out of plaintiff's bill may not be enlarged by an intervener.

This Court in its opinion suggested "The Complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise" (324 U. S. 439, 463). The averments of damage to Georgia and the rates complained of and other averments were not deemed by defendants to be sufficiently specific

and they filed a motion for a bill of particulars which was granted in part. In answer to questions as to what rates the conspiracy, coercion, etc., applied, Georgia answered as to each such question "To coerce, restrain, prevent and hinder any individual carrier transporting freight *to, from or within the State of Georgia*", etc. (p. 7, Bill of Particulars).

Alabama specifically adopts "the allegations contained in the amended complaint" but has not adopted or referred to the bill of particulars. If Alabama is allowed to intervene under the meager and general averments attached to the motion, the status will be that Alabama will be allowed to intervene in an individual suit brought under the Clayton Act to enjoin the defendants from acts which "threatened loss or damage" to Alabama without any of the specifications of damage, etc., as to Alabama which the Court required as to Georgia. This will make it necessary for defendants to file a motion for a bill of particulars, just as was done in the case of Georgia.

The petition pleads no facts to support a finding, and does not even aver that injunctive relief is necessary to protect Alabama against threatened loss or injury.

If the type of case made by Georgia would enable Alabama to intervene, then by the same token all other States could intervene and this but lends aid to defendants' position that Georgia has made out no such case individual to it as would entitled Georgia to sue, but if any case has been made, which we deny, it is one which could be brought only by the United States.

The original jurisdiction of this Court is derived from Art. III, Section 2, Clauses 1 and 2 of the Constitution of the United States, which limits the jurisdiction in which a State shall be a party to controversies between a State and citizens of another State. This Court is aware that the question of jurisdiction of the cause was raised in the original suit (*Georgia* v. *Penna. R. R., et al*, 324 U. S. 439, 463)

on the ground that two of the defendants are citizens of Georgia. The Court held "Georgia may not of course invoke the original jurisdiction of the Court in a suit against one of her citizens." The Court stated that the issue was an involved one and suggested that the citizenship of the two defendants in question be challenged by motion. That issue in the original suit has been saved by defendants, is still insisted upon, and remains undetermined. Alabama adopts the allegations of the amended bill which shows that one of the defendants, Gulf, Mobile and Ohio Railroad Company is a resident of the State of Alabama (pp. 13 and 14, Amended Bill). The result will be that, whatever rights, if any, Alabama asserts through intervention will be determined in a cause which shows on the face of the bill Alabama could not have originally brought in this Court. We suggest that the Court in the exercise of its discretion in allowance or not of the intervention should not permit this added complication.

Undue Delay in Adjudication of the Rights of the Parties to the Original Suit:

It is true Alabama says:

> " * * * Petitioner also adopts the evidence offered by the State of Georgia during the course of this litigation and accepts and relies upon the record as it now stands. Petitioner makes no request for reopening of the proceedings for the purpose of further hearing or the taking of further testimony."

If it adopts the record as it stands, it will have a record upon which it cannot possibly recover or receive any benefit. The futility of the intervention seems apparent. No testimony has been offered by Georgia directed to discrimination against Alabama, damage to Alabama, or to a recovery by Alabama. On the contrary, in certain parts of the testimony, Georgia sought to prove discrimination against Georgia and *in favor of Alabama.* For illustration, see Ex. S-340.

In Section 4 of the motion the averment is that the amended complaint of Georgia and the evidence set forth an unlawful conspiracy by establishing freight rates "detrimental and burdensome to the commerce, and the economy of petitioner, the State of Alabama," etc. Notwithstanding petitioner's concession that it makes no request for reopening of the proceedings, defendants show unto the Court that they would be unwilling for the above averments as to damage to Alabama to go unanswered and defendants may be forced to introduce evidence to disprove such allegation. In which event the record would have to be reopened. Furthermore, defendants would feel compelled to move that Alabama's charges be made more specific. All of which would require great delay and expense in a cause almost ready for submission.

No rights which Alabama has will be foreclosed by the judgment in this case and it is free to prosecute whatever claim it may have in a separate suit filed in a proper forum and these defendants express entire willingness to meet them in such proceeding.

Southern Defendants deem it their duty to the Court to bring the true status of the case to the Court's attention and, for the reasons assigned, ask the Court in the exercise of its discretion to deny the petition of Alabama to intervene.

Respectfully submitted,

WILLIAM L. GRUBBS,
J. N. FLOWERS,
ELMER A. SMITH,
W. R. C. COCKE,
WILLIAM H. SWIGGART,
S. R. PRINCE,
Counsel for Southern Defendants.

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Clerk, Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 10 ~~11~~, Original

THE STATE OF GEORGIA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Defendants

SPECIAL REPORT OF THE SPECIAL MASTER ON THE MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE A PETITION OF INTERVENTION.

LLOYD K. GARRISON,
Special Master.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 11, Original

THE STATE OF GEORGIA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Defendants

SPECIAL REPORT OF THE SPECIAL MASTER ON THE MOTION OF THE STATE OF ALABAMA FOR LEAVE TO FILE A PETITION OF INTERVENTION.

To the Supreme Court of the United States:

In this case the State of Alabama seeks to intervene as plaintiff in a suit brought in this Court by Georgia against the defendant railroads, alleging a conspiracy on their part to use coercion in the fixing of freight rates and to discriminate against Georgia in the rates which are fixed, in violation of the anti-trust laws. This Court appointed me as Special Master in that case, and subsequently referred to me for a "special report" the application of Alabama for intervention. I am reporting accordingly.

The essential events leading up to this report are as follows:

On June 19, 1944, Georgia moved this Court for leave to file its complaint. On September 20, 1944, Georgia moved for leave to file an amended complaint (hereinafter termed "the complaint"). On March 26, 1945, this Court granted the motion, accompanying its order with an opinion (*Georgia* v. *Penna. R. R. Co., et al.*, 324 U. S. 439).

On December 17, 1945, I was appointed Special Master. Hearings before me began on March 18, 1946, and were concluded on August 20, 1946.

On February 10, 1947, the State of Alabama filed with this Court its motion for leave to file a petition of intervention in the above proceedings. With the motion were filed a petition of intervention and a brief.

On March 3 and 4, 1947, the Southern and Northern defendants respectively filed papers in opposition to the motion.[1]

On March 17, 1947, this Court entered the following order:

> The motion of the State of Alabama for leave to file a petition of intervention is referred to the Special Master for a Special Report at his earliest convenience.[2]

On March 28, 1947, I held a public hearing on the motion, at which all parties were represented.[3] I now submit my

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[1] The Southern defendants' paper was entitled a "Reply", and the Northern defendants' paper was entitled a "Memorandum in Opposition."

[2] The original order of appointment of the Special Master directed him "to find the facts specially and state separately his conclusions of law thereon . . . and to submit the same to this Court, with all convenient speed, together with a draft of the decree recommended by him." I have assumed that the scope of my functions under the latest reference would be no less broad than under the original reference.

[3] The State of Alabama appeared by its Attorney General, A. A. Carmichael, and its Assistant Attorney General, Claud D. Scruggs. The State of Georgia appeared by its Deputy Assistant Attorney General, William L. McGovern, and its Assistant Attorney General, Claude Shaw. Messrs.

Report, together with a transcript of the hearing.

At the hearing counsel for the State of Georgia supported Alabama's application and read telegrams from Governor Thompson of Georgia and from Georgia's Attorney General, welcoming Alabama's proposed intervention.[4] The Northern and Southern Defendants continued to assert their opposition to the intervention.

In considering the merits of Alabama's petition, Rule 24 of the Rules of Civil Procedure for the District Court may be taken as a guide, in the absence of any express rule of the Supreme Court on the subject. The pertinent portions of Rule 24 are as follows (italics mine):

> (b) Permissive Intervention.[5] Upon *timely application* anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question *of law or fact in common.* In exercising its discretion the court shall consider whether the intervention will *unduly delay or prejudice* the adjudication of the rights of the original parties.
>
> (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor

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John Dickinson and Hugh B. Cox appeared for the Northern defendants (except the Chesapeake and Ohio Railway Company and The New York, Chicago & St. Louis Railroad Company, for whom Messrs. Horace L. Walker and James B. Osborne appeared). Messrs. William H. Swiggart and W. R. C. Cocke appeared for the Southern defendants. Mr. Elmer A. Smith appeared for the Illinois Central Railroad Company; Messrs. Richard B. Gwathmey and Frank Gwathmey for the Atlantic Coast Line Railroad Company; and Mr. W. L. Grubbs for the Louisville & Nashville Railroad Company. Mr. R. V. Fletcher appeared for all defendants.

[4] The telegram from Governor Thompson read as follows: "As Governor of Georgia I welcome the intervention of the State of Alabama in the case of Georgia against the Pennsylvania Railroad and others." Transcript (hereinafter designated as "T"), p. 6211.

[5] Paragraph (a) of the Rule (28 U. S. C. A. 531) relates to "Intervention as of Right," and concededly is not applicable. T. 6205.

> and shall be *accompanied by a pleading* setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

As to the four requirements italicized above, only one is not seriously in issue here. That is the requirement that the application and the main action shall have a "question of law or fact in common." Alabama, in its petition, "adopts as its own and as applicable to it" the allegations of Georgia's complaint, "as fully and to the same extent as if" Alabama had been originally named in the complaint and had signed it. Alabama also "adopts the evidence offered by the State of Georgia during the course of this litigation and accepts and relies upon the record as it now stands." At the hearing counsel for Alabama, in answer to certain doubts expressed by the defendants, construed the petition as adopting, and making binding upon Alabama, all arguments and admissions, if any, made by Georgia during the course of the proceedings.[6] The requirement of a "question of law or fact in common" has therefore clearly been met, and I so find. There is really no dispute on this point.

The defendants, however, object generally to Alabama's "adoption" of Georgia's complaint as a failure to comply with the requirement of the rule that the motion shall be accompanied by a "pleading setting forth the claim . . . for which intervention is sought." This objection must be considered.

The Requirement of a Pleading

The motion is accompanied by a "petition for leave to intervene." The "petition" begins by saying that Alabama "prays this Honorable Court for leave to intervene and

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[6] T. 6205-6207.

become a party plaintiff in the above-entitled cause, and in support of its said petition alleges and shows to the Court as follows . . ."; and then follow allegations cast in the language of pleading, first dealing with jurisdictional points, then adopting Georgia's complaint and the record made in the Georgia suit, and finally alleging injury to Alabama as well as to Georgia and other Southern States. The defendants, however, object to the "adoption" as insufficient to constitute the petition a pleading. They cite the case of *Mullins* v. *DeSoto Securities, Inc.* (D.C., W.D. La., 1942) 2 F.R.D. 502, aff'd 136 F. (2d) 55, in which a petition for intervention was dismissed on the ground, among others, that it had merely adopted the plaintiff's pleadings and that this was not enough to satisfy Rule 24(b). However, in that case it appeared clearly that the intervener's claims differed in substantial particulars from those of the plaintiff's, and were much more extensive, so that a distinct pleading was really needed; and in any event the principal ground of the decision was that the granting of the application would unduly delay the proceedings and prejudice the rights of the original parties. More in point, I think, is *Rhinehart* v. *Victor Talking Mach. Co.* (D.C., N.J., 1917) 261 Fed. 646, 648, in which Judge Haight said that "the name given to the pleading is of little or no importance,[7] provided that the pleading itself

[7] It was called in that case a "supplemental bill." In *Toler* v. *East Tennessee, V. & G. Ry. Co.* (C. C., E. D. Tenn., 1894), 67 Fed. 168, the Court let the "petition" (filed by a party seeking to intervene as a defendant) stand as an answer, after striking out certain impertinent and irrelevant material. These cases were decided under the old Equity Rule 37 (198 Fed. XXIX), which did not specifically call for any pleading. The courts themselves, however, in applying that rule, required a pleading of some sort (in addition to the *Rhinehart* and *Toler* cases see *Stallings* v. *Conn* (C. C. A. 5th, 1934), 74 F. (2d) 189, and *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.* (1935), 296 U. S. 53). I should not suppose that the new Rule 24(c) would be construed with any more technicality than the courts applied to the old rule.

properly sets forth the intervener's right or interest in the litigation, and is drawn so that it may be answered by any of the parties entitled to answer it." The defendants contend, however, that Alabama's petition is not so drawn that it may be properly answered.[8]

They object, in the first place, that certain allegations of the complaint appear on their face to be inapplicable to Alabama,[9] despite the statement in Alabama's petition that the complaint is "as fully applicable" to Alabama as if Alabama had been named in the complaint. Examples of these allegations are: that the defendants have discriminated against the ports of Savannah and Brunswick; that specific rates to particular points in Georgia are discriminatory; and that Georgia owns a railroad whose value has been impaired by the conspiracy.

Secondly, the defendants say that certain other allegations of the complaint—which they do not specify—fail to disclose on their face whether they are or can be made applicable to Alabama, and the defendants have no way of telling which allegations they must meet and which they need not meet.[10]

Thirdly, the defendants contend that if Alabama's adoption of still other very general allegations of damage to Georgia's economy can properly be deemed to be applicable

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[8] The filing of a pleading is not solely for the purpose of enabling the defendants to frame an answer. It is also for the purpose of enabling the court "to know the nature of the . . . contention desired to be made by the applicant" (*Stallings* v. *Conn* (C. C. A. 5th, 1934), 74 F. (2d) 189, 191); "to determine whether the applicant has the right to intervene, and, if not, whether permissive intervention should be granted." (*Miami County National Bank of Paola, Kan.* v. *Bancroft* (C. C. A. 10th, 1941), 121 F. (2d) 921, 926, referring specifically to Rule 24). Alabama's petition, considered as a pleading, would seem to be sufficient for these purposes. The point has not, however, been argued.

[9] Northern Defendants' "Memorandum in Opposition," filed with this Court March 4, 1947, pp. 3, 4; Southern Defendants' "Reply," filed with this Court, March 3, 1947, p. 4, and see T. 6228.

[10] Northern Defendants' "Memorandum in Opposition," p. 4.

to Alabama, these allegations do not sufficiently specify the nature of the injuries of which Alabama complains. Georgia has been required to submit a bill of particulars, but Alabama has not adopted or referred to the bill of particulars, and therefore it would be necessary for the defendants to demand a bill of particulars from Alabama.[11] At the hearing the Attorney General of Alabama construed Alabama's petition as adopting Georgia's bill of particulars.[12] The defendants, however, were unwilling, without further study, to say whether or not this statement by the Attorney General would relieve them of the necessity of moving for a bill of particulars.[13]

I have considered these objections in the light of what I conceive to be the purpose of Rule 24, of which it has been said (in *Western States Mach. Co.* v. *S. S. Hepworth Co.* (D.C., E.D. N.Y., 1941) 2 F.R.D. 145, 146):

> This Rule as well as all the other Rules of the Federal Rules of Civil Procedure should be construed with great liberality as they were intended to shorten trials, avoid technicalities and promote the administration of justice.

I conclude, therefore, that Alabama's petition should be considered as a pleading within the meaning of Rule 24(c) and recommend that the defendants' contentions for dismissal on this ground be denied for the following reasons:

> (1) As a pleading Alabama's petition is defective in form in that certain allegations in Georgia's complaint, which Alabama purports to adopt, are on their face inapplicable to Alabama. This defect, however, is not so substantial as to warrant denial of Alabama's motion for leave to file the petition. These particular

[11] Southern Defendants' "Reply,", p. 5.
[12] T. 6207.
[13] T. 6242.

allegations could be either disregarded as surplusage, or stricken on motion.

(2) The defendants have claimed that certain allegations (not specified) in Georgia's complaint might or might not be applicable to Alabama. This doubt is an objection going to form rather than to substance. Alabama's petition explicitly makes all such allegations applicable to Alabama as fully as if Alabama had been named in Georgia's complaint. In the absence, therefore, of any showing of prejudice to the defendants on this score the objection would not warrant denial of the motion.

(3) If the defendants are in doubt as to how they should answer Alabama's petition in any material respect they could always file a motion for a bill of particulars. In this connection I construe Alabama's petition, in accordance with the statement of the Attorney General of Alabama at the hearing, as adopting and making applicable to Alabama not only Georgia's complaint but Georgia's bill of particulars. The possibility, if not the probability, that such a bill might later need to be filed, is an element which will be considered hereinafter under the heading of undue delay or prejudice.

This conclusion brings me to the consideration of the defendants' objections to the petition on the ground of timeliness.

The Question of Timeliness

As stated above, Alabama filed its motion for leave to intervene on February 10, 1947. The posture of the case was then as follows. The evidence was all in, the hearings having been completed on August 20, 1946. The transcript filled seventeen quarto volumes. The documentary exhibits filled an additional seventeen volumes. The parties were at work on their briefs, and on proposed findings and decrees, in preparation for final arguments before the Special

Master to be held in April, 1947. (They have since been postponed to May 13-16 inclusive and May 20-23 inclusive. The briefs and other papers are now in the last stages of preparation).

The defendants contend that if this be a timely intervention, it is difficult to visualize one that would be untimely.

At the hearing on March 28, 1947, the Attorney General of Alabama explained the delay in filing as follows:[14]

> "Over a period of years, your Honor, the State of Alabama, together with other states similarly situated, was most hopeful of receiving some measure of relief from the *Southern Governors* case and from the Interstate Commerce Commission case known as Docket No. 28300."

(The *Southern Governors* case had been brought before the Interstate Commerce Commission in 1937 by Alabama, Georgia and six other Southern states. They alleged that the commodity freight rates on a large number of manufactured or processed articles from the states in question to points in Official (Northern) Territory were discriminatory and prejudicial. The case was decided in 1939 (235 I. C. C. 255) and resulted in certain rate adjustments. Docket No. 28300 was an investigation initiated in 1939 by the I. C. C. into the whole class rate structure east of the Rocky Mountains. It resulted in a decision announced on May 15, 1945, prescribing an interim class rate revision which, in general, increased the class rates within Official Territory ten per cent, reduced the class rates within other territories ten per cent, and reduced by ten per cent the interterritorial class rates. As a result of suits (now pending on appeal before this Court) brought by Northern states and Northern commercial interests and by Western

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[14] T. 6194-6198.

railroads to set aside this interim order, it has not become effective).

> "Throughout the region involved, including my State, we were most hopeful that some degree of relief would come.
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> "In October of last year" (after the completion of the hearings in the Georgia suit) "in collaboration with the then elected Governor of the State, and on my own initiative as the then Attorney General of the State, we decided to look into the record in this case. I proceeded to Georgia, conferred with the Attorneys for Georgia, and perused the record to some extent. . . . A perusal, may it please the Court, of the Georgia record was most convincing on this point: That we in Alabama, and indeed in all other states similarly situated, had been lulled into a sense of false security about any relief of a substantial nature coming to us as a result of the *Southern Governors* case, or the Interstate Commerce case, Docket No. 28300. We found the record replete with evidence, proofs and examples of the successful efforts on the part of the railroads to stand apart from and circumvent the relief provided in Docket No. 28300" (The defendants deny that any such efforts had been made). "It was at that time that we considered pursuing two courses:
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> "First: We considered instituting a suit in the Supreme Court of the United States, invoking original jurisdiction of the Court, similar to the suit Georgia instituted; and
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> "Second: We considered, your Honor, the course of attempting to intervene in this suit."

It was then decided that since Alabama's case was identical with Georgia's, intervention should be sought in order to save time and expense. The application for intervention was thereupon filed.

Thus, the Attorney General argued, Alabama has acted with all reasonable dispatch, and the timeliness of the peti-

tion ought not to be challenged, particularly since Alabama asks for nothing more than to come into the case as it now stands, without seeking the privilege of introducing any further testimony in support of its position, which is in all respects the same as that of Georgia.

To this argument the defendants replied, in substance,[15] that Alabama as a State had notice of Georgia's suit from the time it was first commenced in 1944, and that whatever the political explanation may be for the delay in intervening, the delay occurred and is chargeable to Alabama, and by no stretch of the imagination can the motion for leave to intervene be described as timely.

I have not found any reported cases in which intervention was permitted after all the evidence was in. In the following cases intervention was denied, partly on the ground of lack of timeliness: where the application was filed about three years after institution of the proceedings and after the Special Master's report had been submitted (*Miami County National Bank* v. *Bancroft* (C. C. A. 10th, 1941) 121 F. (2d) 921); where the application was filed about two and one-half years after commencement of the suit, and while a motion for rehearing by the plaintiff (following an adverse judgment) was pending (*Mullins* v. *DeSoto Securities Co.* ((D. C., W. D. La., 1942) 2 F. R. D. 502); where the application was filed about two years after initiation of the suit, and about three weeks before trial (*White* v. *Hanson* (C. C. A. 10th, 1942) 126 F. (2d) 559); where the application was filed about two and one-half years after the commencement of the action and about two and one-half months before trial (*Jacobs* v. *Volney Felt Mills, Inc.* (D. C., N. D. Ind., 1942) 47 F. Supp. 493). On the other hand, in one case intervention was permitted where the application had been filed some four years after commencement of the suit, and on

[15] T. 6221.

the day when the trial began (*Innis Speiden & Co.* v. *Food Machinery Corp.* ((D. C., Dela. 1942) 2 F. R. D. 261).

The courts have been unwilling to lay down any hard and fast rule. As was said in *Simms* v. *Andrews* (C. C. A. 10th, 1941) 118 F. (2d) 803, 806:

> The rule is silent as to what constitutes timely application and the question must therefore be answered in each case by the exercise of sound discretion by the trial court.

I have found no case in which intervention has been denied *solely* on the ground of untimeliness. The controlling question seems to be whether intervention will unduly delay the proceedings or prejudice the rights of the original parties. Where undue delay or prejudice would be caused, the courts have generally found untimeliness also; but where undue delay or prejudice would not be caused and the need of intervention has been apparent, the tendency has been to grant the application even after a long lapse of time, as in the *Innis Speiden* case above.

I conclude, therefore, that the issue of timeliness in this case cannot be considered apart from the question of undue delay or prejudice, which is discussed below.

The Question of Undue Delay or Prejudice

While, as has been stated, Alabama would be content to rest upon the record as it now stands, the defendants have stated that if the intervention is granted, they will feel compelled to reopen the record and introduce further testimony.[16] To rebut the allegations of damage to Alabama,

[16] Counsel for the Northern defendants made this statement at the hearing without qualification; "if she is admitted here we will insist most strenuously on the right to reopen the record in order to present evidence that will show the lack of injury" (T. 6217). Counsel for the Southern defendants was not prepared to make an unqualified statement of this sort without checking with his clients. For one thing, the Gulf, Mobile &

which by adoption would be the allegations of damage to Georgia, the defendants could not, they say, rest upon the evidence already introduced, because the situations within Georgia and Alabama would not in all respects be the same, and evidence directed to the one situation would not be in all respects pertinent to the other.

For example, Georgia's complaint charges (in section 4):

> Because of the lack of national markets caused by the conspiracy of defendants which manifests itself in unfair and prejudicial freight rates to Georgia and its citizens, crops have not been grown, factories have not been built, funds have not been invested, employment has not been created, resources have not been exploited, and the State economy, geared to the national economy, has not been developed as otherwise it would have.

To rebut these charges, the defendants have introduced evidence relating in part to freight rates on many manufactured articles shipped from Georgia to Northern markets in relation to rates charged to Northern producers of similar articles, and evidence relating to the economic and industrial progress of Georgia in the years since the alleged conspiracy began. The defendants now say that if intervention were granted they would feel compelled to introduce similar evidence pertaining to Alabama rates and to the economic and industrial progress of Alabama.[17]

To take another example. Section 4 of the complaint alleges that:

> The people of Georgia have been further injured and distrained by the conspiracy of the common carriers

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Ohio Railroad Co., named as a defendant in Georgia's suit, is a citizen of Alabama and, being such, it had instructed counsel not to commit it as to what it would do if Alabama's intervention were permitted (T. 6233). For convenience, I shall refer generally in this section of the report to the "defendants," without attempting to distinguish between the Northern and Southern defendants.

[17] T. 6215, 6216; So. defendants' Reply, p. 7.

> . . . which has resulted in a preference to the seaports of other States over those of Georgia. . . . Defendants, by their rates and practices, give preference and advantage in rates on domestic traffic to and from the North Atlantic ports of Baltimore, Philadelphia, New York, Boston, and other related ports over the ports of Savannah and Brunswick, to the injury and prejudice of the sovereign State of Georgia and to the citizens therein. Illustrative of this, on shipments from Alton, Illinois, in Official Territory as hereinafter defined, to Baltimore, Maryland, the first class rate is $1.68 per one hundred pounds, while to Savannah, Georgia, six miles less in distance, the rate is $2.39.

Alabama having adopted these allegations, the defendants would feel it incumbent upon them, if intervention were granted, to introduce evidence to show that Alabama ports have not been discriminated against in favor of Baltimore, Philadelphia, New York, Boston, and other related ports. The evidence already introduced with regard to Savannah and Brunswick would not serve for this purpose.[18]

The defendants assert, finally, that if intervention is granted they will be compelled to re-examine the entire record in order to ascertain which of the evidence introduced by Georgia of overt acts by the defendants, allegedly harmful to Georgia, actually took place in Alabama or affected shippers in Alabama. (There is some evidence in the record of acts thus related to Alabama).

The defendants might then feel it necessary to introduce further evidence to show that the acts in question were not harmful to Alabama or to Alabama shippers. The principal concern of the defendants up to this time has been to rebut any evidence of overt acts allegedly harmful to Georgia or its shippers. If intervention is granted, the defendants will be equally concerned to sift this evidence

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[18] T. 6215.

for the bearing it may have upon injuries to Alabama or its shippers, and to supplement it if necessary by additional evidence relating to Alabama.[19]

With regard to these contentions by the defendants about the need of re-opening the record and of introducing at least some additional evidence, there is a sharp difference in theory between the defendants on the one hand and Georgia and Alabama on the other.

Georgia contends—and Alabama adopts Georgia's view—that harmful acts by the co-conspirators have been shown merely as "illustrations" of the operation of the conspiracy; that these illustrations could be drawn from anywhere in the Southern States, and not necessarily from within Georgia (or Alabama) inasmuch as the alleged conspiracy discriminates against the South generally; that once it has been shown that the allegedly unlawful rate mechanisms are operating in Georgia (or in Alabama), and once their operations have been illustrated by overt acts performed somewhere in the South, the ground for an injunction has been laid. In other words, it is not necessary to show specific cases of injury to Georgia (or Alabama) shippers. It is necessary only to illustrate the functioning of the conspiracy in the South, and to show its presence in Georgia (or Alabama).[20]

The defendants' theory is diametrically opposed to this.[21] The defendants argue that unless Georgia (or Alabama) can establish actual, and not merely assumed, injury to Georgia or its citizens by showing specific acts of discrimination or coercion directed against them, no injunction can be had. This is why the defendants insist that, if Alabama is permitted to intervene, they must have an opportunity

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[19] T. 6215-7; 6227; 6234-6.

[20] T. 6210; 6244-5.

[21] T. 6214.

to re-open the record and introduce evidence to show that Alabama, like Georgia, has not (as they assert) been actually injured by any acts of the defendants.

It would not be proper for me at this juncture to attempt any conclusion as to which of the clashing theories is correct, nor do the parties wish me to do so.[22] The conflict is deep and runs through the entire proceedings in the Georgia suit. A great deal of evidence on behalf of each side has been objected to by the other in accordance with their rival views of what must, as a matter of law, be proved. As soon as the conflict became apparent—which was at the very outset—I reached an understanding with the parties that I would venture no conclusions of law until all the evidence was in and until I had had the benefit of the parties' briefs and arguments based upon an analysis of the entire record. As indicating the importance which the parties attach to these briefs and arguments, I may say that the briefs have been under preparation for nearly six months, and that eight days have been assigned for the final arguments in May.

I have stated the nature of the conflict in theory very crudely, and in an over-simplified form. The legal position of Georgia has been stated upon a number of occasions in the record, and not always in precisely the same way. I would not wish my summary of Georgia's position, as set forth above, to be taken as definitive. In my final report to this Court I shall go into the whole question at length.

The bearing of this conflict in theory upon Alabama's application may be summed up as follows. The defendants, relying upon their theory of what must be proved, say that if Alabama intervenes, they will feel it necessary to introduce additional evidence for the purposes I have already described. Georgia and Alabama, relying upon a quite

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[22] T. 6248.

different theory of the case, believe that such evidence would be unnecessary. As Special Master, however, I must receive the evidence which the defendants say they will proffer. I cannot rule upon its relevance without ruling upon the whole theory of the case; and this it has been agreed that I shall not do except in my final report to this Court. Quite apart from this compelling reason for declining to rule upon the relevance of such additional evidence, I agreed with the parties at the outset that I would receive whatever evidence either side might offer, subject to any objections which the other side might make, and that in my final report to this Court I would state my conclusions of law with regard to these objections. We agreed that I ought not to exclude evidence which seemed to me incompetent or irrelevant, because if this Court should later disapprove of the exclusions, the evidence would thereafter have to be taken and sifted, which would obviously delay the proceedings and defeat the object of appointing a Special Master.

From this it follows that if Alabama's application is granted, the defendants—unless they change their minds, which I have no reason to suppose they will do—will offer an underterminable amount of additional evidence which it will be my duty to receive, whatever may be the ultimate holding as to its admissibility. The procedural consequences of such a step cannot exactly be foreseen, but for the following reasons I conclude that the granting of Alabama's application will result in substantially delaying the final adjudication of this case and in adding materially to the expense of the litigation:

(1) That in view of the number of counsel involved, the difficulty of agreeing upon mutually convenient dates, and the absorption of everyone's time in preparing for the scheduled arguments in mid-May (which will be held in any

event), it will not prove feasible to schedule further hearings until well into June or July, depending somewhat, of course, upon when this Court acts on Alabama's application;

(2) That the commencement of hearings will be further postponed if the defendants should move, as they well may, for a bill of particulars from Alabama;

(3) That in the course of the hearings, when they are finally held, there will be objections to evidence with regard to which I will ultimately have to state my conclusions of law;

(4) That after the hearings have been completed, some considerable time must be allowed for the completion and mechanical reproduction of the transcript, depending, of course, on the length of the hearings;

(5) That after further time has been allowed for studying the transcript, a new set of briefs and proposed findings of fact will have to be prepared, and after that final arguments will be held;

(6) That after the final arguments have been held, the time necessary for preparing the Special Master's report to this Court will be greater than would otherwise be the case, not only because of the enlarged bulk of the record, but because of its more complex nature and the necessity of dealing with two plaintiffs, whose cases cannot be treated as one in view of the defendants' election to introduce evidence relating particularly to Alabama;

(7) That an enlarged and more complex report from me as Special Master will tend proportionately to increase the time necessary for its study by this Court.

Finally, I must advert to the possibility—however remote it may seem to be—that, as the defendants have

pointed out,[23] if Alabama is permitted to intervene by the simple process of adopting Georgia's complaint and the record as it stands, other Southern States may similarly apply for intervention.

But would the burdens just enumerated, even though substantial, be *undue* within the meaning of Rule 24(b)? In determining that question, it would seem appropriate to consider the applicant's need for intervention. For if the need is very great the delay and expense, in relation thereto, might not be considered as undue, whereas if the need is very slight an opposite conclusion might be reached.

Alabama's Need of Intervention

Alabama's moving papers, without specifying any practical benefit which Alabama might obtain from intervening, simply state in effect that Alabama stands in the same position as Georgia, is injured by the alleged conspiracy in the same way as Georgia, and would, therefore, like to intervene in Georgia's suit.

At the hearing before me, however, counsel for Alabama assigned three grounds for intervention:

> (1) *That if the motion to intervene is denied Alabama would be forced to bring a suit of its own with resulting expense and delay far in excess of any expense and delay which would be caused by intervention.*

Upon further discussion, however the Attorney General of Alabama conceded that should the right to intervene be denied the sound course from a legal point of view would be for Alabama to await the outcome of Georgia's case. The Attorney General in making this concession pointed out that it was necessarily a personal one since he could not speak for the Governor in this connection.[24]

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[23] T. 6256.

[24] T. 6259.

It seems clear to me, and I conclude, that if the motion is denied, Alabama would have everything to gain and nothing to lose by refraining from a suit of its own and awaiting the outcome of Georgia's suit. Indeed, it might even be contended that the granting of the motion would be a disadvantage to Alabama. For Alabama, by coming in, would be bound by everything that Georgia has said and done, and being so bound, would in case of an adverse decision be in a less favorable position to institute a suit of its own than if it had stayed out and were free to frame its case in the light of this Court's decision.

> (2) *That by coming in Alabama would be entitled to see to it that an injunction, if one were issued, would be enforced in accordance with its terms; Alabama does not wish "to rely solely for enforcement upon the changing whims of political administrations in Georgia . . ."* [25]

The defendants objected that this was too speculative a ground for intervention; that it involved three contingencies—first, that a decision in Georgia's favor would be made; secondly, that the railroads would place themselves in contempt of Court by disobeying it; and thirdly, that Georgia would then do nothing about the matter. The defendants argued that these contingencies were too remote to constitute a sufficient reason for intervention.[26]

Moreover, in answer to a question by the Special Master, the defendants stated that they would have no objection to a dismissal of Alabama's motion without prejudice to Alabama's right to renew it if an injunction were issued in Georgia's favor and Alabama wished thereafter to intervene for purposes of obtaining enforcement of the injunc-

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[25] T. 6199.

[26] T. 6219, 6222, 6223, 6263.

tion.[27] Counsel for Georgia did not see how Alabama could be permitted to seek enforcement of an injunction in a suit to which Alabama had not been a party.[28] Counsel for Alabama was uncertain about the law on this point,[29] and contended that a dismissal of the motion without prejudice to its renewal would simply amount to a postponement of the issue and would solve nothing since objections identical to those now being argued would still have to be met.[30] To this the defendants replied that if the application were postponed until after an injunction were issued (if one should be issued), the objections now being raised with regard to the necessity of introducing evidence concerning Alabama's injuries would disappear.[31] The only question then would be the simple one of attending to the enforcement of a decree affecting the Southern States generally.

Having considered the contentions of the parties, I conclude that Alabama's need for intervention for the purpose of insuring enforcement of an injunction (if one should be issued) is remote and speculative.

(3) *That intervention would enable Alabama to participate in the management of the case from this point forward.*[32]

During the course of the discussion the Special Master raised the point that by the time Alabama could intervene, if intervention is granted, Georgia's brief and proposed findings of fact and proposed decree would all have been

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[27] T. 6260, 6263.
[28] T. 6261.
[29] T. 6260.
[30] T. 6260, 6261.
[31] T. 6261, 6262.
[32] T. 6249, 6265.

completed and submitted [33] and (apart from the taking of such additional evidence and the handling of such motions and objections as might result from the intervention of Alabama) nothing would remain in the way of management except to argue the case before the Special Master and then before this Court; and could not Alabama then express its own views to the Special Master and to this Court in an *amicus curiae* capacity—as the defendants suggested—as effectively as if Alabama were to intervene? Counsel for Alabama replied that as *amicus curiae* Alabama would not have power to file exceptions to the Master's report. In reply to the suggestion that Alabama could bring to this Court's attention as *amicus curiae* any portions of the Special Master's report with which it disagreed, counsel for Alabama urged neverthless that the State should be in a position to file exceptions as of right.

Rule 27, subdivision 9, of the Rules of this Court provides that a brief *amicus curiae* may be filed by a State as of right.[34] It seems clear that if Alabama should avail itself of this privilege, it would gain every advantage by way of management of the case which it could gain by intervening at this stage of the proceedings, save only the formal right to file exceptions to the Special Master's report. Since any

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[33] They were to have been submitted on April 14, 1947, in accordance with the time-table heretofore agreed to by the parties, but I have informally extended the time through the week of April 21st, and my present information is that they will be submitted in final printed form not later than April 28th.

[34] The Rule reads as follows:

> 9. A brief of an amicus curiae may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof. Such brief must bear the name of a member of the bar of this Court.

findings or conclusions in the Master's report with which Alabama disagreed could be brought to this Court's attention in a brief, I conclude that the possession of the right to file exceptions, which intervention would bring, would under all the circumstances be a very slight and unsubstantial benefit.

Nowhere in the proceeding—neither in the moving papers nor in what was said at the hearing—has it been suggested or implied that intervention would serve to provide a new party plaintiff who could carry the case on to a conclusion if Georgia should suddenly decide to abandon the case. I take judicial notice of the fact that at the time Alabama's petition was filed with this Court, the status of the Governorship in Georgia was unsettled, and that since then it has been settled by decision of the Supreme Court of Georgia. And I conclude that the only grounds upon which Alabama's affirmative case for intervention can be weighed are the three set forth above, namely, the avoidance of a separate suit; the right to participate in enforcing a favorable decree; and the right to participate in managing the case.

Conclusions and Recommendations

I conclude:

(1) That, weighing the remote and unsubstantial nature of the benefits which Alabama might derive from intervening against the substantial delay and expense which would be caused if the intervention were granted, the granting of the intervention would unduly delay the adjudication of the rights of the original parties within the meaning of Rule 24(b);

(2) That Alabama's application under all the circumstances is untimely within the meaning of that Rule;

(3) That a specific provision permitting Alabama to file a later application for intervention for enforcement purposes, if the need should arise, is unnecessary.

I therefore recommend that Alabama's motion for leave to file its petition of intervention be denied.

Respectfully submitted,

LLOYD K. GARRISON,
Special Master.

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MAY 26 1945
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

10
No. 11, ORIGINAL.

THE STATE OF GEORGIA, *Complainant*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Defendants*.

MOTION BY THE "SOUTHERN DEFENDANTS" FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS BY PLAINTIFF AS TO THE MATTERS ALLEGED IN THE AMENDED COMPLAINT.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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Come now each of the undersigned "Southern Defendants" in the above-entitled cause and separately move the Court, in accordance with the English rule (Order XIX, Rule 7) and with former Federal Equity Rule 20, and upon the analogy of Rule 12 (e) of the Federal Rules of Civil Procedure, for an order requiring the plaintiff to make a more definite statement or to file a bill of particulars as to the following matters which are not averred in the amended complaint (hereinafter referred to as the "complaint") with sufficient definiteness or particularity to enable them properly to prepare their responsive pleadings or to prepare for trial, and for grounds of their several motions respectfully show the Court:

I.

Allegations as to Conspiracy, Unlawful Contracts, Combinations, Agreements in Restraint of Trade and Commerce, Illegal Acts and Collusive Agreements, Etc.

The following allegations of the complaint are defective for generality and want of particularity, as mere epithetical conclusions of law unsupported by any sufficient allegations of fact and as insufficient in definiteness and particularity to enable these defendants properly to prepare their responsive pleadings or to prepare for trial:

1. The allegations of Article 3 of the complaint with respect to the alleged "conspiracy of persons of other States"; that "The defendants, a group of common carriers, have conspired to establish and to maintain freight rates which are unjust, unfair, and harmful to the State and the people of Georgia"; and each other allegation of said Article 3 charging defendants with "conspiracy."

2. Each allegation of "conspiracy" contained in Articles 4, 5, and 6 of the complaint.

3. Each allegation of Article 9 of the complaint charging defendants with "unlawful contracts, combinations, agreements and conspiracies in restraint of trade and commerce among the several States" and with "concerted action and collusion."

4. Each allegation of Article 10 of the complaint charging defendants with "conspiracy" and with "conspiring, combining, confederating, and agreeing jointly" to adopt "arbitrary and non-competitive rates and charges for transportation of commodities among the several States."

5. Each allegation of Article 11 of the complaint charging defendants with "conspiracy" or "concerted action" to fix rates either alleged or intended to be alleged to be illegal or unlawful.

6. Each allegation of Articles 12, 14, and 17 of the complaint charging defendants with "illegal acts" or "concerted action" or "joint actions and agreements" or "conspiracy."

7. Each allegation of Articles 18 and 19 of the complaint charging defendants with "conspiracy" to fix rates "by collusive agreement" or "by the collusive power of the defendant carriers acting in concert" or with "collective or collusive action for the fixing of railroad rates."

With respect to each and all the said allegations the Court is prayed to require the plaintiff to state the following particulars:

(a) The date or dates when each said conspiracy, contract, combination, agreement, concerted action or collusion, illegal act, or joint action and agreement was made, entered into, agreed upon, or otherwise arrived at;

(b) The place or places where each of the same was made, entered upon, or otherwise arrived at;

(c) The period during which each of the same has been in effect;

(d) The name of every person or corporation party to the same, the names of all agents acting with respect thereto for or on behalf of any corporate party, and the period during which each party was and continued, or continues, to be a party to the same;

(e) Whether the same was in writing or oral, with a copy thereof if in writing, and a statement of the substantial provisions thereof if oral;

(f) If in any instance the alleged conspiracy, agreement, or concert of action is inferred from the acts of defendants and their agents or others, a statement set-

ting forth the acts alleged to support such inference and to constitute such conspiracy, agreement, or concert of action, together with the names of all persons participating therein;

(g) The name of each and every co-conspirator, if any, involved in each said conspiracy, agreement, or collusive concert of action.

(h) Facts which establish, or from which a legal or logical inference may be drawn, that these defendants have or had any motive, intent, or desire to fix or participate in the fixing of any rates or rates prejudicial to or discriminating against Georgia, its citizens, ports, localities, or traffic.

II.

Allegations as to the Fixing of Interstate Freight Rates Alleged to be Illegal or Unlawful.

Each of the allegations of Article 3 of the complaint charging the object of the alleged conspiracies, contracts, agreements, collusive action, etc., to have been the fixing of interstate "freight rates which are unjust, unfair, and harmful to the State and people of Georgia" and which are charged to constitute a "barrier" against the State of Georgia, and each of the allegations of Articles 4, 5, 6, 9, 10, 11, 12, 14, 16, 18, and 19 of the complaint charging such rates made, agreed upon, maintained, fixed, or otherwise established and enforced by the defendants to have been arbitrary, non-competitive, collusive, preferential, prejudicial, unreasonable, extortionate, discriminatory, or otherwise illegal or unlawful is defective for generality and want of particularity, as a mere epithetical conclusion of law unsupported by any sufficient allegations of fact and as insufficient in definiteness and particularity to enable these defendants properly to prepare their responsive pleadings or to prepare for trial. And with respect to each said allegation

the Court is prayed to require the plaintiff to state the following particulars:

(a) What are the rates referred to, specifying in detail the classes and commodities on which said rates apply, and between what origins and destinations the said rates apply.

(b) Does the plaintiff by any of the said allegations intend to charge that the defendants have, or any of them has, charged and collected from the State of Georgia or any of its citizens any charge for the interstate shipment of freight not carried in and provided for by a pertinent and applicable tariff on file with and subject to the jurisdiction of the Interstate Commerce Commission, and, if so, specify each such charge and collection not authorized by such tariff.

(c) With respect to each said rate a specification as to whether it was fixed and established by or pursuant to a decision by the Interstate Commerce Commission or with relation to rates fixed and established by said Commission.

(d) With respect to each said rate a specification as to whether the plaintiff State of Georgia or its Public Service Commission has challenged the same as unlawful, illegal, or discriminatory in either Docket No. 28300, *Class Rate Investigation, 1939,* or Docket No. 28310, *Consolidated Classification,* now pending before and undecided by the Interstate Commerce Commission.

(e) With respect to each said rate a particular citation of the decision of the Interstate Commerce Commission, if any, relied upon by plaintiff as establishing and holding the same to be discriminatory or otherwise illegal or unlawful.

(f) With respect to each said rate a citation of the particular provision of the Interstate Commerce Act as amended, if any, under which plaintiff asserts the

same to be discriminatory or otherwise illegal or unlawful.

(g) If no such provision of the Interstate Commerce Act, as amended, be relied upon by plaintiff, then a citation, with respect to each said rate, of the particular provision of any other statute under which plaintiff asserts the same to be discriminatory or otherwise illegal or unlawful.

(h) Facts which establish, or from which it may logically and legally be inferred, that the defendants moving herein have or have had any control, direction, or participation, by conspiracy or otherwise, in the making, fixing, or establishment of any rates in effect for the moving of traffic between points, ports, or localities within official or "northern" territory from which prejudice has resulted or may result to Georgia, its citizens, or ports; and, if any such control, direction, or participation is averred, the names of the parties, the identity of the rates so made, and the means and methods employed in effecting any such control, direction, or participation by any of these defendants.

(i) Facts which establish, or from which it may legally and logically be inferred, that the rates on freight between Georgia and points in other states referred to in the complaint and listed on Exhibits 1 and 3 thereto, were and are fixed and maintained by means of and in furtherance of "unlawful practices" or conspiracy of these defendants; that such rates are "illustrative of the general situation"; and that the differences between such rates and those with which they are compared are the result of alleged conspiracy participated in by these defendants or any of them, rather than from differences in transportation or competitive conditions, or other causes not involving conspiracy.

III.

Allegations as to Monopoly and Monopolizing.

The allegations of Article 9 of the complaint that defendants "have monopolized a substantial part of such trade and commerce" (among the several States); the allegation of Article 10 of the complaint that "the said defendants have monopolized and restrained, hindered, injured, and retarded said interstate trade, traffic, and commerce, including the transportation of freight to and from the State of Georgia, by means and through the instrumentality of such conspiracy, and the agencies named in Exhibit 2"; and the allegation of Article 12 of the complaint charging "monopolistic practices" are defective for generality and want of particularity, as mere epithetical conclusions of law unsupported by any sufficient allegations of fact and as insufficient in definiteness and particularity to enable these defendants properly to prepare their responsive pleadings or to prepare for trial, and as to each of said allegations the Court is prayed to require plaintiff to state the following particulars:

(a) The specific part or parts of interstate and foreign trade and commerce subjected to the alleged monopoly or attempt to monopolize;

(b) The date or dates when the said monopoly or monopolizing occurred and the period or periods of time for which it continued or has continued;

(c) The place or places where the same occurred;

(d) The name of every person or corporation party to the same, the names of all agents acting with respect thereto for or on behalf of any corporate party, and the period during which each party was and continued, or continues, to be a party to the same;

(e) The facts from which the power to monopolize or to attempt to monopolize is inferred;

(f) The facts from which the intent to monopolize or to attempt to monopolize is inferred;

(g) The acts by which the alleged monopoly has been achieved and maintained or by which the alleged attempt to monopolize was or is being carried on, with the names of the defendants by whom such acts were or are being committed.

(h) Whether the said allegations are made with reference to and as a charge against the "Southern Defendants"; and, if so, facts which, if proven, would establish, or from which it could logically and legally be inferred, that these defendants have monopolized what substantial part of such trade and commerce, and by what means and methods, and when and where.

(i) The particular agencies named in Exhibit 2 to the complaint through the instrumentality of which it is charged that such alleged monopoly was achieved or effected or such monopolizing effect was achieved and effected or attempted.

IV.

Allegations as to Coercion of 'Southern Defendants" by "Northern Defendants."

The allegation of Article 13 of the complaint that "The Southern defendants, with lines wholly or principally in the South, generally are dominated and coerced by the Northern defendants, and therefore, even when the Southern defendants desire, they cannot publish joint-through rates between Georgia and the North when the northern carriers refuse to join in such rates," is defective for generality and want of particularity, as a mere epithetical conclusion of law unsupported by any sufficient allegations of fact, as self-contradictory, as in direct conflict with other allegations of the complaint charging these defendants with conspiring and colluding with the "Northern defendants,"

and as insufficient in definiteness and particularity to enable these defendants properly to prepare their responsive pleadings or to prepare for trial, and with respect to said allegation the Court is prayed to require plaintiff to state the following particulars:

(a) Whether by the said allegation plaintiff means and intends to charge that a mere refusal by the "Northern defendants" to join in joint-through rates desired by the "Southern defendants," in and of itself and without more, constitutes a general domination and coercion of the "Southern defendants" by the "Northern defendants."

(b) The name of every person or corporation charged to have been a party to such alleged domination and coercion, the names of all agents alleged to have acted with respect to such domination and coercion for and on behalf of any corporate party, and the period during which each party was and continued, or continues, to be a party to such alleged domination and coercion.

(c) The name of every person or corporation charged to have been subjected to such alleged domination and coercion, the names of all agents alleged to have been subjected to such alleged domination and coercion for and as representing any corporate party, and the period during which each party was and continued, or continues, to be subjected to such alleged domination and coercion.

(d) The specific means, methods, or devices whereby the said Northern defendants have or have had power to dominate and coerce the said Southern defendants and have exercised or now exercise such power to dominate and coerce said Southern defendants.

(e) What is meant by the word "generally" in said allegation.

(f) Whether by the said allegation plaintiff intends to charge a separate and additional conspiracy among the "Northern defendants" alone, and, if so, the several acts charged to have been committed in arriving at and in giving effect to such conspiracy.

V.

Allegations, Attacking the Use of Bureaus, Committees, Conferences, Associations, and Other Such Agencies.

Each of the allegations of Articles 9, 10, and 11 of the complaint charging the defendants with using some sixty rate bureaus, committees, conferences, associations, and so-called "private rate fixing agencies" (referring to Exhibit 2 to the complaint) in the fixing of interstate rates and in the carrying out of the alleged conspiracies and collusion to fix interstate rates alleged to be illegal or unlawful and injurious to the plaintiff, its citizens and ports, and charged to constitute "this intricate private rate-fixing machinery which is not sanctioned by the Interstate Commerce Act and is prohibited by the Antitrust Acts," as alleged in the last paragraph of Article 11, is defective for generality and want of particularity, as a mere conclusion of law unsupported by any sufficient allegation of fact, as insufficiently negativing approval by statutes or pursuant to statutes other than the Interstate Commerce Act and subsequent to the Antitrust Acts, and as insufficient in definiteness and particularity and in legal theory to enable these defendants properly to prepare their responsive pleadings or to prepare for trial. These Defendants and the Court are entitled to a clear statement of position in the Complaint with respect to Defendants' compliance or non-compliance with Certificate 44 of the War Production Board, in order that the fundamental jurisdictional issues created by said Certificate may properly be presented in the answer or by other appropriate pleading to be hereafter filed. And with respect to each said allegation the Court

is prayed to require the plaintiff to state the following particulars:

(a) Whether by the said allegations, or by any of them, plaintiff means and intends to charge that the use of rate bureaus, committees, conferences, associations, or other such agencies is illegal *per se* in the absence of coercive methods in such rate-making and of conspiracy or collusion to discriminate against the plaintiff or its citizens.

(b) Whether by said allegations, or any of them, plaintiff means and intends to charge that any rate bureau, committee, conference, association, or other so-called "private rate fixing agency" has been or is being used by any of these defendants which has not been approved by Certificate No. 44 of March 20, 1943, by the Chairman of the War Production Board (see Federal Register, Vol. 8, No. 61, March 27, 1943, pp. 3804-3805), as "requisite to the prosecution of the war" and declared by Section 12 of the Act of Congress of June 11, 1942, entitled an Act "To mobilize the productive facilities of small business in the interest of successful prosecution of the war, and for other purposes" (56 Stat. 351, 357), to be "deemed in the public interest"; and, if so, what such agency and by what defendant.

(c) If the specification in answer to (b) above be in the affirmative, then a specification of the facts and circumstances relied upon by plaintiff as taking each said bureau, committee, conference, association, or other such agency, out of the approval of said Certificate No. 44 and of said Act of Congress and as rendering its use by these defendants or any of them unlawful.

VI.

Allegations as to Discrimination or Intention or Conspiracy to Discriminate Against the Plaintiff, Its Citizens and Ports.

The allegations of Article 4, last paragraph, of the complaint, that "The people of Georgia have further been injured and distrained by the conspiracy of the common carriers, enumerated in Sections 9 through 16 below, which has resulted in a preference to the seaports of other States over those of Georgia," and that "Defendants, by their rates and practices, give preference and advantage in rates on domestic traffic to and from the North Atlantic ports of Baltimore, Philadelphia, New York, Boston, and other related ports over the ports of Savannah and Brunswick, and to the injury and prejudice of the sovereign State of Georgia and to the citizens therein. Illustrative of this, on shipments from Alton, Illinois, in Official territory as hereinafter defined, to Baltimore, Maryland, the first class rate is $1.68 per one hundred pounds, while to Savannah, Georgia, six miles less in distance, the rate is $2.39," were thus construed by the Court in its opinion of March 26, 1945, pp. 2-3:

> "It is sufficient at this point to say that for purposes of this motion for leave to file we construe the allegation that defendants have conspired to fix the rates so as to 'prefer' the ports of other States over the ports of Georgia as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

However, the Court further said, at pages 16 to 17 of its said opinion:

> "We are dealing with the case only in a preliminary manner. * * * The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. * * * ."

These defendants respectfully show that the above-quoted allegations of the complaint, as thus construed by the Court, charging conspiracy to fix rates so as to discriminate against Georgia and its ports, are defective for generality and want of particularity, as mere conclusions of law unsupported by any sufficient allegation of fact and as insufficient in definiteness and particularity and in legal theory to enable these defendants properly to prepare their responsive pleadings or to prepare for trial. And with respect to each said allegation the Court is prayed to require plaintiff to state the following particulars:

(a) Whether the said allegations are confined to "domestic rates" to and from the said ports of Georgia as compared with "domestic rates" to and from the said North Atlantic ports, or whether they mean and intend also to charge that export and import rates to and from the said Georgia ports are discriminatory as compared with export and import rates to and from said North Atlantic ports.

(b) Whether the said allegations are confined to Class rates or to Class rates of the first class, and, if not, what other rate or rates are intended to be covered by said allegations.

(c) Whether by "preference," "prejudice," and "discriminate" or "discriminatory" as used or intended by said allegations, plaintiff means and intends those terms as used and with the meaning as used in Section 1 (4), Section 2, and Section 3 of the Interstate Commerce Act, or, if not, then in what sense or with what meaning the said terms are intended.

(d) What are the rates referred to in said allegations, specifying in detail the classes and commodities on which said rates apply and between what origins and destinations the said rates apply.

(e) With respect to each said rate complained of a specification as to whether it was fixed and established by or pursuant to a decision of the Interstate Commerce Commission or with relation to rates fixed and established by said Commission.

(f) With respect to each said rate a specification as to whether the plaintiff State of Georgia or its Public Service Commission has challenged the same as unlawful, illegal, or discriminatory in either Docket No. 28300, *Class Rate Investigation, 1939*, or Docket No. 28310, *Consolidated Classification*, now pending before and undecided by the Interstate Commerce Commission.

(g) With respect to each said rate a particular citation of the decision of the Interstate Commerce Commission, if any, relied upon by plaintiff as establishing and holding the same to be discriminatory or otherwise illegal or unlawful.

(h) With respect to each said rate a citation of the particular provision of the Interstate Commerce Act as amended, if any, under which plaintiff asserts the same to be discriminatory or otherwise illegal or unlawful, or, if no such provision be relied upon, then a citation, with respect to each said rate, of the particular provision of any other statute under which plaintiff asserts the same to be discriminatory or otherwise illegal or unlawful.

(i) The facts supporting the conclusion that these defendants have, or any of them has, intended or conspired to discriminate against Georgia or its ports.

VII.

Allegations as to Damage or Injury to Georgia, Its Citizens or Ports.

These defendants point out as defective for generality and want of particularity, as being too vague to enable these defendants to answer, as mere conclusions of the pleader unsupported by any sufficient allegations of fact, and as insufficient in definiteness and particularity to enable these defendants properly to prepare their responsive pleadings or to prepare for trial, the following allegations of the complaint:

The allegations of Article 3 of the complaint that defendants have conspired to establish and maintain freight rates which are harmful to the State and the people of Georgia in the respects therein alleged;

The allegations of Article 4 that the people of Georgia have been harmed in their interests and impeded in their development and that "Because of the lack of national markets caused by the conspiracy of defendants which manifests itself in unfair and prejudicial freight rates to Georgia and its citizens, crops have not been grown, factories have not been built, funds have not been invested, employment has not been created, resources have not been exploited, and the State economy, geared to the national economy, has not been developed as otherwise it would have been";

The allegations of Article 5 as to "irreparable injury";

The allegations of Article 6 as to citizens of Georgia, "who, in the payment of extortionate charges for freight carriage, have suffered the impact of the conspiracy, and who, because of it, have been injured in being denied the opportunity to expand their businesses and thereby enhance the general welfare of all the citizens of the State" and "who have suffered pecuniary damage";

The allegations of Article 19 of the complaint charging that conspiracy by the defendants "impedes and distrains the State of Georgia in the exercise of its sovereignty in developing its resources, encouraging its industry and commerce, insuring adequate employment of its citizens, protecting its people by the exercise of its police power, and gearing its economy to the national economy; and injures and hinders citizens, as individuals and as a people.

The foregoing allegations made for the purpose of showing "threatened loss or damage by a violation of the antitrust laws" (Section 12 of the Clayton Act, 15 U. S. C. 22) essential to the right of Georgia to maintain this suit, are indefinite and general and wholly insufficient to enable these defendants properly to respond thereto in the positive and certain degree commensurate with the dignity and high position of this Court. The generality of the averments invites defendants and the Court to indulge in a comprehensive discussion of the differences between the economy of the northern area of the United States and the southern area, as affected by their respective natural resources, climate, topography, density of population, and the inclinations and preferences of the people of the two areas in respect to avocations, habits, and modes of life.

No facts are averred to establish a causal connection between railroad freight rates and the economic condition of Georgia and its citizens, and no facts are averred from which it may be inferred that Georgia in fact is not now growing, prospering, and flourishing, industrially and agriculturally, under existing freight rate levels and policies to a greater extent than in any former period of its history.

And with respect to the said allegations the Court is prayed to require the plaintiff to make its complaint more definite in its averments of threatened loss or damage resulting from the conspiracy charged in the complaint, and to file a bill of particulars setting forth facts which establish, or from which it may legally and logically be inferred *that*, as a result of conspiracy among and participated in

by the "Southern Defendants," or any of them, in violation of the antitrust laws of the United States:

1. Manufacturers, sellers, and other shippers in the North are given an advantage over manufacturers, shippers, and others in Georgia.

2. Freight rates for the transportation of traffic moving to and from, or to or from, Georgia are approximately 39 per cent higher than the rates and charges for transportation of like commodities for like distances between points in the North, or higher in any substantial degree or percentage.

3. That "the State economy, geared to the national economy, has not been developed as otherwise it would have been," and what particular freight rates are charged to be unfair and prejudicial and to have caused a lack of "national markets" preventing such development which otherwise, but for such freight rates, would have taken place; with definition of the terms "State economy," "national economy," and "national markets."

4. Products of Georgia are denied equal access with those of other states to the national market; with specification of what products are thus denied and what is meant by the term "national market," as averred in Section 3 and elsewhere in the complaint.

5. The "Georgia economy" is limited to staple agricultural products; opportunity in manufacturing, shipping and commerce in Georgia curtailed; and the full and complete utilization of the natural wealth of the State prevented; with specification of what "economy," manufacturing, shipping, and commerce are thus prejudiced and what "natural wealth" is prevented from being utilized, and by what means and methods.

6. "Georgia economy" is held in a state of arrested development.

7. Markets have been put beyond the reach of Georgia citizens and corporations, crops have not been

grown, factories have not been built, funds have not been invested, employment has not been created, and resources have not been "exploited", as averred in Section 4 of the complaint.

8. The rates set out in Article 5 of the bill alleged to be prejudicial to the State of Georgia in its proprietary capacity and the rates with which said first mentioned rates are compared were so fixed and that the financial loss and disadvantage claimed by the State of Georgia so resulted.

9. The establishment of industries on the line of the Western & Atlantic Railroad has been lessened and will continue to lessen, the amount of freight handled on said line has been lessened, and that the rental and sales value of said railroad has been decreased, as averred in Section 5 (b) of the amended bill; with specification of what industries and what freight have been diverted from location and transportation on said line, and in what manner and extent the rental and sales value of said railroad has been decreased, and by what means and methods.

10. Citizens of Georgia, including farmers, manufacturers, merchants, and shippers, have paid "extortionate charges for freight carriage," have been denied the opportunity to expand their businesses, or have suffered pecuniary damage because of railroad rates imposed, maintained, or participated in by any of these defendants, as averred in Article 6 of the complaint.

11. Freight rates on commerce and traffic to and from Georgia, fixed and established by concerted action and collusion, through any of the rate bureaus, committees, conferences, associations, etc., referred to or listed in Sections 9, 10, and 11 of the amended bill and in Exhibit 2 thereto, prefer the ports of other states over the ports of Georgia and exact from the State of Georgia, its shippers and citizens, charges for transporting commodities which are unjust, unreasonable, arbitrary, non-competitive and favorable to localities, ports and shippers outside of Georgia, to the disadvantage, harm, hurt, prejudice, or injury of the

State of Georgia, its ports and shippers, as averred in said sections of the complaint.

Respectfully submitted,

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOMAS W. DAVIS,
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THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,

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IN THE

Supreme Court of the United States

No. 10 Original

October Term, 1950

STATE OF GEORGIA,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

DEFENDANTS' MOTIONS AND EXCEPTIONS AND OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

The Pennsylvania Railroad Company, et al.

DEFENDANTS' MOTIONS AND EXCEPTIONS AND OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

I

Defendants' Motion to Dismiss on the Ground that Georgia has Failed to Establish Her Right to Sue as *Parens Patriae* for Her Citizens

The defendants move that the Court accept the conclusion of the Special Master that Georgia has not established her right to bring suit in this Court in her sovereign capacity and as a person entitled to seek injunctive relief under Section 16 of the Clayton Act, and on that conclusion enter a decree dismissing the amended complaint in accordance with the recommendation made by the Special Master. In

support of this motion the defendants assign the following grounds:

A. In paragraphs 1, 2 and 3 on p. 201 of Volume I of his Report the Special Master concludes:

> 1. That Georgia's standing in Court depends upon the establishment of her capacity to seek an injunction as *parens patriae*.
>
> 2. That the evidence does not support the claims of injury to Georgia's economy, asserted in the amended complaint and noted by this Court as charging an injury beyond that suffered by particular individuals; nor is the evidence sufficient to warrant a conclusive presumption of injury to Georgia's economy.
>
> 3. That, therefore, Georgia has not established her right to bring suit in this Court in her sovereign capacity, and as a person entitled to seek injunctive relief under Section 16 of the Clayton Act.

B. The conclusion so stated by the Special Master is supported by other conclusions set forth at pp. 131-139 of Volume I of his Report, including the following conclusion: (I, p. 137)

> "I conclude that Georgia has not established the injury alleged in her pleadings which this Court expected her to prove, and that she has not therefore established her right to bring suit in this Court in her sovereign capacity, and as a person entitled to seek injunctive relief under Section 16 of the Clayton Act."

C. The conclusion that Georgia has not established her right to bring suit in this Court in her sovereign capacity and as a person entitled to seek injunctive relief under Section 16 of the Clayton Act is also supported by the following Findings of Fact made by the Special Master at pp. 125-131 of Volume I of his Report: Findings of Fact 275-279; 281-289; 290 (except the last clause of the last sentence); 292-294. This conclusion and the Findings of Fact upon which it rests are supported by the evidence and are

correct as a matter of law. The Court should accept the conclusion and the supporting Findings of Fact and on the basis of the conclusion enter a decree dismissing the amended complaint.

II

Defendants' Motion to Dismiss on the Ground that Georgia has Failed to Prove Threatened Loss or Damage within the Meaning of Section 16 of the Clayton Act

The defendants further move that the Court accept the conclusion of the Special Master that Georgia has failed to prove the existence of threatened loss or damage as required by Section 16 of the Clayton Act and is, therefore, not entitled to relief, and on that conclusion enter a decree dismissing the amended complaint in accordance with the recommendation made by the Special Master. In support of this motion, the defendants assign the following grounds:

A. In paragraphs 4, 5, 6 and 7, pp. 201-202 of Volume I of his Report the Special Master concludes:

> 1. That a plaintiff other than the United States, to be entitled to injunctive relief under Section 16 of the Clayton Act, must show either:
>
> (a) That loss or damage to the plaintiff is threatened by acts, violating the anti-trust laws, which are aimed and directed at the plaintiff, or at a special class of persons of whom the plaintiff is one, or
>
> (b) That (since injuries to the public at large are subject to injunction only at the instance of the United States) the threatened loss or damage to the plaintiff is a direct injury differing from that suffered by the public at large.
>
> 2. That Georgia has not met either of these tests and, therefore, "has failed to establish threatened loss or damage within the meaning of Section 16 of the Clayton Act and consequently is not entitled to relief."

B. The conclusion so stated by the Special Master is supported by other conclusions set forth at pp. 139-156 of Volume I of his Report, including the following conclusion: (I, p. 154)

> "The allegations in Georgia's amended complaint, it seems to me, pictured, and were expected by this Court to show, an injury of the first sort, vivid and tangible and very special to Georgia; whereas the evidence, as I found it to be, consisted only of certain statistical probabilities of a small and shadowy nature. And in my view, even if this Court should derive from those statistical probabilities a conclusive presumption of injury to Georgia's economy, sufficient to sustain her standing to sue as *parens patriae*, the presumed injury would lack that quality of differentiation from the injury suffered by the public at large which is necessary to permit a person other than the United States to sue for injunctive relief."

C. The conclusion that Georgia has failed to prove threatened loss or damage within the meaning of Section 16 of the Clayton Act and consequently is not entitled to relief is also supported by the following Findings of Fact made by the Special Master which appear at pp. 125-131 of Volume I of his Report. Findings of Fact 275-279; 281-289; 290 (except the last clause of the last sentence); 292-294. This conclusion and the Findings of Fact upon which it rests are supported by the evidence and are correct as a matter of law. The Court should accept the conclusion and the supporting Findings of Fact and on the basis of the conclusion enter a decree dismissing the amended complaint.

III

Defendants' Motion to Dismiss on the Ground that Georgia has Failed to Prove the Cause of Action that She was Given Leave to File

The defendants further move that the Court accept the conclusion of the Special Master that Georgia has not proved her charge that the defendants have engaged in a

conspiracy to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed, and on that conclusion enter a decree dismissing the amended complaint herein. In support of this motion the defendants assign the following grounds:

A. In its opinion giving Georgia leave to file the amended complaint, the Court said, *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 462:

> "As we have said, we construe the bill to charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed. We hold that under that construction of the bill a cause of action under the anti-trust laws is alleged."

B. The Special Master in his Report concludes that Georgia has failed to establish either a conspiracy to coerce and discriminate in the sense of a conspiracy purposefully directed against Georgia and the South, or a conspiracy to coerce the fixing of freight rates generally. See Volume I, pp. 138-139; 170; 171; 172; 174 and par. 10, p. 203. This conclusion is supported by the following Findings of Fact made by the Special Master at pp. 34-84; 85-91; 96-125 of Volume I of his Report: Findings of Fact 1-65; 67-91; 93-133; 135-139; 141; 143-148; 150-161; 164-176; 187-279; 281-289; 290 (except the last clause of the last sentence); 292-294.

C. The conclusion that Georgia has failed to prove that the defendants are engaged either (1) in a conspiracy to fix rates by coercion and to discriminate against Georgia in the rates fixed, or (2) in a general conspiracy to fix rates by coercion, and the findings on which the conclusion rests are supported by the evidence and are correct as a matter of law. The plaintiff has failed to prove the only cause of action that the Court gave it leave to file and the plaintiff should not now be permitted to assert a different cause of action based upon the theory that the defendants are parties to non-coercive and non-discriminatory agree-

ments for the joint consideration of rates. The Court should accept the Special Master's conclusion that Georgia has failed to prove that the defendants have engaged either in a conspiracy to fix rates by coercion and to discriminate against Georgia in the rates fixed or in a conspiracy to coerce the fixing of freight rates generally, together with the Findings of Fact that support the conclusion, and on the basis of that conclusion enter a decree dismissing the amended complaint.

IV

Defendants' Motion to Dismiss on the Alternative Ground that by Reason of the Enactment of Section 5a of the Interstate Commerce Act the Cause of Action that Georgia is Now Seeking to Assert is not Cognizable under Section 16 of the Clayton Act

In the event that the Court should not grant any of the preceding motions, the defendants move in the alternative that the Court enter a decree dismissing the amended complaint on the ground that the cause of action that Georgia is seeking to assert is a cause of action against common carriers in respect of a matter which is now subject to the regulation, supervision and jurisdiction of the Interstate Commerce Commission and hence is a cause of action not cognizable by the Court under Section 16 of the Clayton Act. In support of this motion the defendants assign the following grounds:

A. Even if it should be concluded that the opinion of the Court granting the plaintiff leave to file the amended complaint is not a bar to the maintenance by the plaintiff of a different and residual cause of action based upon a charge that the defendants by participating in territorial rate associations are parties to non-discriminatory and non-coercive agreements for the joint consideration of rates, nevertheless the amended complaint should be dismissed. As a result of the enactment of Section 5a of the Interstate Commerce Act (49 U.S.C. 5b), which occurred

after the decision of this Court granting the plaintiff leave to file the amended complaint, the different and residual cause of action cannot now be maintained by Georgia under Section 16 of the Clayton Act.

B. Section 16 of the Clayton Act provides that nothing contained therein "shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, * * * in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

C. Section 5a of the Interstate Commerce Act (Public Law 662, 80th Cong., ch. 491, 2nd Sess., 49 U. S. C. 5b) authorizes the Interstate Commerce Commission to approve agreements among carriers "relating to rates, fares, classifications, divisions, allowances, or charges * * * or rules or regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof" if the Commission finds that any such agreement will be in "furtherance of the national transportation policy" and otherwise meets certain requirements imposed by the statute. One of the requirements of the statute is that the Commission shall not approve any agreement unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action. Section 5a further provides that the approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe and that each conference bureau, committee or other organization established or continued pursuant to any agreement shall keep such records and make such reports to the Commission as it may prescribe and that the Commission may, after investigation, terminate or modify the terms upon which such approval was granted. Section 5a further provides that parties to any agreement approved by the Commission are relieved from the operation of the anti-trust laws with respect to the making of the agreement and with respect to

the carrying out of the agreement in conformity with its terms. An agreement so approved by the Commission cannot properly be held to be an unreasonable restraint of trade or commerce in violation of the anti-trust laws. (See the Report of the Special Master, I, pp. 195-196)

D. Agreements to which both the Northern and Southern defendants are parties, establishing territorial rate associations, bureaus and committees have been submitted to the Interstate Commerce Commission for approval pursuant to the provisions of Section 5a. An agreement establishing territorial rate associations, bureaus and committees in which the Northern defendants and other railroads participate has been approved by the Interstate Commerce Commission in a proceeding entitled *Section 5a Application No. 3, Eastern Railroads—Agreements*, 277 I. C. C. 279. Other applications for the approval of agreements establishing territorial rate associations, bureaus and committees in which the defendants, and other railroads, participate are now pending before the Interstate Commerce Commission in the following proceedings: *Section 5a Application No. 6, Southern Freight Association, et al.—Agreements; Section 5a Application No. 21, Illinois Freight Association—Agreement; Section 5a Application No. 19, Southern Ports Foreign Freight Committee—Agreement;* and *Section 5a Application No. 26—Railroad Interterritorial Agreement.* An agreement among a number of railroads, including all 20 defendants, continuing procedures for the national handling of matters of per diem and mileage on cars and of demurrage and storage and charges thereof has been approved by the Interstate Commerce Commission in a proceeding entitled *Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage—Agreement*, 277 I. C. C. 413. The orders of approval already made by the Interstate Commerce Commission under Section 5a adjudicate, and any orders of approval that the Commission may hereafter make in the proceedings pending before it, will adjudicate,

that the agreements and procedures covered by the orders are reasonable and appropriate methods of consultation and conference in rate making and accord with the standards prescribed by Section 5a of the Interstate Commerce Act. Such orders of the Interstate Commerce Commission can be reviewed, if at all, only in proceedings brought under the statutes that provide for judicial review of orders of the Interstate Commerce Commission; the question of the validity of the orders of the Commission approving such agreements and procedures and the question of the lawfulness of such agreements and procedures under Section 5a of the Interstate Commerce Act cannot be passed upon in this case.

E. Any residual cause of action based upon the charge that the defendants have violated the Sherman Act by participating in the territorial rate associations, committees and bureaus is a cause of action against common carriers in respect of a matter that is "subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission." Under Section 16 of the Clayton Act, such a cause of action cannot be maintained by any person except the United States. It follows that even if Georgia's amended complaint could properly be construed as asserting such a residual cause of action, the amended complaint should nevertheless be dismissed.

V

Defendants' Alternative Motion to Defer the Consideration of Certain Findings and Conclusions Contained in the Report of the Special Master

In the event that the Court should not grant any of the preceding motions of the defendants to dismiss, the defendants move in the alternative that the Court defer any consideration of the Findings of Fact and Conclusions of Law in the Report of the Special Master that relate (a) to the legality under the Sherman Act of agreements establishing non-coercive and non-discriminatory territorial

rate associations, and (b) to the legality under the Sherman Act of certain activities of the defendants as members of the Association of American Railroads, until final orders have been entered in all of the proceedings before the Interstate Commerce Commission entitled: *Section 5a Application No. 3, Eastern Railroads—Agreements; Section 5a Application No. 6, Southern Freight Association, et al.—Agreements; Section 5a Application No. 21, Illinois Freight Association—Agreement; Section 5a Application No. 19, Southern Ports Foreign Freight Committee—Agreement; Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage—Agreement;* and *Section 5a Application No. 26—Railroad Interterritorial Agreement.* In support of this motion, the defendants assign the following grounds:

A. The Special Master concludes that even though Georgia has failed to prove that the defendants have conspired to fix rates by coercion that discriminate against Georgia, or to fix rates generally by coercion, Georgia should be permitted to assert a cause of action based upon the charge that the defendants by participating in territorial rate associations are parties to unlawful agreements for the joint consideration of rates, provided that Georgia is held to have established her right to maintain the suit as *parens patriae* and to have proved threatened loss or damage as required by Section 16 of the Clayton Act. (I, pp. 175-177; par. 11, p. 203) To assist the Court in considering this residual cause of action, if the occasion for its consideration should arise, the Special Master has made Findings of Fact and stated Conclusions of Law that relate (1) to the legality under the Sherman Act of the agreements establishing non-coercive and non-discriminatory territorial rate associations (see, for example, I, Findings of Fact 140; 142; 177-186; 280 at pp. 85, 93-96, 127 and Conclusions of Law on pp. 175-191; 192-201), and (2) to the legality under the Sherman Act of certain activities of the defendants as members of the Association of American

Railroads (see I, Findings of Fact 178; 179; 180 at p. 94 and the Conclusions of Law on pp. 197-201 and in par. 19 on p. 205). The Court should defer consideration of these Findings of Fact and Conclusions of Law until there has been a final determination of the status of the agreements that the defendants have submitted to the Interstate Commerce Commission for approval pursuant to Section 5a of the Interstate Commerce Act. The titles and docket numbers of the proceedings before the Interstate Commerce Commission involving these agreements are: *Section 5a Application No. 3, Eastern Railroads—Agreements; Section 5a Application No. 6, Southern Freight Association, et al.—Agreements; Section 5a Application No. 21, Illinois Freight Association—Agreement; Section 5a Application No. 19, Southern Ports Foreign Freight Committee—Agreement; Section 5a Application No. 7, Association of American Railroads, Per Diem, Mileage, Demurrage and Storage —Agreement;* and *Section 5a Application No. 26—Railroad Interterritorial Agreement.*

B. In his Report the Special Master concludes that it would be premature for him to attempt now to recommend a decree dealing with the territorial rate associations: (I, pp. 191-192)

> "Although this Court may decide that the record in this case warrants a decree dealing with the defendants' territorial rate associations, it would seem premature for me to attempt now to recommend a specific form of such a decree. For, as I stated at the outset, agreements replacing those here at issue are now pending before the Commission for approval under Section 5a of the Interstate Commerce Act; and though the new agreements as submitted are basically similar to the old, changes may be made in them as a result of Commission action; and, of course, the Commission may approve them, with or without changes, and such approval, if reviewed, may be judicially upheld.
>
> "Moreover, there may later be before this Court, in consequence of developments under the new Section

> whose course cannot now be foreseen, additional material to guide it in formulating a decree, including the views of the Commission, and also the views of shippers, whose stake in a proper rate association set-up is obvious since through the National Industrial Traffic League they are parties to an agreement with the railroads covering the handling of rate proposals. As has been stated, no representatives of shippers appeared in the proceeding before me."

The reasons that led the Special Master to conclude that it would be premature for him now to recommend a decree dealing with the territorial rate associations also lead to the conclusion that it would be premature for the Court to consider or to pass upon the findings and conclusions of the Special Master that relate to the legality of the territorial rate associations under the anti-trust laws in advance of a final determination by the Interstate Commerce Commission of the status of those associations under Section 5a of the Interstate Commerce Act.

C. The findings and conclusions of the Special Master that relate to the legality under the Sherman Act of the activities of the territorial rate associations deal with the following questions, among others: (1) the relationship between the procedures of the territorial rate associations and the duties imposed upon carriers by the Interstate Commerce Act, (2) the relationship between the activities of the territorial rate associations and achievement of the national transportation policy declared in the Interstate Commerce Act, and (3) whether the procedure of the territorial rate associations reserves and affords to each carrier the free and unrestrained right to take independent action. By the enactment of Section 5a of the Interstate Commerce Act Congress committed these questions to the primary jurisdiction of the Interstate Commerce Commission. Insofar as these questions arise with respect to the territorial rate associations in which the defendants now participate, the questions are now before the Commission for decision. Under well established principles of law, the Court should not

adjudicate a legal issue that requires consideration and determination of questions that have been committed to the primary jurisdiction of the Interstate Commerce Commission and that are before the Commission for decision, in advance of a final determination of those questions by the Commission.

D. If the Court should decide that the Interstate Commerce Commission does not have primary jurisdiction of any of the questions raised by the findings and conclusions of the Special Master that relate to the legality under the Sherman Act of the activities of the territorial rate associations, there are, nevertheless, persuasive reasons why the Court, in the exercise of its discretion, should decline to pass upon the legality of those activities in advance of a final determination of the status of the associations under Section 5a of the Interstate Commerce Act. If the agreements of the Northern and Southern defendants establishing territorial rate associations are approved by the Interstate Commerce Commission, and the approval is not judicially reviewed, or if reviewed, is not set aside, the defendants will be relieved from the operation of the antitrust laws with respect both to the making of the agreements and their performance. In that event, the question of the legality of the defendants' participation in the rate associations will be moot. It would be premature for the Court now to consider and decide issues that will be academic if the agreements establishing the territorial rate associations are finally approved under Section 5a of the Interstate Commerce Act.

Even if it is assumed that the primary jurisdiction of the Interstate Commerce Commission does not apply and that the Court will at some time decide the question of the legality of the defendants' participation in territorial rate associations the consideration of that question should be postponed until the Interstate Commerce Commission has finally determined the status of the associations under Section 5a of the Interstate Commerce Act. In making that determination the Interstate Commerce Commission will necessarily consider (1) the relationship between the activi-

ties of the territorial rate associations and the duties imposed upon the carrier by the Interstate Commerce Act, (2) the relationship between the activities of the territorial rate associations and the national transportation policy declared in the Interstate Commerce Act and (3) whether the particular agreements establishing territorial rate associations reserve and accord to the carriers the free and unrestrained right of independent action. These same questions will be involved in any determination that the Court may make with respect to the legality of the territorial rate associations under the Sherman Act. Since the Interstate Commerce Commission is an expert body "informed by experience" in the problems of the transportation industry its judgment on these questions would be entitled to receive careful consideration and to be accorded substantial weight by the Court. For that reason, the Court should not pass upon the findings and conclusions of the Special Master that relate to the legality of the territorial rate associations in advance of a final determination by the Interstate Commerce Commission with respect to the status of those associations under Section 5a.

The Special Master noted that his own conclusions with respect to the legality of certain aspects of rate conference procedure were arrived at without "expert knowledge of the railroad industry" (I, p. 181), and points out that if this Court should, as recommended, withhold any decree (other than a decree of dismissal) in this case until the Commission's action has been taken in the proceedings pending before it, "the Court will be duly informed of the Commission's expert views and can give to them such weight as it deems proper under the circumstances then existing" (I, pp. 181-182).

Particularly because the only relief now sought by Georgia is for future application, the Court, as well as the parties, is entitled to the benefit of the "expert views" of the Commission before affirmative action is taken with respect to the legality of rate conference procedure.

E. The Special Master has concluded that the right of the plaintiff to relief against the defendants' activities in the Association of American Railroads should not be decided by the Court until "the Court has definitively disposed of Georgia's case in relation to the territorial rate associations" (I, p. 195). This conclusion is correct and should be accepted by the Court. Since, for the reasons that have been stated, the Court should not attempt to dispose of the question of the legality of the territorial rate associations in advance of a final determination of the status of those associations under Section 5a of the Interstate Commerce Act, it follows that any consideration or decision of the issues relating to the legality of certain activities of the defendants in the Association of American Railroads should be similarly postponed.

VI

Defendants' Motion for Judgment in Favor of the Defendants on the Ground that Georgia has Failed to Establish a Claim upon Which Relief Can be Granted, and Exceptions and Objections to the Report of the Special Master

The defendants move for judgment on the ground that Georgia has failed to establish a claim upon which relief can be granted. In support of this motion the defendants submit the following exceptions and objections to certain Findings and Conclusions of the Special Master. The portions of the Record believed to support each exception and objection will be set forth in a brief which the defendants expect to file hereafter.

Exceptions and Objections

I

The defendants except and object to the conclusion of the Special Master (I, pp. 133-134; 175-177; and par. 11 on p. 203) that if Georgia is held to have established her right

to sue as *parens patriae* and to have proved threatened loss or damage as required by Section 16 then, even though Georgia has failed to prove the coercive and discriminatory conspiracy alleged in the amended complaint, Georgia should be permitted to assert a different and residual cause of action based on the charge that the defendants are parties to unlawful agreements for the joint consideration of rates. The grounds of the exception and objection are:

A. The residual cause of action would be a suit for injunctive relief against common carriers subject to the provisions of the Act to regulate commerce, in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and hence could not be maintained by Georgia under Section 16 of the Clayton Act.

B. Determination of the residual cause of action would require the Court to pass initially upon issues that are subject to the primary jurisdiction of the Interstate Commerce Commission.

C. The residual cause of action is not the cause of action that Georgia alleged in the amended complaint or the cause of action that the Court gave Georgia leave to assert; the Court permitted Georgia's amended complaint to be filed only to afford relief against a conspiracy to use coercion in the making of rates and to discriminate against Georgia in the rates made, and against threatened injury if proven, and not to determine generally the legality of defendants' rate making procedures.

D. If the amended complaint is construed as confined to the residual cause of action, the amended complaint does not state a claim upon which relief can be granted.

II

The defendants except and object to the finding and conclusion of the Special Master that "a major purpose" of

the territorial rate associations is to prevent or discourage rate erosion (I, F. 177 pp. 93-94; F. 182 p. 95; F. 280 pp. 126-127; pp. 178, 183, par. 13, p. 203; II, pp. 369, 597-598, 613) on the ground that the finding and conclusion are not supported by the evidence.

III

The defendants except and object to the finding and conclusion of the Special Master that the defendants have included in the procedures of the territorial rate associations provisions that "constitute a deterrent to the freedom of rate making" (I, F. 185 p. 96; F. 280 pp. 126-127; pp. 138, 178; II, pp. 614-615) on the ground that the finding and conclusion are not supported by the evidence.

IV

The defendants except and object to the finding and conclusion of the Special Master that the defendants have included in the procedures of the territorial rate associations provisions that "dampen down" the use of the right of independent action (I, F. 186 p. 96 and p. 178) on the ground that the finding and conclusion are not supported by the evidence.

V

The defendants except and object to the findings and conclusions of the Special Master that when rate proposals are disapproved independent action is taken in only a small fraction of the cases; that there is a "relative paucity" of independent action, and that the right of independent action is "rarely" exercised (I, F. 134 p. 84; F. 140 p. 85; F. 142 p. 85; F. 184 p. 96; the last clause of the last sentence in F. 290, p. 130; II, pp. 290, 536-539, 613-615; III, p. 829) on the ground that the findings and conclusions are not supported by the evidence.

VI

The defendants except and object to the findings and conclusions of the Special Master that the procedure of voting on rate proposals in the territorial rate associations is "designed to slow down the pace and extent of rate reductions"; is a "method of persuading the minority to go along with the majority"; is a method for bringing the influence "of adverse majority votes" to bear on the proponents of rate reductions and is a deterrent to the freedom of rate making (I, F. 181(b) pp. 94-95; par. (a) p. 178; p. 183; par. 13, p. 203; II, pp. 604-608) on the ground that the findings and conclusions are not supported by the evidence.

VII

The defendants except and object to the finding and conclusion of the Special Master that the procedure for secret voting in the territorial rate associations is "designed to slow down the pace and extent of rate reductions" and is a deterrent to the freedom of rate making (I, F. 181(a) p. 94; par. (b) pp. 178-179; p. 183; par. 13, p. 203; II, pp. 601-604) on the ground that the finding and conclusion are not supported by the evidence.

VIII

The defendants except and object to the conclusion of the Special Master that the procedure for voting in the territorial rate associations provides for bringing the influence of adverse votes by railroads "not directly concerned" with a given proposal to bear on the proponent of a rate reduction (I, par. (a) p. 178; p. 183; par. 13, p. 203) on the ground that the conclusion is not supported by the findings of fact made by the Special Master or by the evidence.

IX

The defendants except and object to the conclusion of the Special Master that the procedure for appeals from one

committee in a territorial rate association to a higher committee is designed to slow down the pace and extent of rate reductions and is a deterrent to the freedom of rate making and to the further conclusion of the Special Master that in the case of such appeals the members of the territorial rate associations agree to abide "by the majority will" or to "abide by the decision" (I, pars. (c) and (d) p. 179), on the ground that the conclusions are not supported by the evidence.

X

The defendants except and object to the finding and conclusion of the Special Master that the provisions in the procedure of the territorial rate associations for appeals by chairmen are designed to slow down the pace and extent of rate reductions and are a deterrent to the freedom of rate making and to the further finding and conclusion of the Special Master that the members of the territorial rate associations agree to withhold independent action pending the determination of such appeals (I, F. 149 p. 86; F. 181(c) p. 95; pars. (d) and (e) p. 179; p. 183; par. 13, p. 203; II, pp. 608-609) on the ground that the findings and conclusions are not supported by the evidence.

XI

The defendants except and object to the finding and conclusion of the Special Master that the establishment in the North and the South of separate traffic executive associations and presidents' conferences and the provisions for appeals to these separate bodies were steps designed to slow down the pace and extent of rate reductions and constitute a deterrent to the freedom of rate making (I, F. 92 p. 67; F. 182 p. 95; par. (f) p. 180; p. 183; par. 13, pp. 203-204; II, p. 380; p. 555; pp. 609-613) on the ground that the finding and conclusion are not supported by the evidence.

XII

The defendants except and object to the conclusion of the Special Master that the defendants agree in the territorial rate associations that they will "rarely" exercise their right of independent action (I, par. (g) p. 180; par. 13, pp. 203-204) on the ground that the conclusion is not supported by the findings of fact made by the Special Master or by the evidence.

XIII

The defendants except and object to the following conclusion stated in the third paragraph on p. 180 of Volume I of the Report:

> "I conclude that, unless the foregoing agreements in paragraphs (a) to (g) inclusive are needed to enable the railroads to discharge their duties under the Interstate Commerce Act, they would constitute price-fixing agreements of the sort held unlawful under the anti-trust laws by the two cases upon which Georgia has principally relied, *United States* v. *Trenton Potteries*, 273 U. S. 392, and *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150."

A. The conclusion adopts or incorporates by reference the characterizations of the procedures of the territorial rate associations contained in paragraphs (a) to (g) on pp. 178-180 of the Report, and these characterizations are erroneous and objectionable in the respects and for the reasons set forth under Exceptions VI-XII, *supra*.

B. The conclusion applies an erroneous standard to determine the legality of the procedures of the territorial rate associations. The conclusion assumes that the territorial rate association agreements are unlawful unless they are necessary to enable the railroads to discharge their duties under the Interstate Commerce Act, whereas the proper standard for determining the legality of the agreements is whether they provide reasonable and appropriate methods of conference and consultation which assist the railroads

in the discharge of their duties under the Interstate Commerce Act, and promote rather than restrain trade and commerce by facilitating the establishment and maintenance of rates and charges that are just and reasonable and without unjust discrimination or undue preference.

C. The conclusion that the agreements establishing the territorial rate associations are "price-fixing agreements of the sort held unlawful under the anti-trust laws" in *United States* v. *Trenton Potteries*, 273 U. S. 392 and *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 is not supported by the evidence and is erroneous as a matter of law.

XIV

The defendants except to the following conclusion stated in the first full paragraph on p. 181 of Volume I of the Report:

> "The real question, it seems to me, is whether these agreements are needed to enable the railroads to perform their duties under the Interstate Commerce Act. If they are needed, that act should govern and the agreements should be upheld. If they are not needed, the Sherman Act should prevail."

for the same reasons that have been stated in support of Exception XIII, *supra*.

XV

The defendants except and object to the following conclusion stated on p. 183 of Volume I of the Report:

> "It seems clear that in discussing rate proposals within the rate associations the defendants may properly, and perhaps also have the positive duty to, consider the statutory factors and standards referred to above; but in order that such consideration may take place, it is not in my judgment necessary for the defendants to be parties to the agreements described in paragraphs (a) through (g) above."

The grounds of the exception and objection are:

A. The Special Master erred in failing to conclude without qualification that when the defendants initiate rates, they have a positive duty to consider and to comply with all the relevant "statutory factors and standards."

B. The statement that "it is not necessary for the defendants to be parties to the agreements described in paragraphs (a) through (g) above" in order for the defendants to consider the relevant statutory factors and standards when they initiate rate proposals is erroneous for the following reasons:

1. The statement adopts or incorporates by reference the characterizations of the procedures of the territorial rate associations contained in paragraphs (a) to (g) on pp. 178-180 of Volume I of the Report, and those characterizations are erroneous and objectionable in the respects and for the reasons set forth under Exceptions VI-XII, *supra.*

2. The statement is not supported by the Findings of Fact made by the Special Master, or by the evidence.

3. The statement adopts an erroneous legal standard for determining the legality of the procedures of the territorial rate conferences; the proper standard is whether the procedures provide reasonable and appropriate methods of conference and consultation which assist the railroads in the discharge of their duties under the Interstate Commerce Act, and promote rather than restrain trade and commerce by facilitating the establishment and maintenance of rates and charges that are just and reasonable and without unjust discrimination or undue preference, and not whether the particular procedures are "necessary" to enable the defendants to comply with the provisions of the Interstate Commerce Act.

4. The statement is not consistent with the prior conclusion of the Special Master that the defendants may properly consider the statutory factors and standards set forth in the Interstate Commerce Act.

C. The Special Master erred in failing to conclude that the procedures of the territorial rate associations are reasonable and appropriate methods of conference and consultation that assist the railroads to consider and to comply with all the applicable statutory factors and standards, and that promote and aid interstate commerce by facilitating the establishment and maintenance of just and reasonable rates and charges, without unjust discrimination or undue preference.

XVI

The defendants except and object to the passage in the Report beginning at the foot of p. 183 of Volume I of the Report, in which the Special Master states the following conclusion with respect to the procedures of the territorial rate associations that are referred to in paragraphs (a) through (g) on pp. 178-180 of the Report:

> "I find and conclude that the railroads could do away with these particular agreements and still perform their duties under the Interstate Commerce Act, and that therefore the agreements fall into the class of those held by this Court to be unlawful under the Sherman Act."

The grounds of the exception and objection are:

A. The conclusion that the railroads could "do away" with their agreements and "still perform their duties under the Interstate Commerce Act" is inconsistent with the prior conclusion of the Special Master in the first full paragraph on p. 183 of Volume I of the Report that the defendants may properly, "and perhaps also have the positive duty to" consider the statutory factors and standards set forth in the Interstate Commerce Act.

B. The conclusion is not supported by the evidence.

C. The conclusion that without these agreements the defendants could "still perform their duties under the Interstate Commerce Act," and that therefore the agreements are unlawful under the Sherman Act, applies an erroneous standard to determine the lawfulness of the agreements; the conclusion assumes that unless the defendants can establish that without the agreements they would be unable to perform their duties under the Interstate Commerce Act the agreements are unlawful, whereas the proper standard for determining the legality of the agreements is whether they provide reasonable and appropriate methods of conference and consultation which assist the railroads in the discharge of their duties under the Interstate Commerce Act, and promote rather than restrain trade and commerce by facilitating the establishment and maintenance of rates and charges that are just and reasonable and without unjust discrimination or undue preference.

D. The conclusion that "the agreements fall into the class of those held by this Court to be unlawful under the Sherman Act" is not supported by the evidence and is erroneous as a matter of law.

E. The Special Master should have concluded that the agreements establish reasonable and appropriate methods of conference and consultation that assist the railroads to comply with the duties imposed upon them by the Interstate Commerce Act, that promote and aid interstate commerce by facilitating the establishment of rates and charges that are just and reasonable and without unjust discrimination or undue preference, and do not unreasonably restrain interstate trade or commerce or violate the anti-trust laws.

XVII

The defendants except and object to the following conclusion set forth in paragraph 14 on p. 204 of Volume I of the Report:

"Unless the portions of the agreements referred to in paragraph 13 are needed to enable the railroads to discharge their duties under the Interstate Commerce Act, they would constitute price-fixing agreements of the sort held by this Court to be unlawful under the Sherman Act."

The grounds of the exception and objection are:

A. The conclusion adopts by reference the characterizations of certain procedures of the territorial rate associations stated in paragraph 13 on pp. 203-204 of Volume I of the Report and those characterizations are erroneous and objectionable in the respects and for the reasons stated under Exceptions VI-XII, *supra*.

B. The conclusion adopts an erroneous standard to determine the legality of the procedure of the territorial rate associations; the conclusion assumes that the procedures of the territorial rate associations are unlawful unless they "are needed" to enable the railroads to discharge their duties under the Interstate Commerce Act, whereas the proper standard for determining the legality of the agreements is whether they provide reasonable and appropriate methods of conference and consultation which assist the railroads in the discharge of their duties under the Interstate Commerce Act, and promote rather than restrain trade and commerce by facilitating the establishment and maintenance of rates and charges that are just and reasonable and without unjust discrimination or undue preference.

XVIII

The defendants except and object to the following conclusion set forth in paragraph 15 on p. 204 of Volume I of the Report:

"Said portions are not so needed and therefore fall into the class of agreements held to be unlawful under the Sherman Act."

The grounds of the exception and objection are:

A. The conclusion adopts by reference the characterizations of certain procedures of the territorial rate associations stated in paragraph 13 on pp. 203-204 of Volume I of the Report and those characterizations are erroneous in the respects and for the reasons stated under Exceptions VI-XII, *supra.*

B. The conclusion is based on the legal standard stated in paragraph 14 on p. 204 of Volume I of the Report which is erroneous as a matter of law for the reasons set forth under Exceptions XV, XVI, and XVII, *supra.*

C. The Special Master erred in failing to conclude that the procedures of the territorial rate associations are reasonable and appropriate means of conference and consultation that assist the railroads to comply with their duties under the Interstate Commerce Act, promote and aid interstate commerce by facilitating the establishment of rates and charges that are just and reasonable and without unjust discrimination or undue preference, do not unlawfully restrain interstate commerce, and are not unlawful under the Sherman Act.

XIX

The defendants except and object to the Special Master's conclusion (I, p. 191) that "it would seem feasible to provide that no final consideration of a rate proposal could take place except at a public conference, subject, however, to certain exceptions in the case of emergencies." The grounds of the exception and objection are:

A. The conclusion is not supported by the evidence.

B. The conclusion is erroneous because it assumes implicitly that the consideration of rate proposals by the territorial rate associations in executive session unreasonably restrains interstate trade and commerce, whereas, in fact, the consideration of rate proposals in executive ses-

sion promotes and protects the freedom of rate making, and does not restrain trade and commerce or violate the anti-trust laws.

XX

The defendants except and object to the conclusion stated in Finding 295 (I, p. 131) and on p. 832 of the Report that there is "a fair chance" that a fraction of the proposals for reductions in rates from Georgia to the North that are disapproved each year would be approved if there were no "deterrents" to independent action. The grounds of the exception and objection are:

A. The conclusion is inconsistent with the express finding made in Finding 294 (I, pp. 130-131) that "there is no way of telling" what proportion of the proposals for reductions in rates from Georgia to the North which are disapproved "would be concurred in if there were no rate association deterrents to independent action."

B. There is no evidence to support the conclusion that the alleged "deterrents" cause the disapproval of any proposals for rate reductions from Georgia to the North that would be approved in the absence of the alleged deterrents.

C. The conclusion that there is "a fair chance" that a fraction of the proposals for reductions in rates from Georgia to the North that are disapproved each year would be approved if there were no deterrents to independent action is erroneous and objectionable because indefinite, speculative and inconclusive by its own terms.

XXI

The defendants except and object to the following conclusion of the Special Master relating to the Association of American Railroads (I, par. 19, p. 205):

> "At least the following practices of the A.A.R. that are authorized or engaged in by the defendants violate the anti-trust laws because they are not needed

> for the purposes of the Interstate Commerce Act and are designed to check rate reductions or induce rate increases: resolutions designed to preclude the adoption of particular rate reductions; resolutions, not adopted under the aegis or at the prompting of the I.C.C. in connection with some pending proceeding before the I.C.C., designed to bring about agreement upon rate increases applicable to some particular commodity; efforts by the A.A.R.'s Traffic Department, with or without the backing of resolutions, to induce particular roads to agree to refrain from rate reductions or to agree to make rate increases; and actions designed to promote procedural changes in territorial associations to check rate erosion."

and to the same conclusion stated in the fourth paragraph on p. 199 of Volume I.

The grounds of the exception and objection are:

A. The conclusion is inconsistent with the following prior findings and conclusions of the Special Master which are supported by the evidence and should be accepted by the Court:

> 1. Findings 94-128 (I, pp. 68-81) and the conclusions appearing on pp. 156-158 of Volume I of the Report in which the Special Master finds and concludes that the members of the Association of American Railroads do not bind themselves to comply with resolutions of the Board of Directors of the Association and that particular carriers, Southern as well as Northern, have from time to time acted independently in respect to particular policies laid down by the Board of Directors.
>
> 2. Finding 179 (I, p. 94) that the Association of American Railroads "has no coercive authority and has exercised no coercive means."

B. The conclusion (I, p. 205) that the specified practices of the Association of American Railroads violate the antitrust laws "because they are not needed for the purposes

of the Interstate Commerce Act and are designed to check rate reductions or induce rate increases" applies an erroneous legal standard to determine the legality of those practices; the proper legal standard is whether the practices are reasonable and appropriate methods of conference and consultation which assist the railroads in the discharge of their duties under the Interstate Commerce Act, and promote rather than restrain trade and commerce by facilitating the establishment and maintenance of rates and charges that are just and reasonable and without unjust discrimination or undue preference, and not whether the practices are "needed" for the purposes of the Interstate Commerce Act or are "designed to check rate reductions or induce rate increases."

C. On the law and the evidence, the practices described in the conclusion are reasonable and appropriate means to assist the railroads to discharge their duties under the Interstate Commerce Act; and promote and aid interstate commerce by facilitating the establishment of rates and charges that are just and reasonable and without unjust discrimination or undue preference.

D. The conclusion that the specified practices of the Association of American Railroads violate the anti-trust laws is not supported by the evidence and is erroneous as a matter of law. The Special Master should have concluded that the specified practices of the Association of American Railroads are reasonable and appropriate means of conference and consultation that assist the railroads to discharge their duties under the Interstate Commerce Act, promote and aid interstate commerce by facilitating the establishment of rates and charges that are just and reasonable and without unjust discrimination or undue preference, do not unlawfully restrain interstate commerce, and do not violate the anti-trust laws.

XXII

The defendants except and object to the finding and conclusion that "the Association of American Railroads constitutes a continuing influence in the railroad industry in support of territorial rate association efforts to slow down the pace and extent of rate reductions" (I, F. 180 p. 94; II, pp. 600-601) on the ground that the finding and conclusion are not supported by the evidence.

XXIII

The defendants except and object to the conclusion (I, p. 162) that in the case of the rates on paper and paper products, Cleveland, Vice President of the Association of American Railroads, "may very well have been partly responsible for the withholding of independent action by Southern and Southwestern lines and for the lack of any application to the I. C. C. by Southern carriers seeking northbound rate parity."

The grounds of the exception and objection are:

A. The conclusion is indefinite, speculative and inconclusive.

B. The conclusion is contrary to the Special Master's findings that the evidence shows that in the handling of this matter Cleveland played a "very minor role" and that there is no evidence that he acted, with respect thereto, "otherwise than as a mediator" or that he "attempted directly or indirectly to exert any pressure on the Southern roads" (II, p. 507; III, p. 721, footnote 36).

C. The conclusion is not supported by the evidence.

XXIV

The defendants except and object to the finding and conclusion that the Association of American Railroads was authorized by its Articles of Organization to modify any of the rules and regulations of the territorial rate associations which provided "means for settlement of disputes," (I, F. 66 p. 57; II, pp. 327, 343) on the ground that the said finding and conclusion are not supported by the evidence and are erroneous as a matter of law.

XXV

The defendants except and object to the following conclusion of the Special Master relating to the Traffic Department of the Association of American Railroads, which appears at p. 159 of Volume I of the Report:

> "The continued existence of that office, given the functions in rate matters which have been assigned to it, may therefore fairly be regarded as a factor operating under the aegis of the Association of American Railroads which tends to discourage large-scale rate reductions."

The ground of the exception and objection is that the conclusion is not supported by the evidence.

XXVI

The defendants except and object to the finding and conclusion that in the joint conference of contact committees "there is an expectation that majority action will be followed" (I, F. 163 p. 90) and to the related finding and

conclusion stated in the last full paragraph on p. 575 of Volume II of the Report, on the ground that the said findings and conclusions are not supported by the evidence.

Respectfully submitted,

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In the

Supreme Court of the United States

No. 10 ORIGINAL

October Term, 1950

THE STATE OF GEORGIA,
Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Defendants.

MOTION TO DISMISS

ROBERT W. PURCELL
HORACE L. WALKER
Counsel for defendant, The Chesapeake and Ohio Railway Company.

In the

Supreme Court of the United States

No. 10 ORIGINAL

October Term, 1950

THE STATE OF GEORGIA,

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THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Defendants.

MOTION TO DISMISS

The defendant, The Chesapeake and Ohio Railway Company, moves the Court to enter a decree dismissing the amended complaint in accordance with the recommendation made by the Special Master at page 206 of his Report dated June 8, 1950, and filed June 12, 1950.

In support of this Motion this defendant states that the conclusion of the Special Master that the amended complaint be dismissed and the Findings of Fact in support thereof are supported by the evidence of record and are correct as a matter of law. It is submitted that the Court should accept the Findings of Fact and Recommended

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THE PENNSYLVANIA RAILROAD CO., ET AL., *Defendants*.

RESPONSE OF STATE OF GEORGIA TO DEFENDANTS' MOTIONS TO DISMISS.

EUGENE COOK,
Attorney General of Georgia,

WILLIAM L. MCGOVERN,
Deputy Assistant Attorney General of Georgia.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Decree of the Special Master and enter a decree dismissing the amended complaint.

If this Motion to Dismiss is granted by this Court, then The Chesapeake and Ohio Railway Company is willing to acquiesce in the apportionment of the costs under the conditions set forth in the document entitled "Defendants' Conditional Consent to the Taxation of Costs" filed October 23, 1950.

ROBERT W. PURCELL

HORACE L. WALKER

Counsel for defendant, The Chesapeake and Ohio Railway Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 10 Original.

THE STATE OF GEORGIA, *Complainant*,

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THE PENNSYLVANIA RAILROAD CO., ET AL., *Defendants*.

RESPONSE OF STATE OF GEORGIA TO DEFENDANTS' MOTIONS TO DISMISS.

Comes the complainant, the State of Georgia, by its Attorney General, in response to the motion or motions to dismiss filed by the defendants, without accepting or adopting any of the statements therein contained, but for the grounds set forth in the attached statement, and upon condition that all costs and expenses, including whatever fee of the Special Master the Court may fix, not satisfied by moneys advanced by the parties during the course of the case, be taxed against the defendants, joins in the motion or motions to dismiss.

EUGENE COOK,
Attorney General of Georgia,

WILLIAM L. MCGOVERN,
Deputy Assistant Attorney General of Georgia.

GROUNDS OF STATE OF GEORGIA FOR JOINING IN MOTIONS TO DISMISS.

Georgia's motion for leave to file its amended bill of complaint herein was granted by this Court pursuant to its opinion filed March 26, 1945 (324 U. S. 439).

The amended complaint was construed by the Court to charge conspiracy among the defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which were fixed.

Georgia was diligent in the presentation of evidence before the Special Master appointed by the Court, supporting the averments of combination and conspiracy to Georgia's injury made in the amended complaint. The defendants, through their Chief Traffic Officers made full disclosure in their testimony before the Special Master of their several rate making practices, which they represented to be appropriate to enable them fully to meet their several obligations and responsibilities under the Interstate Commerce Act, severally denying that they had been parties to any combination, conspiracy, or purpose to discriminate against Georgia or the South in the freight rates published by them, and denying the existence of any practices or policies of coercion against any of them in respect of the rates applicable over their several lines of railroads.

The report of the Special Master filed June 12, 1950 contains an extensive and exhaustive analysis of the evidence presented by the parties for his consideration. The report states the conclusion of the Special Master that because Georgia's case was brought under and is controlled by the provisions of Section 16 of the Clayton Act, the burden under the antitrust laws was cast upon Georgia to establish by proof that its asserted damage was the result of acts which were aimed and directed at Georgia or at a special class of persons of whom Georgia was one, and that the threatened loss or damage to Georgia was and is a direct injury differing from that suffered by the public at large. The Special Master concluded that Georgia had not

been successful in establishing this special damage and injury and recommended that its amended complaint be dismissed. Nevertheless, the Special Master concluded that the rate association agreements to which the defendants were parties contained some provisions not necessary to enable them to comply fully with the Interstate Commerce Act, and to that extent constituted agreements in violation of the anti-trust laws.

The report of the Special Master notes that rate association agreements to which the defendants now are parties, replacing agreements in effect when suit was brought, are now before the Interstate Commerce Commission for approval under the provisions of Section 5(a) of the Interstate Commerce Act, enacted June 17, 1948. The Special Master has recommended that this Court withhold any decree (other than a decree of dismissal) until the Commission shall have acted on the pending applications for approval of the new rate association agreements, and the Commission's expert views with respect thereto are available for consideration of the Court.

Responding at the outset of this case to an order of the Court that the amended complaint be supported by a bill of particulars, specifying in detail the grounds of the complaint Georgia made it clear that its primary complaint was directed at participation by the Association of American Railroads and its officers in the negotiation and establishment of freight rates by the several railroads, particularly with respect to traffic moving between Georgia and the North.

The agreement of the Eastern railroads establishing rate associations, to which all of the railroads designated in the amended complaint as Northern Defendants are parties, was approved by the Interstate Commerce Commission on March 15, 1950, subject to acceptance by the railroads of conditions imposed by the Commission. Those conditions were accepted, and the agreement was finally approved by the Commission on August 28, 1950 to be effective October

15, 1950. Included in the conditions imposed by the Commission was the elimination of the right of the Chairmen of the rate associations to appeal disposition of a rate proposal to another committee, thus delaying final action on the proposal, criticized as unnecessary by the Special Master in his report herein.

The agreement of the Eastern railroads, so approved by the Commission, contains in Article Four, Section 5, the following provision, "All existing organizations and procedures of the parties, and agreements and arrangements with respect thereto for the joint consideration, initiation and establishment of traffic matters within the scope of this agreement are hereby terminated and cancelled and the parties hereafter will jointly consider, initiate, and establish such traffic matters only through the organization and pursuant to the procedures provided for in this agreement."

The railroads of Southern territory, including all of the Southern Defendants herein, have now established Southern Freight Association by an agreement effective January 1, 1949 which provides that "All existing organizations and procedures of the parties, and agreements and arrangements with respect thereto, for the joint consideration, initiation and establishment of freight and passenger traffic matters * * * are hereby terminated and cancelled." That agreement has been submitted to the Commission for approval, and states the willingness of the Southern railroads to accept conditions the Commission may impose.

Each of the agreements to which the defendants are now parties, establishing regional or territorial rate associations, contains provisions preserving to the railroads of each territory the right to control and determine their own rates, without interference by any other organization of railroads. Each of the territorial agreements also contains provisions securing to each individual railroad the right of independent action with respect of its own rates, without regard to the views or action of any other railroad or organization.

The 20 railroad defendants, together with all other class one railroads of the nation, including all members of the Association of American Railroads, have executed an agreement for the negotiation and joint consideration of rates affecting railroads of more than one territory, to become effective upon approval by the Interstate Commerce Commission subject to any conditions imposed by that Commission. That agreement contains the same provision, quoted above from the agreements of the Eastern and Southern railroads, terminating and cancelling all previously existing organizations and procedures for the joint consideration and initiation of rates, and further provides that final determinations of all interterritorial rates shall be made by the railroads of each affected territory through the procedures established by their territorial rate association.

The Association of American Railroads is not mentioned in any of the foregoing agreements, and the procedures thereby established for the consideration of rate matters make no provision and leave no room for participation therein by the Association of American Railroads or any of its officers or committees. Recognizing this omission of the Association of American Railroads in the agreement of the Eastern railroads, the Interstate Commerce Commission in its report of March 15, 1950, approving the agreement, said, "We may not read into the agreement language or coverage at variance with the plain language it contains." The elimination of the Association of American Railroads from interference in rate making has therefore been accomplished.

The new Rate Association Agreement of Southern railroads has eliminated Southeastern Presidents Conference as a rate making organization. It has also abolished Traffic Executive Association—Southern Territory, an appellate organization which Georgia's amended complaint charged was created at the instance of the Association of American Railroads and through which the association

exercised influence with respect to rates to and from Georgia. The Joint Conference of Contact Committees through which rates were fixed to and from Georgia and the North, in conferences in which Georgia charged that Georgia and the South did not have fair representation, has also been eliminated from rate conference procedure. Joint consideration of rate matters by Southern railroads is now accomplished through only two main committees, one a committee of subordinate traffic officers and the other a committee of chief traffic officers. The elaborate system of committees, in existence when the amended complaint was filed, to which successive appeals could be taken and by means of which Georgia charged rate reductions could be defeated by delay, has now been abandoned.

While Georgia does not approve or accept all of the provisions of the new rate association agreements of the railroads, the Interstate Commerce Commission has now been constituted by the Congress as the tribunal with power to approve them and thereafter to regulate them, and to require amendments in their procedures from time to time as a condition to Commission approval. The members of the Commission are now equipped both with experience, information, and statutory power to protect the interests of our people from any efforts to control or shackle Southern railroads in the establishment of rates which will enable the industries of Georgia and the South to compete freely and on equal terms with their competitors in other sections of the nation.

The improvement in the rate making practices of the railroads during the pendency of this action, coupled with the power now possessed by the Interstate Commerce Commission to supervise rate association procedures, acquired since the amended complaint was filed, has convinced Georgia and its representatives that it should not press further its suit for injunctive relief with respect to the rate conference procedures of the defendants but should look to the Interstate Commerce Commission for proper regula-

tion of the rate associations in proceedings to which all of the interested railroads are parties.

Counsel for the State of Georgia has represented to the defendants through their counsel that the cost of this proceeding including the fee and the expenses of the Special Master have been greatly augmented by the extent to which the defendants amplified their testimony with respect to their rate conferences and their rate-making practices. The evidence presented to the Special Master by the State of Georgia was documentary and required a single day for its presentation. Testimony offered by the defendants filled 21 volumes, and 15 volumes of exhibits were filed in addition. Analysis of this evidence and the preparation of the Special Master's report required approximately 3 years. The report of the Special Master contains no recommendation with respect to the payment of the costs, but left it to the Court to determine "whether, if the Court should dismiss the suit, the cost might not be apportioned in some manner in the light of the entire record." In these circumstances, the defendants through their counsel have agreed that upon Georgia joining in a motion to dismiss this suit, the defendants will assume and satisfy all costs and expenses of the proceedings, including whatever fee of the Special Master the Court may fix, not satisfied by moneys advanced by the parties during the course of the case.

EUGENE COOK,
Attorney General of Georgia,

WILLIAM L. MCGOVERN,
Deputy Assistant Attorney General of Georgia.

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IN THE

Supreme Court of the United States

No. 10 Original

October Term, 1950

STATE OF GEORGIA,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

DEFENDANTS' CONDITIONAL CONSENT TO THE TAXATION OF COSTS.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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No. 10 ORIGINAL

October Term, 1950

STATE OF GEORGIA,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

DEFENDANTS' CONDITIONAL CONSENT TO THE TAXATION OF COSTS.

The defendants having filed motions to dismiss, and the complainant having joined in the said motions, upon the "condition that all costs and expenses, including whatever fee of the Special Master the Court may fix, not satisfied by moneys advanced by the parties during the course of the case, be taxed against the defendants," the defendants hereby state that upon the dismissal of the amended complaint pursuant to the said motions, the defendants will pay any costs and expenses, including whatever fee of the Special Master the Court may fix, that are not satisfied by

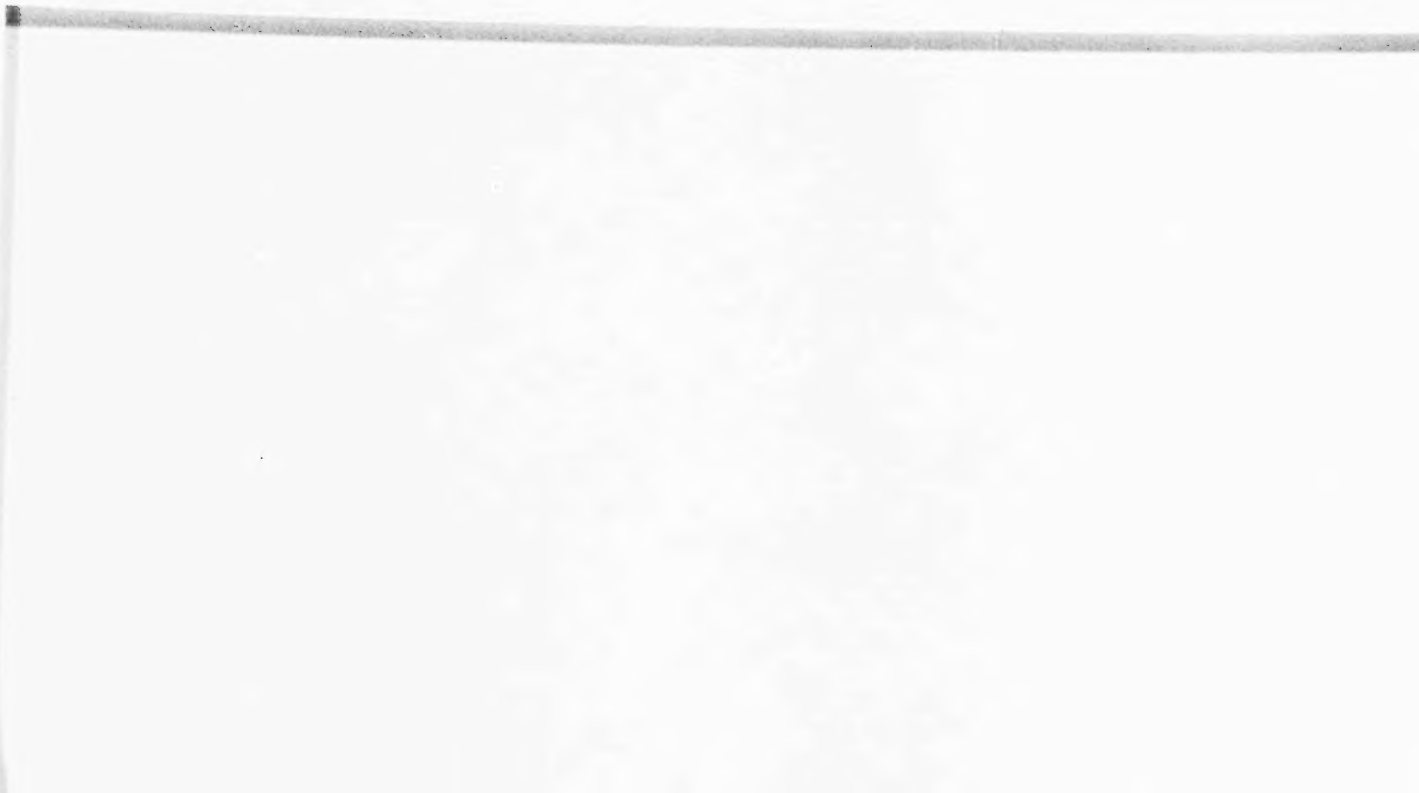
moneys advanced by the parties during the course of the case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDANTS

REPORT OF THE SPECIAL MASTER

Submitted in Three Volumes, of Which Volume One Contains the Main Body of the Report. Volumes Two and Three Contain a Detailed Analysis of the Evidence in Support of the Findings in Volume One

VOLUME ONE

(Pages 1 to 208)

Containing:

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II. MOTIONS AND JURISDICTIONAL QUESTIONS
III. FINDINGS OF FACT
IV. CONCLUSIONS OF LAW
V. SUMMARY OF CONCLUSIONS
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IN THE

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OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDANTS

REPORT OF THE SPECIAL MASTER

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e Supreme Court of the United States:

State of Georgia, by an amended bill of complaint September 15, 1944, charged "a conspiracy among dants to use coercion in the fixing of rates and to minate against Georgia in the rates which are fixed," ation of the anti-trust laws. *Georgia* v. *Pennsylvania ad Co., et al.*, 324 U. S. 439, 462. The defendants welve northern and eight southern railroads. Geor- ing primarily as *parens patriae* to redress an alleged ning injury to her economy and her citizens, asked injunction and damages.[1]

---

rgia sued in four capacities, "only two of which," said the we need mention" (324 U. S. 439, 443). The first was as vereign or *parens patriae;* the second, "as a proprietor to vrongs suffered by the State as the owner of a railroad and wner and operator of various institutions of the State."

Georgia moved for leave to file the amended complaint as an original bill in this Court under Article III, Section 2 of the Constitution. The defendants resisted the application.

On March 26, 1945 this Court granted leave to file the amended complaint, *Georgia* v. *Pennsylvania Railroad Co., et al.*, supra; rehearing denied, 324 U. S. 890.

The Course of the Proceedings to Date

On December 17, 1945, the Court appointed me as Special Master with directions "to find the facts specially," to state separately my "conclusions of law thereon" and "to submit the same to this Court with all convenient speed, together with a draft of the decree" recommended by me.[2]

Hearings before me began on March 18, 1946, and, with such adjournments as the parties needed for purposes of preparation, were concluded on August 20, 1946.

On February 10, 1947, the State of Alabama moved this Court for leave to intervene. On March 17, 1947, the Court referred the matter to me for a special report. After a public hearing on March 28, 1947, I filed my special report on April 21, 1947, recommending that in view of the state of the proceedings the motion be denied. On May 12, 1947 the Court entered an order denying the motion (331 U. S. 788).

On May 20 to 30, 1947 the parties made their final arguments before me, having shortly prior thereto submitted their final briefs and proposed findings of fact.

Submission of Transcript Herewith; Methods of Citation

With this Report I am submitting for the use of the Court the transcript of the proceedings before me, consisting of:

(Ibid) The Court decided to "treat the injury to the State as proprietor merely as a 'makeweight.'" (324 U. S. 439, 450). In the proceedings no evidence was introduced, and no arguments were advanced, regarding Georgia's interest as a proprietor.

[2] The text of the order is in Appendix A, p. 833 infra.

(a) Twenty-one volumes of testimony (blue-covered and bearing Roman numerals, by which they will hereafter be cited with the appropriate page numbers). Extracts from most of Georgia's exhibits also appear in these volumes, chiefly in I; and the citations to exhibits hereafter made are to these extracts only, except where there is some reason for referring to the full text which is contained in:

(b) Fifteen volumes of documentary exhibits (brown-covered and designated by capital letters, by which they will hereafter be cited, with references to the particular exhibits contained therein. The exhibits in turn are marked, with accompanying Arabic numbering, ND for the Northern Defendants, SD for the Southern Defendants, AD for All Defendants, and S for the State of Georgia).

The General Arrangement of this Report

This Report is in three volumes.

In *Volume One* I have concentrated all the material which seems to me essential for a comprehension of the case as a whole. I have interspersed among the Findings of Fact in this volume explanatory summaries of the parties' contentions on various points, in the hope that the Findings may serve the Court's convenience as a running summary of the entire evidence.

Volumes Two and *Three* consist of a detailed analysis of the evidence, relating respectively to the alleged coercion and the alleged discrimination.

The Findings of Fact in Volume One are keyed by page references to the detailed analysis of the evidence in Volumes Two and Three.

Treatment of the Evidence in this Report

In addition to the Findings of Fact contained in this Volume One, every statement of fact in Volumes Two and Three may be considered as an informal finding, except where the context indicates otherwise.

A few objections were made to the competence of particular items of evidence, and with regard to these objections I shall, as I reach them (in Volumes Two and Three) state my conclusions of law. More numerous objections were made to relevance. The issues of relevance turn almost entirely upon conflicting views regarding the theory and nature of the case. I shall note as I proceed (again in Volumes Two and Three) only those objections to relevance which seem to me of sufficient importance to bring to the Court's attention, or which are not automatically disposed of by my own treatment of the case.

In Appendix D to Volume Three I have summarized certain evidence introduced by Georgia which I have regarded as irrelevant, and which seemed to me to be so clearly in that category as not to warrant analysis in the main body of the Report. In summarizing this evidence, however, I have sought to treat it in enough detail and to document it sufficiently thoroughly to enable this Court to give due weight to it if it should be held to be relevant.

In my analysis of the evidence in Volumes Two and Three, and in the Findings of Fact in this Volume One which are derived therefrom, I have adopted an order of presentation which seems to me to be most nearly in accordance with Georgia's theory of the case as it was developed before me. I shall discuss that theory presently.

Parties, Appearances and Acknowledgments

The *Northern defendants* are those whose lines lie wholly or principally in *Official Territory* (one of five major territories recognized for rate-making purposes by the Interstate Commerce Commission; it comprises, approximately, the territory east of the Mississippi and north of the Ohio and Potomac Rivers. I shall frequently refer to it simply as "the North"). The Northern defendants are:

The Pennsylvania Railroad Company.
The Baltimore & Ohio Railroad Company.
Chicago & Eastern Illinois Railroad Company.

Chicago, Indianapolis & Louisville Railway Company (L. F. DeRamus and Holman D. Pettibone, Trustees).
The Chesapeake & Ohio Railway Company.
Erie Railroad Company.
The New York Central Railroad Company.
The New York, Chicago & St. Louis Railroad Company.
Norfolk & Western Railway Company.
Richmond, Fredericksburg & Potomac Railroad Company.
The Wabash Railroad Company.
Western Maryland Railway Company.

The *Southern defendants* are those whose lines lie wholly or principally in *Southern Territory* (comprising the territory south of Official Territory and east of the Mississippi. I shall frequently refer to it simply as "the South"). The Southern defendants are:

Atlantic Coast Line Railroad Company.
Carolina, Clinchfield & Ohio Railway, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, Lessees
Illinois Central Railroad Company.
Gulf, Mobile & Ohio Railroad Company.
Louisville & Nashville Railroad Company.
The Nashville, Chattanooga & St. Louis Railway.
Seaboard Air Line Railway Company (L. R. Powell, Jr. and Henry A. Anderson, Receivers).
Southern Railway Company.

The case has been exhaustively and ably presented, argued and briefed by counsel.

Georgia appeared in the proceedings before me, first by Governor Arnall (who submitted an opening statement in the form of a letter to the Special Master outlining the State's position),[3] and later by Acting Governor Thompson; and Georgia's case was presented by Eugene Cook, Attorney General, Claude Shaw, Assistant Attorney General, and William L. McGovern, Deputy Assistant Attorney

[3] This letter appears in Vol. I of the record, at p. 22.

General. The latter was assigned primary responsibil
for presenting Georgia's case.

The Northern defendants (except the Chesapeake & O
and the New York, Chicago & St. Louis Railroad Co
pany) were represented by John Dickinson, Hugh B. C
Joseph F. Eshelman, Anthony P. Donadio, K. L. Richmon
B. G. Stackhouse, W. T. Pierson, Thomas P. Healy (sin
deceased), D. Lynch Younger, E. Randolph Williams, Jose
A. McClain, Jr., and Paul S. Parsons. Messrs. Dickinson a
Cox shared the presentation of the case.

The Chesapeake & Ohio and the New York, Chicago
St. Louis Railroad Company were represented by Robe
W. Purcell, Horace L. Walker, and James B. Osborne. A
the conclusion of the proceedings they filed a separa
brief asking that the two railroads be dismissed as d
fendants on the principal ground that they had withdraw
from the Association of American Railroads effectiv
January 15, 1947, thus severing their connections "wit
the only activities alleged to be violations of the anti-trus
laws." I have concluded that separate consideration nee
not be given the case of these two railroads. If member
ship in the Association of American Railroads should b
found to warrant injunctive relief, withdrawal from th
Association in the midst of the proceedings ought not
under the circumstances, to preclude the granting of in
junctive relief.

The Southern defendants were represented by R. B
Gwathmey, J. J. McLaughlin, E. J. Zoll, Jr., Charles Clark
N. J. Flowers, W. R. C. Cocke, W. L. Grubbs, Elmer A
Smith, S. R. Prince, R. B. Tunstall, and William H. Swig
gart. Messrs. Flowers, Cocke, Grubbs, Swiggart, and, until
their fatal illnesses, Messrs. Smith and Prince, took varying
parts in the actual conduct of the case, Mr. Swiggart taking
the leading part.

The Association of American Railroads (which was not
named as a defendant) was informally represented by its
Vice-President and General Counsel, R. V. Fletcher. Mr.

Fletcher was formally designated in the proceedings as counsel for all defendants.

I wish to acknowledge my indebtedness to the several counsel for their courtesy and assistance throughout the proceedings and for the thoroughness and conspicuous ability with which they presented their respective cases.

I would like also to express my appreciation of the very able services rendered by Mr. C. Tracy Barnes, who was engaged with the approval of all parties on August 19, 1946 to assist me in analyzing the voluminous record and various questions of law, and who devoted much of his time at intervals to this task.

Finally, thanks are due to my associate, Mr. William T. Coleman, Jr., for his intensive work on the proof, and to Mr. H. S. Middlemiss, for his efficient reporting of the proceedings.

Respectfully submitted,

LLOYD K. GARRISON,
Special Master.

JUNE 8, 1950.

IN THE

Supreme Court of the United State

OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDAN

REPORT OF THE SPECIAL MASTER

I. NATURE AND THEORY OF GEORGIA'S CAS

A. *Georgia's Original Complaint*

Georgia's original complaint, in addition to attack the defendants' rate associations, challenged the lega of the differentials between the higher Southern rate str ture and the lower Northern rate structure. The compla sought from the Court a decree equalizing all rates betw Georgia and the North with rates in the North for like c modities on a mile for mile basis. The complaint char that the Interstate Commerce Commission was "conctruc ing" the fixing of unlawful rates by the alleged conspir and was "derelict in its duty" and a "party to the ill practices" of the defendants' associations.[4]

[4] This charge was in the Governor's order to the Attorney Ge of Georgia, which the complaint reproduced in paragraph (1).

B. *Georgia's Amended Complaint*

The amended complaint, on which the present suit is based, sought no relief against rates as such. It was directed solely against the practices and set-up of the defendants' rate associations. As previously stated, this Court construed it as charging "a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed."

The amended complaint contained five main charges, as follows:

(1) *That the Conspiracy Was Effectuated Through Coercive Rate Associations*

Paragraph 9 of the amended complaint alleged that the conspiracy was effectuated through the defendants' use of "some sixty rate bureaus, committees, conferences, associations, and other private rate fixing agencies. . . ."[5] These agencies were then pictured as having the power to make decisions which the carriers were forced to obey. Thus paragraph 10 alleged that:

> "Any proposal to change the rates and charges for transportation in such commerce, *must* be considered and acted on by some of such agencies, with power in the highest thereof *finally to decide* whether such proposal shall be accepted or rejected. *No line can change joint through rates without the approval of the private rate-fixing agencies created by defendants.* The effect of this conspiracy is unjustly and *oppressively* to increase and augment the said rates and charges, and to counteract the effect of competition . . . and to *prevent* any one of said defendants from

[5] The varying nomenclature arises from the fact that some of the organizations are full-time bodies of salaried professionals; others are bodies of railroad representatives meeting regularly under a professional chairman; others are committees of railroad representatives meeting irregularly, but with rules of procedure; while still others are ad hoc committees or conferences. I shall generally, though not invariably, refer to all these organizations simply as "rate associations".

reducing such arbitrary and noncompetitive rates, and thereby to exact and collect great sums of money from the State of Georgia and the people of Georgia in commerce among the several States." (Emphasis added)

(2) *That the Purpose of the Conspiracy Was to Give Northern Producers an Advantage Over Southern Producers*

Paragraph 12 of the amended complaint stated that the "monopolistic practices hereinbefore described, participated in by defendants, were *intended to be* and were, and are, effective in giving manufacturers, sellers, and other shippers in the North an advantage over manufacturers, shippers, sellers, and buyers in the State of Georgia. . . ." (Emphasis added)

The Court in its opinion in this case, 324 U. S. 439 at p. 444, took note of this element of intent. The amended complaint, said the Court, alleged that the defendants' practices "in purpose and effect" give manufacturers, etc., in the North an advantage over those in Georgia. At p. 462 the Court said that while it could not be determined in advance what rates may be lawfully established, coercion could be enjoined, and so could a combination "which has as its purpose an invidious discrimination against a region or locality."

(3) *That the Northern Roads Use Coercion on the Southern Roads in the Fixing of Joint Through Rates*

The amended complaint charged all the defendants, both Southern and Northern, with participation in the conspiracy against the South. Paragraph 13 of the amended complaint, at p. 20 however, alleged that "the Southern defendants, with lines wholly or principally in the South, generally are dominated and coerced by the Northern defendants and therefore, even when the Southern defendants desire, they cannot publish joint-through rates between Georgia and the North when the northern carriers refuse to join in such rates."

The Court in its opinion in 324 U. S. 439 set forth the substance of the foregoing paragraph and at p. 445 construed it as follows ("for purposes of this motion for leave to file"):

> "And we construe the allegation that the Southern defendants are dominated and coerced by the northern roads and cannot publish joint through rates when the northern roads refuse to join as a charge that the northern roads use coercion on the southern roads in the fixing of joint through rates."

(4) *That the Defendants Have Fixed Rates Which Are Unjust and Unfavorable to Georgia*

Paragraph 9 of the amended complaint stated that the defendants, through their rate bureaus and unlawful combinations and conspiracies, "have so fixed the rates and charges on transportation to and from the State of Georgia as to prefer the ports of other States over the ports of Georgia," and have thereby "exacted" from Georgia and shippers in Georgia charges which are "unjust, unreasonable, arbitrary, noncompetitive and favorable to localities, ports, and shippers outside of Georgia. . . ."

Paragraph 14 of the amended complaint alleged that the defendants "have the power to, and do, fix rates and charges for transportation of some commodities in commerce among the several States, between points in the North and points in Georgia, which are approximately 39 per cent higher than the rates and charges for transportation of like commodities for like distances between points in the North."

Paragraph 16 of the amended complaint referred to an exhibit which purported to show that the mileage rates on some commodities from Georgia to the North were higher than the mileage rates on like commodities within the North. The amended complaint stated that this exhibit, "although limited to a few items is illustrative of the general situation, and reference thereto is prayed."

(5) *That the Conspiracy Has Injured the Economy of Georgia.*

Paragraph 3 of the amended complaint contained extensive allegations of injury, which this Court quoted verbatim at p. 444 of its opinion, as follows:

> "It [the amended complaint] alleges that the rates as a result of the conspiracy are so fixed as
>
> "(a) to deny to many of Georgia's products equal access with those of other States to the national market;
>
> "(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;
>
> "(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and
>
> "(d) to hold the Georgia economy in a state of arrested development."

Other similar allegations of injury were included in various portions of the amended complaint, notably in paragraph 4, where it was said that "because of the lack of national markets caused by the conspiracy . . . crops have not been grown, factories have not been built, funds have not been invested, employment has not been created, resources have not been exploited, and the State economy, geared to the national economy, has not been developed as otherwise it would have been."

Commenting upon the allegations of injury, the Court in its opinion in this case, at p. 451, said that:

> "Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters

of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate."

C. *The Nature of the Case as Actually Presented by Georgia in the Trial*

I shall here compare the case as presented with the case as charged, taking up each of the five basic elements in the amended complaint which have been summarized above.

(1) *As to the Effectuation of the Conspiracy Through Coercive Rate Associations*

Georgia amplified her charges regarding the coercive rate associations by alleging in the bill of particulars and in the evidence as it was developed, that the Association of American Railroads constituted the focal point and effective center of the conspiracy,[6] and that the conspiracy began with the taking of the first steps to organize the Association in or about 1933.[7]

---

[6] The amended complaint did not mention the A.A.R. However, paragraph 9, in speaking of the various associations set up by the defendants, referred to an exhibit attached to the complaint, in which the A.A.R. was set forth at the pinnacle of the chart. Paragraph 10, describing the procedure in general, stated that rate proposals must be acted on by the defendants' agencies "with power in the highest thereof finally to decide whether such proposal shall be accepted or rejected."

[7] The Bill of Particulars stated at page 1 that "the acts complained of in this amended complaint, began in or about the year 1932 and have continued to the present, although the origin of the alleged illegal combination had its inception many years prior to this date, the exact date being unknown to complainant." Mr. McGovern, opening for Georgia, referred to "the time we suggest this conspiracy started, namely, 1933" (I, 305). In Georgia's Final Brief, 1932 was assigned significance merely as the time when the railroad industry and the institutional investors in it were alleged to have become fearful of a lowering of freight rates (p. 17); 1933 witnessed the meeting at the Metropolitan Club in New York City, out of which the Association of American Railroads was alleged to have resulted (p. 17); and 1934 marked the actual formation of the Association (p. 28). In the first of two Conclusions of Law which Georgia in

Georgia's Final Brief at pp. 6 and 7 described the origin and effectuation of the conspiracy as follows:

> "From the decision of this Court in the Trans-Missouri Freight Association Case in 1897 until the inception of the conspiracy complained of here, the railroads of the United States, in addition to specialized national associations with limited powers, maintained over one hundred regional trade associations, varying in size from the smallest, comprising the carriers in a single state, to larger associations covering a number of states. The basic function of each of these organizations was to maintain a small group of technical rate experts to assist the railroads on various mechanical aspects of rate modification.
>
> "In 1934, however, to immunize the existing rate structure from the erosion threatened by the depression, all of the pre-existing national, regional, and functional trade associations were merged into a single integrated hierarchy of trade associations to create a cartelized private rate-making machinery *deriving the strength for its structure and the sanction for its decisions from the newly-formed AAR.* The power over rates implicit in the mechanism thus created was fortified by the influence of certain large institutional and private investors that participated in the conspiracy and largely instigated the formation of the Association of American Railroads." (Emphasis added)

(2) *As to the Alleged Purpose of the Conspiracy to Give Northern Producers an Advantage Over Southern Producers*

Georgia offered no evidence to show that the Association of American Railroads was organized for the purpose of discriminating in rates against Georgia or the South, or of giving Northern producers an advantage over Southern producers. Nor did Georgia undertake to show that any

---

her Final Brief (p. 267) asked the Special Master to make and report to the Court, the illegal conspiracy was stated to be the defendants' agreement to integrate the regional rate associations into a coercive national association, etc.; this would presumably date the conspiracy as starting in 1933.

of the territorial rate associations, North or South, which grew up over a great many years and long antedated the A. A. R., were established for any such purpose.

In the case as tried the element of intent ceased to be specific. It became generalized into a charge that the object of the conspiracy was to establish control over *all* freight rates, *including* rates to, from and within Georgia. Thus Georgia's Final Brief in its "Summary of Facts" stated at p. 7:

> "The object of this combination was to establish private domination and control over all freight rates, including rates affecting freight to, from, or within the State of Georgia, by preventing individual carriers from initiating competitive freight rates in accordance with the provisions of the Interstate Commerce Act."

(3) *As to the Alleged Use by the Northern Roads of Coercion on the Southern Roads in the Fixing of Joint Through Rates*

Georgia failed to show that, as charged in the amended complaint, the Southern defendants "generally are dominated and coerced by the Northern defendants," or that, in the language of this Court, "the northern roads use coercion on the southern roads in the fixing of joint through rates."

The record disclosed a series of controversies at various times in the past between northern and southern railroads over the establishment of joint through rates, and Georgia contended that the refusal of northern roads, acting in concert, to agree to a particular joint through rate proposed by southern roads, constituted coercion as a matter of law. Georgia also contended that the economic relationships between southern and northern railroads were such as to give the latter power over the former. These contentions will be examined later.

Limiting herself to these contentions, Georgia offered no specific evidence to show that in any of the rate negotiations

between southern and northern roads the will of the southern roads was in fact overcome by pressure from the northern roads or by the weight of their superior authority, or that by any such pressure or weight the southern roads were in fact restrained from seeking relief from the Interstate Commerce Commission or from taking any other steps which they believed to be in their own interests.

(4) *As to the Alleged Fixing of Rates Which Are Unjust and Unfavorable to Georgia*

Georgia pictured the conspiracy, not as "fixing" rates which were unjust and unfavorable to Georgia, but as restraining the southern railroads from obtaining reductions of rates which mostly antedated the conspiracy and which were higher, mile for mile, from points in Georgia to points in the North than the rates within the North on like commodities.

(5) *As to the Alleged Injury to Georgia's Economy*

Georgia introduced no evidence to show specific injury to Georgia's economy as a result of the defendants' actions.

Georgia did introduce certain data to show that the North was more highly developed industrially, and produced higher earnings, than the South; and Georgia asserted that the "deliberate pursuit by the Northern carriers of the colonial policy described has naturally resulted in arresting the normal economic development of the South and in retarding its industrial growth."[8] But no actual proof of this connection, or of the existence of a "colonial policy", was offered.

On the contrary, Georgia deliberately refrained from offering proof of injury, contending that it was unnecessary and that injury could be presumed to flow from the existence of the conspiracy.

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[8] Final Brief, p. 97.

D. *Summary Comparison of the Case as Charged and the Case as Presented*

(1) In the case as charged Georgia alleged that the conspiracy complained of was effectuated through coercive rate associations.

In the case as presented Georgia amplified the charges by pointing to the Association of American Railroads as the basic source and, through the subjection of the territorial rate associations to its authority, as the effective center of the conspiracy.

(2) In the case as charged Georgia alleged that the purpose of the conspiracy was to discriminate against southern producers in favor of northern producers.

In the case as presented Georgia offered no proof of this purpose, but sought to show only that the purpose was to establish control over all freight rates, including rates to, from and within Georgia.

(3) In the case as charged Georgia alleged that the northern roads generally dominated the southern roads and used coercion on the southern roads in the fixing of joint through rates.

In the case as presented Georgia offered no evidence of any such domination or of any such use of coercion. Georgia limited herself to contending that the northern roads had the economic power to coerce the southern roads, and that concerted refusal by the northern roads to concur in particular joint rates proposed by southern roads constituted coercion as a matter of law.

(4) In the case as charged Georgia alleged that the defendants had fixed rates which were unjust and unfavorable to Georgia.

In the case as presented Georgia pictured the conspiracy not as "fixing" such rates but as restraining the southern roads from obtaining reductions, to the northern level, of rates which had mostly been established prior to the conspiracy.

(5) In the case as charged Georgia alleged that the conspiracy had injured Georgia's economy in a number of ways. In the case as presented Georgia offered no proof of any such injury. Georgia contended that such proof was unnecessary, and that injury could be presumed to flow from the existence of the conspiracy.

E. *Georgia's Theory of the Case as Presented*

Counsel for Georgia, Mr. McGovern, in his final argument, gave a succinct statement of Georgia's theory of the case.

"The guts of the Georgia case," he said, was that the rate structure in the South and from the South to the North was historically higher than within the North; that "the only way that discrimination could be rectified was by constant erosion of the existing structure"; that the South "had to knock down that difference"; that in 1934 the defendants created the Association of American Railroads as a coercive mechanism designed and empowered to prevent erosion of the rate structure; that this mechanism was placed "right athwart the economic facts" (see below); and that "from that standpoint alone Georgia and the South was injured. That is the basic theory of Georgia's case."[9]

The "economic facts" were (a) the alleged inequality in rate levels previously referred to; (b) the relatively backward industrial development of the South as compared with the North; (c) the existence in the North of the largest consuming markets in the country; (d) the desire of Southern producers to sell in those markets; (e) their inability to get there on the railroads except by the use of northern railroads as destination carriers, in consequence of which reductions in joint through rates cannot be effected without the concurrence of these carriers (except, of course, as reductions may be ordered by the I.C.C.).

These economic facts are not in dispute, except that,

[9] XIX, 6767, 6768.

according to the defendants, if there is any over-all difference in rate levels it is very small and without legal significance.

The defendants, denying that their rate associations possess coercive power or operate to the disadvantage of the South, introduced evidence to show that, since the inception of the alleged conspiracy in the early '30s, industry in the South has been increasing more rapidly than in the North and that in recent years many new industries have been established in the South, including Georgia, and that new plants are being constructed there.

Georgia objected to this evidence as wholly irrelevant, stating in her Final Brief at p. 195 that "by deliberately *acquiring power* coercively to fix all freight rates and to discriminate against Georgia in the rates so fixed, defendants have *irreparably injured the economy of Georgia*, and Georgia *declines to enter into any investigation* with defendants as to whether the benevolence with which they claim to have operated their unlawful rate mechanisms has left the economy of Georgia relatively better or worse than might otherwise have been the case." (Emphasis added)

Georgia did offer certain case examples, derived from copies of documents in the defendants' files, to illustrate the defendants' "coercive and discriminatory price-fixing" as it operated in practice. Counsel for Georgia, however, in their final argument, made it clear that these case examples were intended to be only illustrative of various "facets of the case"[10] and were not an essential element of its proof.[11]

And in Georgia's Final Brief, at p. 8, it was argued that the defendants had "monopolized the transportation of freight . . . by acquiring power to coerce the fixing of all freight rates and to discriminate against Georgia in the rates which are fixed. No principle of anti-trust law is more firmly established than the proposition that the

[10] XXII, 7838.
[11] XXII, 7669, 7835.

potentiality for evil in the mere existence of such power, regardless of the use made of it, constitutes a flagrant violation of Section 2 of the Sherman Act. In this case, therefore, *the criterion of illegality is the acquisition of power to employ a coercive and discriminatory mode of fixing rates*, not the reasonableness of the rates thus fixed." (Emphasis added)

Stripped to its bare essentials, therefore, the theory of Georgia's case is that by acquiring a certain type of power, in a given setting of certain economic facts, the defendants violated the anti-trust laws to the injury of Georgia.

The case which Georgia presented at the trial and sought to establish, as heretofore described, was consistent with this theory; and (to sum up) the nature of the theory was such that Georgia failed to prove by specific evidence certain elements which Georgia had alleged in her amended complaint, namely: a purposeful conspiracy to discriminate against Georgia's producers; domination and coercion of the southern railroads by the northern; the actual fixing of discriminatory rates by the defendants; and various injuries to Georgia's economy.

I shall consider hereinafter under Conclusions of Law the defendants' contention that the amended complaint should be dismissed on the ground that the case as presented was not the case which this Court gave Georgia leave to try. Meanwhile, as previously stated, in analyzing the evidence I shall, for the sake of clarity, order it in a manner which follows as closely as possible the main lines of Georgia's theory.

F. *The Nature of the Relief Sought*

As has been stated, Georgia in her amended complaint asked for damages as well as for injunctive relief.

In granting Georgia's application for leave to file the amended complaint, this Court held that since the legality of the rates fixed by the alleged conspiracy could be challenged only in a proceeding initiated before the Inter-

state Commerce Commission, Georgia could not recover damages even if the alleged conspiracy were shown to exist. On the other hand, injunctive relief could be sought under Section 16 of the Clayton Act against the alleged coercion and discrimination practiced by the defendants in the fixing of rates.[12]

Georgia accordingly dropped the prayer for damages and in her Final Brief (p. 206) requested a decree as follows (emphasis added):

> "The State of Georgia respectfully requests that:
>
> "1) Defendants be adjudged to have violated the anti-trust laws as charged;
>
> "2) Defendants be ordered to pay costs, including allowance to Georgia of a reasonable attorney's fee; and that
>
> "3) The defendants, and each of them, their officers, agents, and employees, be perpetually enjoined and restrained from *agreeing among themselves* or with other railroads *upon freight rates*, rules, regulations or practices to be filed with the I.C.C.;
>
> provided that in each major rate territory defendants may jointly support *one rate conference*, to which they may refer proposed rate adjustments for public docketing and public discussion at a *single public meeting* to be held within ten days of the date of submission of the proposal;
>
> and provided that nothing herein shall be construed to prevent the agreeing by two or more connecting carriers participating in a joint interline movement on the establishment of through routes and joint rates

[12] *Georgia* v. *Pennsylvania R. R. Co., et al.*, 324 U. S. 439, 453, 461, 462. At 447 and 452 the Court held that Georgia was a "person" within the meaning of Section 16 of the Clayton Act (38 Stat. 737, 15 U.S.C. § 26), which entitles a person to injunctive relief in the Federal Courts "against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . ." At 460 the Court held that the requirements of this Section were "sufficiently satisfied to justify a filing of this bill."

covering such a movement and on the division among or between themselves of revenue derived from such interline movement."

It will be seen that in paragraph (3) Georgia concedes that organized rate conferences in some form are necessary and permissible in the railroad industry.

The principal changes in the present set-up which the decree would bring about if it were adopted are as follows (in presenting them I have summarized for explanatory purposes some of the evidence hereinafter to be reviewed in detail):

(1) *The substitution of a single-level rate association in the North, and a single-level rate association in the South, in place of the present associations which comprise several levels of committees corresponding in rank to the ranks of the railroad officials serving on them*

In the defendants' associations in Southern and Official Territory, rate proposals (the great majority of which, in both the North and the South, are proposals for rate *reductions*) are referred in the first instance to a small full-time committee of technical rate experts. They study each proposal to see whether it conforms to the requirements of the Interstate Commerce Act and the rules of the Commission, and then they distribute it among the member railroads and the shippers' organizations. In addition, the proposal is published. Unless written objections are received from shippers or carriers, the proposal is published in tariff form and filed with the Commission. The great majority of rate proposals are approved by correspondence at this initial stage.

Proposals not thus approved are referred in each territorial association to a so-called *General Freight Committee*, consisting for the most part of the general freight agents of the respective member roads. These agents are the officials who are actively engaged in negotiating with shippers; they are on the firing line of the rate-making process. Most rate proposals which are submitted to the General

Freight Committees are disposed of by agreement at that level.

Above the freight agents in authority are, in order, *Freight Traffic Managers, Traffic Executives* (vice-presidents in charge of traffic who are also called "chief traffic officers"), and *Presidents*. Generally speaking, these layers of officialdom meet in organized committees or, at the Presidents' level, in ad hoc conferences, to take up rate proposals which have not been finally disposed of below.

Any member road may appeal from the recommendation of a given committee to the next higher one. Member roads may also, and sometimes do, exercise the right to publish independently rates disapproved by a committee, without bothering to appeal (or after partially or fully exhausting appellate rights). Appeals by member roads are infrequent in practice because, as has been stated, most proposals are approved by correspondence or by the General Freight Committees. In addition, there is a large degree of acquiescence in disapprovals.

In both Official and Southern Territory there is a further sort of appeal. If the rate association chairmen, who are paid officials, regard a particular committee action as inimical to the best interests of the carriers as a whole, they may appeal the action (which is normally the approval of a proposed rate reduction) to the next higher committee. Pending the disposition of appeals by chairmen the rules provide in substance that member roads will not independently publish the proposed rate which is the subject of the appeal. The right of independent action is nevertheless preserved pending appeals; but it is rarely exercised.

Georgia's decree would do away with appeals by eliminating all the hierarchical bodies and permitting but a single rate conference in each Territory, in which no decisions or agreements would be made.

(2) *The elimination of voting and of secrecy*

Within the defendants' associations actions upon rate proposals are determined by the vote of the member roads

present at the meeting. The meetings are closed to shippers (who may be heard prior to the meetings upon request), and the proceedings are kept confidential, for the purpose of enabling carriers to vote freely without fear of retaliation by particular shippers. The rules in Official Territory permit the votes to be cast by secret ballot if the Chairman so directs. Georgia's decree, as construed by her counsel, would do away with voting in any form; and all meetings would be public.

(3) *The exclusion of the Association of American Railroads from anything to do with rate adjustments*

The A. A. R. was not made a party defendant and is not mentioned in Georgia's decree. As will appear hereinafter, the Board of Directors of the A. A. R. has rarely taken action to determine or affect the level of particular rates. However, the Board has from time to time adopted resolutions relating to rate policies, including resolutions designed to discourage unnecessary rate reductions, in the interest of conserving revenues; and Cleveland, the Vice-President in charge of the Traffic Department, has at certain times acted as a mediator in rate controversies and at other times has sought by persuasion to bring about or to avoid the effectuation of particular rate reductions. The Traffic Department is one of a number of Departments of the A. A. R. and is the only one which concerns itself with rate matters.

Broadly construed, Georgia's decree would require the defendants either to withdraw from the A. A. R. or to cause it to refrain from acting in rate matters, at least where agreements upon rates might eventuate.

(4) *The elimination of interterritorial collective bargaining over rates, and of every form of agreement on rates (other than agreements upon joint rates by those participating therein)*

Nearly all of the traffic from the South to the North moves on joint through commodity rates, each one of which

is the result of a separately bargained transaction. A joint through rate from the South to the North is normally established as follows. The Southern proponent files it with the Southern Freight Association and copies are sent to the Official Territory associations. The proposal is considered separately in the two groups of associations. If it is approved in both, as happens in the large majority of cases, the proposal is published and filed with the I. C. C., and the connecting carriers proceed to effectuate the new rate. If the proposal is disapproved in the southern or northern associations or in both, it may be dropped, or the interested southern and northern railroads may (though they rarely do) join in publishing and effectuating it.

Up to this point nothing in Georgia's decree would substantially change the procedure (assuming the reconstitution of the associations as previously described).

More complicated situations, however, often arise—typically rate proposals involving some widely manufactured and distributed commodity—in which large numbers of the southern and northern railroads may be directly or indirectly interested—some of them because they would be immediately involved as connecting carriers, and others because the effectuation of the change might necessitate changes in related rates in which they were concerned. Georgia's decree would prevent these indirectly interested carriers from agreeing with the directly interested carriers as to what the rate action should be. Moreover, as construed by Georgia's counsel, the decree would prohibit negotiations between southern and northern rate association representatives, or committees of railroad representatives, or both, looking toward an agreement (typically some sort of a compromise). Such negotiations and agreements have long been a commonplace of railroad practice.

Georgia believes that whenever an interterritorial rate proposal fails to be jointly concurred in after a single public discussion of it in each of the two territories the proponent railroads, if they wish to go ahead, should at once

submit the proposal to the I. C. C. for hearing and decision; and that only by this procedure can southern shippers be assured of an outcome not warped by the dominating pressures of northern interests bent on preserving the northern markets for northern producers. The defendants deny the existence of these pressures and contend among other things that the proposed decree would be unworkable and would cast an intolerable burden on the Interstate Commerce Commission.

II. MOTIONS AND JURISDICTIONAL QUESTIONS

A. *The Misjoinder Issue*

The Court stated in its opinion in this case (324 U. S. 439, 463) that "two of the defendant-corporations" (the Seaboard Air Line Railway Company and the Nashville, Chattanooga & St. Louis Railway Company) "claim to be citizens of Georgia. Georgia asserts that they are not. That issue is an involved one. Georgia may not, of course, invoke the original jurisdiction of the Court in a suit against one of her citizens. If either of the defendants who assert their defense are citizens of Georgia and are necessary parties, leave to file would have to be denied."

The Court went on to hold that the two defendants in question were not necessary parties. The remaining defendants concededly were citizens of other States. "In a suit to enjoin a conspiracy", said the Court, "not all the conspirators are necessary parties defendant." Therefore, even if the two defendants were stricken from the case, pursuant to a motion to strike, the Court would not lose jurisdiction over the controversy between Georgia and the other defendants.

No motion to strike has been made.[13] Therefore, the defendants argue, the case should be dismissed.

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[13] I advised the parties in a memorandum appearing in XVIII, 6467 that I would notify them if in my opinion any need to make such a motion existed. As I have concluded that such a motion is unnecessary, I have given no notice to the parties, so that they have been justified in taking no action.

With respect to this issue my basic conclusions of law, supported by findings of fact (which, with certain supplementary conclusions of law, are set forth in Appendix B at pp. 834-847 infra) are as follows:

1. There has been no misjoinder because (a) The Nashville, Chattanooga & St. Louis Railway Company for purposes of jurisdiction is a citizen of Tennessee and not of Georgia; (b) the Seaboard Air Line Railway Company is a citizen of Georgia but it is also a citizen of Virginia and may properly be sued in this Court as a citizen of Virginia.

2. If this Court should nevertheless conclude that either defendant has been improperly joined and should also conclude that Georgia is entitled to relief, the Court in its decree granting relief may dismiss such defendant from the case as an unnecessary party. The inclusion of such defendant in the case up to that point will not have caused prejudice to it or to the other defendants.

B. *Certificate No. 44*

The defendants contended before me that Certificate No. 44, issued on March 20, 1943 under a war-time Act of Congress, protects the alleged combination from attack under the anti-trust laws. The defendants made a similar contention before this Court, and the Court overruled it in footnote 7 to its opinion in this case (324 U. S. 439, 459). The defendants now argue, however, that their presentation to the Court had been made in the light of the allegations in the amended complaint, and that the case as tried sustains their claim.

For reasons set forth in Appendix C at pp. 848-850 infra, I conclude that adequate ground has not been shown for disturbing the Court's ruling on this point.

C. *The Defendants' Motion to Dismiss*

After the plaintiff's case in chief had been presented the defendants moved for a decree dismissing the amended

complaint. They argued that there was no evidence of a conspiracy to coerce and discriminate, or of a violation of the anti-trust laws, or of damage or threatened damage special to Georgia.

I took the motion under advisement, stating that I would withhold any conclusion of law thereon until the end of the case and that my ruling when made would be upon the record as it stood when the motion was filed.[14] The Southern defendants, who took the leading part in pressing the motion, filed an extensive brief in support of the motion and were heard on the subject at the commencement of the defendants' case and, in more detail, in the course of the final arguments.

After examining the brief and reviewing the arguments, I have concluded that the motion should not be granted. Interpreting the plaintiff's case in chief in the light most favorable to Georgia, and drawing from it those inferences which in the absence of explanation by the defendants could within reason be drawn from it, I am of the view that a trial judge, presented with such a motion at that stage of the case, would probably have overruled it and would have been sustained in doing so. I conclude that I should pursue the same course.

I think it unnecessary to burden the Court with an extended analysis of the plaintiff's case in chief and of the reasons for concluding that the motion should be overruled. By far the largest part of the evidence introduced by the defendants consisted of explanatory material designed to show from the defendants' point of view the true nature of the various documents and excerpts therefrom introduced by Georgia. I find that a significant portion of Georgia's documentary case, when considered in the light of the defendants' explanatory material, conveys a rather different meaning from that which Georgia ascribed to it in her trial brief, and that inferences which might

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[14] III, 963, 965, 967.

have been drawn from the particular selection of exhibits made by Georgia sometimes appear to be unwarranted in the larger perspective provided by the defendants' evidence. If I were to try to present to the Court first of all an analysis of the nearly 500 exhibits comprised in the plaintiff's case in chief, and of the inferences drawn from them by Georgia, *considered without reference to the defendants' explanatory material*, and if I were then to follow that undertaking by presenting (as I think I would be bound to do under the order of my appointment) a reanalysis of the plaintiff's case in the full light of the defendants' case, I fear that I would end by involving the Court in a maze of complexities and details which it was the object of my appointment to avoid, so far as could be done consistently with justice to the parties.

From the point of view of the parties, it is to their interest that the basic issues be presented to the Court as directly and clearly as possible, and I am persuaded after laboring for a long while with the record that this end can best be accomplished by taking up the case from the outset as a whole.

D. *The Effect on this Case of Steps Taken by the Defendants Under the Recently Enacted Section 5(a) of the Interstate Commerce Act*

1. *Summary of the New Section*

On June 17, 1948 Congress added a new Section 5a to the Interstate Commerce Act.[15] Its essential provisions are as follows:

Under paragraph (2) carriers may apply to the I.C.C. for approval of agreements "relating to rates, fares, classifications, divisions, allowances, or charges . . . or rules and regulations pertaining thereto, or procedures for the

[15] Act of February 4, 1887, c. 104, Part I, § 5a, as added by c. 491, 62 Stat. 472, 49 U.S.C. § 56.

joint consideration, initiation or establishment thereof . . ." This description covers agreements of the sort challenged by Georgia in this case; and the Northern and Southern defendants have filed agreements for approval that are substantially the same, in basic respects, as the agreements involved in this case. The approval of an agreement, if given, exempts the parties making and acting under it from the operation of the antitrust laws, as more fully described below.

Paragraph (2) further provides that the Commission "shall by order approve any such agreement" if the Commission finds that (a) exemption from the antitrust laws should be accorded "by reason of the furtherance of the national transportation policy" declared by the Act, and (b) approval of the agreement is not prohibited by paragraphs (4), (5) or (6) of the new section. Paragraph (6) contains the chief, and for our purposes the only relevant, prohibition. It reads as follows:

> "(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the *free and unrestrained right to take independent action* either before or after any determination arrived at through such procedure." (Emphasis added)

By paragraph (8) no order may be made until after interested parties have been given reasonable opportunity for a hearing.

The exemption clause is as follows:

> "(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraphs (4), (5), or (6) of this section, *hereby relieved from the operation of the antitrust laws* with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the

terms and conditions prescribed by the Commission." (Emphasis added)

An exemption once granted may be terminated or modified by the Commission, by complaint or upon its own initiative, if it finds that an agreement previously approved does not conform to the statutory standard (paragraph (7)).

2. Action Thus Far Taken Under the New Section

As of December 23, 1949, when the manuscript of this Report went to the printer, the following steps had been taken under Section 5a.

Applications for approval of rate association agreements were filed with the Commission under Section 5a by Western railroads on November 15, 1948; by Eastern railroads on December 7, 1948; and by Southern railroads on January 5, 1949.[16] The Eastern and Southern agreements have replaced the agreements challenged by Georgia in this case, but, while there has been some simplification of structure in the association set-up, the basic features objected to by Georgia are incorporated in the new agreements, in the same or substantially similar form, so that their execution has not in and of itself rendered Georgia's case moot.

On January 10, 1949, railroad members of the Association of American Railroads filed an agreement "relating to procedure for the establishment and modification of railroad per diem, mileage, and demurrage and storage rates and charges, and rules and regulations pertaining thereto."[17] The agreement was "designed to operate within the framework of the Association of American Railroads," and a copy of the Association's Plan of Organization was attached as an exhibit, but the applicants sought formal approval only of the agreement in question. It is the Plan of Organization, and not that agreement, which Georgia is attacking. The differences between the present

[16] Section 5a Applications numbered 2, 3, and 6 respectively.
[17] Section 5a Application No. 7.

Plan and the Plan as it stood at the close of the proceedings before me are shown in Appendix G at p. 907. The changes are only in housekeeping details and involve nothing of substance.

On October 3, 1949 the Commission approved the Western agreement under Section 5a, finding among other things that "it accords each party thereto the free and unrestrained right to take independent action either before or after any determination arrived at through procedures established by the agreement." [18] The approval was made subject to certain conditions not related to that finding.[19] No orders have been made with respect to the other agreements.

The Department of Justice formally opposed each of the applications, and moved to consolidate the proceedings relating to all four, alleging that each "is merely a single step toward the consummation of a common scheme or design and is a single integral part of a unified plan or structure, which in its entirety amounts to nothing less than a system of private government for the railroad industry throughout the United States insofar as traffic matters are concerned." [20] The Department further took the position that the agreements were of a character prohibited by Section 5a because they did not accord to each party the free and unrestrained right to take independent action and because they were not in furtherance of the national transportation policy.[21] The Commission denied the Department's motion.

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[18] From the Commission's mimeographed report and order, captioned "Interstate Commerce Commission—Section 5a Application No. 2—Western Traffic Association Agreement—submitted June 20, 1949. Decided October 3, 1949."

[19] In a supplemental order dated November 7, 1949, the Commission noted that the agreement had been amended to conform to these conditions, and the Commission directed that its order of approval should become effective on December 15, 1949.

[20] Protest and Motion for Consolidation dated February 7, 1949, p. 2.

[21] Ibid, p. 3.

No proceedings have thus far been taken for review, either of the denial of the Department's motion or of the approval of the Western agreement. No specific provision for review is contained in Section 5a.

3. *The Effect on Georgia's Case of the Enactment of the New Section*

The enactment of Section 5a has not given the Commission any authority to find that an agreement, or action under it, either violates or does not violate the antitrust laws. The Commission's approval of an agreement, if granted, simply relieves the parties from the operation of those laws with respect to the making and carrying out of the agreement in conformity with its provisions and with such conditions as the Commission may prescribe (paragraph (9) above). This is made clear by paragraph (10) of the new section, which provides that the Commission's approval or disapproval, or the termination of an approval, "shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9) of this section."

Beyond noting this one rather obvious fact, I have concluded that it would be inappropriate for me to attempt to anticipate or comment upon the questions which may confront this Court under Section 5a at the time when it is ready to act upon Georgia's case. For at that time the applications for approval of the Eastern and Southern agreements may or may not be still awaiting Commission action, and if Commission action has by then been taken it may or may not have resulted in approval of the agreements, and proceedings for judicial review may or may not then be pending. Moreover, many persons who are parties to Section 5a proceedings but not to Georgia's case, as well as other agencies of government, may have an interest in and be entitled to be heard at the proper time upon the various questions of interpretation and application of Section 5a which are bound to arise.

Meanwhile I consider it my plain duty to the Court, as well as to the parties, to report fully upon the merits of the case which the Court has referred to me.

III. FINDINGS OF FACT

Proposed Findings submitted to me by the parties are not, for the most part, specifically referred to or analyzed in this report, but they proved very helpful to me in framing my own Findings, which here follow.

As previously indicated, each Finding is followed by a reference to the particular pages of this Report (Volumes Two and Three) from which they are derived. These pages in turn contain supporting citations to the record.

The Findings follow the same order, and contain the same major headings, as the material in Volumes Two and Three.

Explanatory comments, appearing in brackets, are inserted here and there among the Findings. These comments are not Findings.

The Findings are consecutively numbered.

FINDINGS OF FACT DERIVED FROM VOLUME TWO

Part One. The Alleged Acquisition of Coercive Power to Prevent the Lowering of Freight Rates

I. *Preliminary Note as to the Nature and Interrelationships of Railroad Rates, and the Necessity of Organized Rate Conferences to Consider Rate Proposals*

[The defendants' rate associations are actively concerned with the interrelationships of rates and exist because of them. Hence to understand the development and role of these associations it is necessary first of all to understand the nature of the rates with which they deal.]

A. *The Nature and Interrelationships of Rates*

1. There are separate *class rate* structures, which have been prescribed by the I. C. C., in each of the major rate

territories, and between them. All commodities of every description are contained in a classification book, which assigns them to particular classes, according to their weight, quality, ease of handling, etc. Attached to each class are mileage rates which bear a percentage relationship to the mileage rates attached to first class; and within each given class the various commodities assigned to it carry the same mileage rates for any given distance. Class rates constitute within each territory, and interterritorially, an interrelated and closely articulated structure or "fabric," no part of which can be modified without affecting other parts of it (p. 224).

2. Most freight, however, moves on *commodity rates.* These are individualized rates, separately bargained and established on a case-by-case basis, covering the carriage of some specific commodity between two specific points, whether within a territory or interterritorially. Commodity rates, unlike class rates, have no prescribed percentage relationship to one another, and their chief historical function has been to effectuate particular reductions, when needed, below the otherwise applicable class rates, without the necessity of revamping the latter. [As already indicated, the great majority of all rate proposals are for reductions.] (p. 224).

3. The greater the extent to which freight rates enter into the price of a commodity, and the more widely the commodity is produced and distributed, the greater will be the number of carriers and shippers concerned with any change in a commodity rate between any two points. In the case of many commodities the existing net-work of commodity rates may be so interrelated as to constitute, like class rates, a kind of "fabric." Many commodity rate changes, however, may be made without widespread effects on other shippers or carriers, and the majority of all rate proposals that are filed with the defendants' rate associations are approved by mail without objections by interested carriers (pp. 224, 225).

4. Railroad rates (whether commodity or class rates) differ from ordinary prices because rates are tied to places, which have a fixed geographical relationship to one another; and they are tied to commodities, which have a commercial relationship to one another (pp. 210, 211).

5. Shippers are normally more concerned with the stability of their rates, and the relationship of those rates to the rates of their competitors, than they are with the actual measure of rates (pp. 211, 212).

6. As a result of commercial needs and railroad competition, and the requirements of the Interstate Commerce Act, there exists a multiplicity of routes between important commercial centers, each carrying the same rates (whether class or commodity) between two given centers regardless of the actual distance of the particular route. Consequently a change in the rate on a particular article over any one route between such centers would affect the rates on the same article over the other routes between such centers (pp. 212-219).

7. Joint rates (covering the shipment of a commodity over the lines of two or more connecting carriers) constitute the great bulk of railroad rates, and any change in particular joint rates necessarily concerns all railroads participating in those rates. Changes in rates local to a single carrier may affect other carriers with related or competing routes (pp. 220-223).

B. *The Necessity of Some Form of Organized Rate Conferences*

[As previously noted, Georgia conceded at the close of the proceedings that some form of organized rate conferences within the different territories was necessary. It has seemed desirable, however, to review briefly the evidence on this point since it throws light on the nature and functions of the defendants' rate associations.]

8. If every rate proposal had to be filed with the I. C. C. before it could be discussed and opposed or supported by interested shippers and carriers, serious delays in the I. C. C. procedure, and expense to shippers and carriers in appearing before the I. C. C., would be caused (pp. 226-228).

9. Organized rate conferences also facilitate clearances of rate proposals with connecting carriers, whose views and intentions with regard to joining in the rates need to be obtained as nearly simultaneously as possible in order to avoid a multiplicity of discussions (p. 228).

10. Organized rate conferences also make it easier for the railroads to discharge their duty of endeavoring to frame their rate proposals in conformity with the requirements of the Interstate Commerce Act (49 U. S. C.), such as:

Sections 1(4), 1(5) and 1(6), which obligate the carriers to establish "reasonable through routes . . . and just and reasonable rates applicable thereto"; to make "just and reasonable charges" for any services rendered; and to establish and observe "just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed. . . .";

Section 3, the basic anti-discrimination section, which in paragraph (1) prohibits the giving of "any undue or unreasonable preference or advantage," or the causing of "any undue or unreasonable prejudice, or disadvantage in any respect whatsoever" to any person, locality, region, etc.; and which in paragraph (4) forbids carriers to "discriminate in their rates, fares and charges between connecting lines. . . . "; and

Section 4, the long-and-short-haul clause, which forbids any carrier, without special permission from the I. C. C., "to charge or receive any greater compensation . . . for a shorter than for a longer distance over the same line

or route in the same direction, the shorter being included within the longer distance. . . ." (pp. 228, 229)

11. The defendants' duty to establish non-discriminatory rates as described in Finding 10 applies even when the rates fall within the so-called "zone of reasonableness"—a zone between maxima and minima within which ordinarily any rate fixed by a carrier may not be disturbed as unreasonable (pp. 230-232).

12. Advance clearance of rates through organized rate conferences helps to protect railroads against claims for damages for having established rates which, though becoming legal after filing and publication as required by the Act, may later be held unlawful (pp. 233, 234).

13. For the reasons set forth in Findings 8 to 12 inclusive, some form of organized rate conference in each major territory, at which interested shippers and carriers may have an opportunity to examine and consider together all rate proposals before they are filed, is a practical necessity (p. 234).

II. *The History and Functions of the Defendants' Territorial Rate Associations*

A. *The History in General, Down to World War I*

14. When the Interstate Commerce Act was passed in 1887, there were in existence some eleven traffic associations covering nearly all the railroad industry, South and North. They had rate-fixing powers enforced through pooling arrangements (by way of the confiscation of the share of a recalcitrant railroad in the pooled earnings of a group of roads). The Act prohibited the pooling of earnings, and after its passage the associations adopted money penalties as sanctions for the enforcement of rate agreements. In spite of their compulsory features the agreements kept breaking down, and rate wars and discriminations against shippers were frequent (pp. 234, 235).

15. After the passage of the Sherman Act the agreements, with their compulsory features, were held illegal in *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290 and in *United States* v. *Joint Traffic Association,* 171 U. S. 505. Following these decisions the railroads removed from the rate association agreements their compulsory clauses (p. 236).

16. The associations, thus modified, continued with no substantial changes in structure or procedure down to the period of Federal control in World War I. A series of amendments to the Interstate Commerce Act, beginning with the Elkins Act in 1903, introduced more effective controls over secret rebates and open rate wars, and thus made easier the efforts of the associations to stabilize rates (p. 237).

[The history after World War I is set forth beginning in Section C below.]

B. *Official Territory Associations Down to the Period of Federal Control in World War I*

17. Because of differences in resources, and in industrial, geographical and other characteristics, railroad construction developed separately in three sub-territories within Official territory: New England, Trunk Line, and Central Freight Association, with their respective centers in Boston, New York City, and Chicago. Separate rate associations were formed and now exist in each sub-territory. The associations in Trunk Line Territory (dating from 1885) and in Central Freight Association (dating from 1887) developed along similar lines, and derived many of their features from the Southern Railway and Steamship Association, organized in 1875. A Joint Committee of members of the Trunk Line Association and the Central Freight Association was created very early to establish joint tariffs and to agree upon classifications of freight, divisions of joint revenues between connecting car-

riers, and other matters. This Committee was the forerunner of the more elaborate machinery developed after World War I for the purpose of tying the sub-territorial associations more closely together (pp. 237-240, 244).

[In Finding 18, and generally hereinafter, particular stress is laid on the Trunk Line Association as the most important of the Official Territory associations. The record contains no evidence regarding the New England Freight Association, and it plays no part in Georgia's case.]

18. The Trunk Line Association articles of 1889, adopted after pooling provisions had been prohibited by the Interstate Commerce Act, provided for binding decisions and prohibited independent action by individual railroads. These provisions were eliminated following the *Trans-Missouri* and *Joint Traffic Association* decisions (Finding 15). The articles also provided for the filing of statistics and the establishment of inspection bureaus to weigh freight, correct underbilling, and to inspect and correct rates and classifications. These provisions, with others relating to traffic matters, remained in one form or another throughout the later history. The articles also provided for a series of hierarchical committees composed of representatives of the member roads: General Freight Agents (who normally deal with shippers' rate questions at first hand); Freight Traffic Managers (next in authority); Vice Presidents in Charge of Traffic (one such on each road being the top policy executive in traffic matters; and the committees on which they serve being called "Executive Committees"); and Presidents. Normally rate proposals would start at the bottom, and if not finally disposed of there, they would go to the next highest committee by a process of appeal, and so on. The rate associations North and South settled into this form of structure, which survived numerous revisions of the various articles (pp. 240-247).

C. *The Period of Federal Control During and Immediately After the First World War*

19. During World War I all the territorial rate associations were supplanted by federal traffic agencies which evolved into a national organization of carrier and shipper representatives. In 1920, after federal control had ended, the railroads (a) re-established their territorial rate associations with the changes noted in Section E below, and (b) as an aftermath of the war-time cooperation between carriers and shippers in rate matters, entered into an agreement with the National Industrial Traffic League, a shippers' organization representing Chambers of Commerce, Boards of Trade and numerous industries throughout the country, as described in the next Finding (pp. 247, 248).

D. *The Agreement Between the Railroads and the N. I. T. League, and the Consequent Participation of Shippers in the Consideration of Rate Proposals*

20. Under the agreement just referred to, rate proposals are publicly docketed with the appropriate rate associations and are widely published and disseminated among shippers' organizations; changes desired by shippers are submitted for action to the rate associations; and proposals objected to by shippers are not finally acted on in the associations until the shippers have had an opportunity to confer about them with the appropriate railroad executives. In emergency cases railroads occasionally proceed with rate changes without publicly docketing them as called for by the agreement. The agreement has met with the general approval of shippers. (pp. 248-252)

E. *Comparison of Rate Associations After the Period of Federal Control With Those Existing Before That Period*

21. The rules or articles of the rate associations which the railroads established after the end of federal control described the committee set-up and procedure in more detail

than before the war, and there were certain structural additions referred to in Finding 23, but the committees of the associations were assigned the same functions of considering and recommending or disapproving rate proposals as they had exercised before the war. (pp. 253-255)

22. The rules or articles referred to in Finding 21 were in substance, as they had been previously, and as they continued to be, agreements between the members of the respective associations that they would follow the procedures specified therein, subject to the rights of the members (described in Findings 136 to 142) to act independently in rate matters. (pp. 252, 253, 513)

23. When the defendants re-established their rate associations after World War I, they set up (a) in Southern Territory a detailed three-level structure in place of a rather loosely defined two-level structure, and (b) in Official Territory a new over-all body composed of Vice-Presidents (the *Traffic Executive Association-Eastern Territory*) to which appeals might be taken from disagreements on rate proposals involving two or more of the sub-territories (New England, Trunk Line, and Central Freight Association). (p. 252)

24. The re-established rate associations continued substantially unchanged down to the time of these proceedings, except for certain developments in 1938, which are traced in Section IV B below, beginning at p. 57.

[Georgia alleged, and the defendants denied, that the Association of American Railroads brought about the 1938 developments just referred to, as a part of the conspiracy to control freight rates in the interests of the North.]

F. *The Structure and Procedure of the Rate Associations in Official Territory, Under the Agreements in Effect at the Time of the Hearings Before the Special Master in This Case*

[Although the present tense is used for convenience

throughout this Section F in describing the rate associations, the Findings relate exclusively to their structure and procedure under the agreements in effect at the time of the hearings.]

1. *The Trunk Line Association*

[Stress again is laid on this Association as the most important of the three sub-territorial associations in Official Territory and as typical of the others.]

25. In the Trunk Line Association rate proposals are examined first by the *Auxiliary Committee*. This Committee consists of employed rate experts who make a technical analysis of each proposal and send a report thereon to the member roads. At the same time the proposal is publicly docketed, published, and distributed to shippers' organizations, as described in Finding 20. (p. 257)

26. If no written objection is made by any shipper or railroad, the proposal is effectuated without further action. A majority of all rate proposals are thus approved by mail in Official Territory without committee action. During a sample three months' period in 1942 and in 1945, 80 and 82 per cent respectively of the Pennsylvania Railroad's rate proposals were thus approved by mail. (p. 258)

27. If a written objection is made, the proposal goes to the *General Freight Committee* (consisting of member roads' general freight agents). This Committee meets monthly. It hears any shipper wishing to be heard. After that, the shippers being excluded, each railroad votes on the proposal through its own freight agent. When any railroad requests, the vote is by secret ballot, to avoid possible shipper pressure. (pp. 258, 259)

28. From the action of the General Freight Committee an appeal to the *Freight Traffic Managers' Committee* (consisting of the member roads' freight traffic managers) may be taken (a) by any member road, or (b) by the Chairman of the General Freight Committee (a paid official without

vote) if he regards the action as "inimical to the best interests of the carriers as a whole." (pp. 259, 260)

[Similar appellate authority is lodged in the paid Chairmen of the other committees, as described below.]

29. Of the rate proposals not approved by mail (constituting a minority of all proposals as per Finding 26) all but a very small percentage are disposed of either in the General Freight Committee or the Freight Traffic Managers Committee. (pp. 260, 261)

30. From action by the Freight Traffic Managers Committee a member road (or the Committee Chairman, as per Finding 28) may appeal to the *Traffic Executive Association-Eastern Territory.* [In extremely rare instances which need not be noted here, the appeal is to a Traffic Executive Committee of the Trunk Line Association members only.] The Traffic Executive Association-Eastern Territory consists of vice-presidents in charge of traffic of the member roads in Official Territory. The membership is open to all members of the Trunk Line, New England and Central Freight Associations, which in turn are open to all Class I railroads having headquarters in their territories. (pp. 261-263)

31. A second over-all appellate body in Official Territory, with functions more limited than those of the Traffic Executive Association-Eastern Territory, is the "Joint Conference of Official Territory Lines," or the *Buffalo Conference* as it is called. It consists of the Freight Traffic Managers of the lines in Official Territory, who meet periodically in Buffalo, New York. Under the agreement ("rules of procedure") establishing it, rate proposals which have a "general basis" in Official Territory (i. e., which affect rates in more than one of the sub-territories) must be concurred in by the appropriate rate association committees in all three sub-territories. Any one of such committees, in case of disagreement among the three, may refer the proposal to

the Buffalo Conference for disposition. [As previously noted in Finding 30, appeals by individual railroads from the sub-territorial committees, as distinguished from disagreements among the sub-territorial committees themselves, are taken directly to the Traffic Executive Association-Eastern Terrtiory.] Appeals may be taken from the Buffalo Conference to the Traffic Executive Association-Eastern Territory. (p. 265)

32. In special cases railroads may docket their rate proposals directly with a higher committee (including the Traffic Executive Association-Eastern Territory and the Buffalo Conference of Freight Traffic Managers) without first submitting them to a subordinate committee in the normal order. Rate association procedure is not rigid. (pp. 263, 264)

33. Appeals from actions by the Traffic Executive Association-Eastern Territory on rate proposals may be taken to the *Presidents Traffic Conference.* This Conference meets very rarely and appeals to it are very infrequent. (pp. 264, 265)

[At p. 268 infra are set forth two charts illustrating the procedure and structure of the rate associations in Official Territory in somewhat more detail than that given in the above Findings.]

G. *Development of the Southern Territory Associations Down to the Period of Federal Control in World War I*

34. The first rate organization in Southern Territory (which, unlike Official Territory with its three differing sub-territories, developed as a single territory with successive territory-wide associations) was formed in 1875. At that time rate wars and secret rebates were frequent and the railroads were in serious financial difficulties. Prior to the passage of the Interstate Commerce Act the successive associations provided for compulsory arbitration of rate

controversies, with sanctions based on pooling provisions, for which money penalties were substituted after the passage of the Act. All compulsory provisions and penalty clauses were removed after the *Trans-Missouri* decision in 1897 (Finding 15), and the right of any member to take independent action in rate matters was expressly affirmed. Subsequent amendments amplified and strengthened the form of this affirmation. The structure up to this period consisted of one layer of railroad rate officials to consider proposals in the first instance, and another layer of top officials, comprising an appellate Executive Board. (pp. 269-272)

H. *Development of the Southern Territory Associations from World War I to 1938*

35. After the period of Federal control (described in Finding 19) the re-established Southern Freight Association included, in addition to the two previous committee layers referred to in Finding 34, a new preliminary sifting committee of employed rate experts, with functions similar to those of the Auxiliary Committee in Trunk Line Territory (described in Finding 25). The procedure of this three-level structure was spelled out in more detail than before; in general it was like that in Official Territory where, however, the set-up was more complex owing to the existence of separate sub-territorial associations. (pp. 272, 273)

I. *Enlargements of the Southern Set-Up in 1938*

36. In 1938 the Southern defendants established a new *Traffic Executive Association-Southern Territory* (similar to the Traffic Executive Association-Eastern Territory described in Finding 30). They also provided for appeals to this new Association from committee action in the Southern Freight Association, and for appeals from the new Association to the *Southeastern Presidents Conference*. (This conference, formed in 1932, had had no previous part in the processing of rate proposals). Thus a five-level structure,

similar to that in Official Territory, came into being in 1938. (pp. 273, 274).

[The origin and nature of the 1938 changes, which are highly controversial, are covered in Section IV below, beginning at p. 57]

J. *Structure and Procedure of the Southern Freight Association as of the Time of the Hearings Before the Special Master*

[The following Findings do not include the changes made in the agreements recently submitted to the I. C. C. under Section 5(a) of the Interstate Commerce Act.]

37. The Southern Freight Association (hereinafter referred to as the "SFA") historically has concerned itself not only with all-rail rates, but with joint ocean-rail rates between North Atlantic ports and interior southern points, and from the beginning it has included in its membership coastwise steamship lines as well as railroads. (pp. 274, 275)

38. There are seventy-five short line railroads in Southern Territory. All are members of the American Short Line Railroad Association, which is not involved in this proceeding. The ten longest are members of the SFA. The non-members enjoy the facilities of the tariff publishing agencies of the SFA, and have a representative who receives from the SFA all rate proposals and who files with the SFA rate proposals, objections, and announcements of intention to take independent action. (pp. 275, 276)

39. As in Official Territory, the great majority of rate proposals are approved by correspondence, without formal committee action, after initial analysis and report by the rate experts employed for that purpose (the *Standing Rate Committee*). (pp. 276, 277)

40. If a member line deems a proposal to be of an "emergency" character it may distribute the proposal direct to the membership, skipping the Standing Rate Com-

mittee. If no objection is received within ten days, the proposal is deemed approved. In case of such objection, the proposal may be submitted directly to the topmost Committee, the Executive Committee. (p. 277)

41. With the exception noted in Finding 40, proposals which are objected to in correspondence normally go to the *General Freight Committee* (traffic officers of the rank of Assistant General Freight Agent or higher), whence, if adverse action is taken, an appeal may be had to the *Executive Committee* (Chief Traffic Officers of member lines). Further appeals may be taken to the *Traffic Executive Association-Southern Territory* and the *Southeastern Presidents Conference* (bodies which are later described in Findings 80, 81, 89, 90). (pp. 278, 279)

42. As in Official Territory, relatively few proposals reach the higher committees. Of 1,220 proposals filed by member roads during a representative three-months period in 1940 (93 per cent of which were for reductions), 995, or about 82 per cent, were approved by correspondence. 166 were submitted to the General Freight Committee, which approved 143 and disapproved 23. 49 were submitted to the Executive Committee, which approved 46 and disapproved 3. 10 reached the Traffic Executive Association-Southern Territory, which approved 6 and disapproved 4. None reached the Presidents Conference. (pp. 278, 279)

[A chart of the structure and procedure in Southern Territory is set forth at p. 280 *infra*.]

K. *Methods of Handling Interterritorial Rate Proposals, in General*

43. Proposals relating to joint through rates between Southern and Official Territory are normally filed with the rate associations in the two territories and normally go through the same procedure in each territory as intraterritorial rate proposals. [Certain special aspects of the han-

dling of interterritorial proposals are noted hereinafter, particularly in Findings 154 to 164.] (p. 281)

III. *The Establishment and General Nature of the Association of American Railroads*

A. *The Earlier National Railway Associations Out of Which the A. A. R. Was Formed*

44. Prior to the formation of the A. A. R. in 1934, there had long existed a number of independent and uncorrelated national railway associations. Of these the two most important were the *American Railway Association* (established in 1891, and having to do chiefly with matters of equipment, demurrage, standardization, interchange of cars, etc.; it had jurisdiction also over rates until the *Trans-Missouri* decision in 1897, when this function was eliminated); and the *Association of Railway Executives* (established in 1914 to deal with policy matters such as federal legislation). In 1934 these two associations were consolidated to form the A. A. R., which in turn absorbed the remaining organizations (the Bureau of Railway Economics, the Railway Accounting Officers Association, and the Treasurers' Association). (pp. 281-283)

B. *The Events Leading Up to the Formation of the A. A. R.*

[As previously indicated, Georgia charged that the A. A. R. was organized in 1934 to create, by a process of merger, a "cartelized private rate-making machinery" whose purpose was "to immunize the existing rate structure from the erosion threatened by the depression." Georgia also charged that powerful eastern investors and banking interests "participated in the conspiracy and largely instigated the formation" of the A. A. R. In this connection Georgia particularly stressed a meeting of investors and railroad directors at the Metropolitan Club in New York City in 1933 as the fountain-head of the conspiracy. The defendants denied all these charges, and contended in sub-

stance that the railroads initiated and shaped the A. A. R. to cope with competitive wastes in services, under the promptings of the I. C. C. and the Federal Coordinator of Transportation.]

45. The precipitating causes of the formation of the A. A. R. were economic and political, growing out of the depression of the '30s: the railroads' acute financial distress, their need of reducing costs and increasing revenues, their fear of government ownership, their desire to bring about adequate government regulation of the rates and practices of competing forms of transportation, and their sensitiveness to the public promptings of the Interstate Commerce Commission, and later of the Federal Coordinator of Transportation (appointed in June, 1933) to reduce competitive wastes by concerted action. (pp. 283-291, 300-303)

46. The competitive wastes which the Commission, and later the Coordinator, most frequently referred to up to the time of the formation of the A. A. R. were wastes in service and in the duplication of facilities; occasionally they mentioned competitive wastes in rates and the need of restudying the entire rate structure. (pp. 284-291, 300-303)

47. The fears and desires of large investors in railroad securities during this period were similar to those of the railroads, as described in Finding 45, and as reflected in the accounts of a meeting held at the Metropolitan Club in New York City on November 14, 1933. (pp. 291-300)

48. The Metropolitan Club meeting was sponsored by an organization of railroad investors, and consisted of a mixed group of investors and directors of large influence and importance. The meeting was concerned with the financial plight of the railroads; with the need of taking steps to avoid the dangers of government ownership, of excessive regulation of railroads and lack of regulation of competing forms of transportation; and with the need of cooperating with the Federal Coordinator in formulating constructive plans for the betterment of the railroad industry. As a result

of the meeting a Directors Committee of nine, three from the South, three from the North, and three from the West, was appointed to further the purposes of the meeting. (pp. 291-300)

49. Some two months after the Metropolitan Club meeting the Federal Coordinator of Transportation, Mr. Eastman, made the first of several public statements (in a report to the I. C. C. which was transmitted to the President and Congress) expressing the hope that the railroads might be able "to 'form a more perfect union' "; he suggested in this report that through an appropriate organization the railroads should act upon "matters of common concern, such as scientific research, the establishment of standards, the adoption of new types of equipment and new forms of service, the unification of terminal operations, and readjustment of the rate structure." In the spring of 1934, in a series of addresses, he spoke of the great expansion of transportation facilities through trucks, busses, waterways, pipe lines and airplanes, and of the "fierce and destructive" competition between and within each separate group, leading to "instability, discrimination, and cut-throat or piratical competition" analogous to the conditions which brought about the passage of the Interstate Commerce Act. In the light of these conditions he urged more effective regulation of the new forms of transportation, and combined efforts by the railroads to "abandon wasteful competition" among themselves. (pp. 300-303)

50. In the spring of 1934 a number of meetings of the Advisory Committee of the Association of Railway Executives (Finding 44) took place at which the formation of a new national association was discussed. In June 1934 that Committee appointed a special committee of six railroad presidents (Atterbury of the Pennsylvania, Chairman; Williamson of the New York Central; Holden of the Southern Pacific; Scandrett of the Chicago, Milwaukee & St. Paul; Cole of the Louisville & Nashville; and Pelley, who subsequently became the first president of the A. A. R., of

the New York, New Haven & Hartford) to formulate recommendations looking toward the reorganization and consolidation of the Association of Railway Executives and the American Railway Association. The evidence does not warrant a finding that the Metropolitan Club meeting had any direct causal relation with this action by the railroad executives, or that this action was taken as a result of pressure from or suggestion by the Directors Committee which had been appointed as a result of that meeting. (pp. 303-316)

51. The Directors Committee desired the railway executives to establish an independent committee of five railroad presidents, divorced from their properties, to function continuously in Washington for the purpose of dealing with government officials and agencies and committees of Congress; and at the beginning the Directors did not wish to have a new national association established. The railway executives were not in accord with the views of the Directors Committee and proposed as an alternative that in the executives' pending plans for the establishment of a new association provision be made for an Executive Committee of five railroad presidents not divorced from their properties. This alternative proposal was approved by the Directors Committee. (pp. 308-313)

52. Discussions and communications took place from time to time between some members of the Directors Committee and some of the railroads' representatives who were interested in the plans for the new association, but the evidence does not show that the Directors Committee made any specific organizational suggestions to the executives apart from the proposal discussed in Finding 51. (pp. 314-316)

53. In the formulation of the plans for the new association by the drafting committee of six railroad Presidents (Finding 50), the views of a number of people played an important part, including particularly those of Atterbury, Holden and Pelley, of the Committee; Judge Fletcher, counsel to the

two associations which were to be reorganized and consolidated; and Willard, president of the Baltimore & Ohio. There was no showing that Atterbury, or the Pennsylvania Railroad, or any single person or railroad, dominated the deliberations. (pp. 317, 318)

54. The degree of authority to be vested in the new association was a major point of discussion during the deliberations just referred to. Pelley advocated "teeth" in the form of a provision for compulsory arbitration, with some form of penalties; Judge Fletcher doubted the legality of penalties under the anti-trust laws, and suggested expulsion from the Association as a "sufficient punishment"; Holden objected to any expulsion provision, and in the end his view prevailed, with the concurrence of Judge Fletcher, who finally concluded that if the railroads agreed to an arbitration provision they would carry it out in good faith without sanctions, and that a railroad breaking its agreement "would simply be outside the pale." (pp. 318-323)

55. The record of the deliberations, so far as shown, contains no references to the control of railroad rates. (pp. 317-325)

56. On September 21, 1934 the member roads of the two constituent national associations (Finding 50), including the southern roads, unanimously approved the final plan of organization of the A. A. R. (p. 325)

57. Upon the approval of the plan, the President of the United States, with whom Pelley had previously discussed the plan, at a press conference informally expressed his commendation of the action, as did the Federal Coordinator in a public statement. (pp. 324-326)

58. The record discloses no evidence that sectional considerations or an intent to discriminate against a region or its carriers or shippers motivated the establishment of the A. A. R. or the form of its organization. (pp. 283-326)

C. *The Structure and General Nature of the A. A. R.*

59. The Plan of Organization of the A. A. R. (herein referred to as the "Articles of Association") vested in the Board the authority to "determine the policies and control the activities of the Association." In pursuance of the understanding set forth in Finding 51, the Articles established an Executive Committee of five Board members, with a provision that this Committee "shall be considered as being continuously in session" and that the presidents composing it "shall give to the affairs of the Association such time as may be necessary." It was expected at the time that this Committee would meet, at least in the first year, fairly continuously for the primary purposes of dealing with government officials and Congressional committees and of discouraging plans for government operation of the railroads. The record does not, however, reveal the extent to which the Executive Committee actually functioned in practice. (pp. 326-329)

60. One of the objects of the A. A. R., although not specifically declared, was to deal at the national level with rate questions of importance to the industry. The Association had other purposes related to the economic well-being of the industry, namely: to promote operating efficiency and reduce costs, to avoid competitive wastes in service, to bring about adequate government regulation of competing forms of transportation, to discourage proposals for government ownership, and generally to represent the railroads as effectively as possible in their relations with the government. These other purposes, with one minor exception, were the only ones of which mention appears in the record of the events leading up to the establishment of the A. A. R., and after its establishment they occupied more of the agenda of the Board of Directors and the Executive Committee than questions of rate policy. (Finding 45; pp. 317-329; 339-341)

61. Upon its establishment the A. A. R. created the following departments, each in charge of a vice-president of the

Association appointed by the Board: Operations and Maintenance, Traffic, Law, Research, and Finance, Accounting, Taxation and Valuation. The first of these was the largest; it now consists of seven divisions (under which are 32 sections or their equivalent), three special committees and one bureau, and it performs a multitude of functions, including the administration of rules relating to car service, demurrage and per diem payments for the use of cars; the interchange of freight; the direction of empty freight car movements from road to road and territory to territory when necessary to meet peak demands; and the standardization of equipment of all sorts. (pp. 329-333)

62. The Traffic Department of the A.A.R., the smallest of the five departments of the A.A.R., was intended to be the branch of the A.A.R. which would concern itself with rate questions of importance to the industry, affecting both passenger and freight traffic. In this field Cleveland, who served as a Vice-President and as Chairman of the Traffic Department from its inception up to and including these proceedings, was given broad discretion. His activities included helping to bring about particular rate increases through conferences with carriers, with the Interstate Commerce Commission, and with shippers; helping to forestall shipper demands for particular rate reductions; and persuading carriers in one or another territory to refrain from rate reductions or other adjustments which would have resulted, either immediately or through their proximate effects, in substantial loss of revenue. He established soon after the organization of the Department a Traffic Advisory Committee of eight traffic executives from the West, eight from the East, and six from the South, including the top association chairmen from the three territories; and on December 8, 1934 the A. A. R.'s President sent to the member roads the recommendations of that Committee that, as an essential step toward improving revenues, rate changes should be considered from the viewpoint of the industry as a whole rather than of individual carriers, and

that chief traffic officers, being directly responsible for freight and passenger revenue, should personally attend the meetings of their Executive Committees in the various territorial associations. All of these activities were consistent with the general purposes of the A.A.R. to conserve and increase the revenues of the railroad industry. (p. 333)

IV. *Alleged Integration of the Territorial Associations Into The A.A.R.*

[Georgia alleged that the basic function of the territorial rate associations, prior to the formation of the A.A.R., had been to "maintain a small group of technical rate experts to assist the railroads on various mechanical aspects of rate modification." Georgia further alleged that these associations did not constitute "a serious threat to lessen substantially competition in the formation of through rates," but that upon the establishment of the A.A.R. they were "merged into a single integrated hierarchy of trade associations to create a cartelized private rate-making machinery." The defendants' conspiracy, according to Georgia, consisted in their having agreed "to organize coercive regional mechanisms" and "to integrate them into a coercive national association." (pp. 341, 342). The defendants denied all these allegations.]

A. *The Alleged Changes Brought About in the Character of the Territorial Associations as a Result of the Formation of the A.A.R.*

63. The establishment of the A.A.R. brought about no immediate changes in the structure, functions or rules of procedure of the pre-existing territorial rate associations. (p. 342)

64. The only associations which were merged into the A.A.R. were the pre-existing national associations described in Finding 44, which had to do primarily with operational,

technical, legislative and other broad policy questions. (p. 342)

65. No appeals from the rate actions of the territorial associations, and no regular method for reviewing their actions, were provided for in the Articles of the A.A.R., or in any rules of procedure, or in the practice thereunder. (pp. 342, 343)

66. The A.A.R.'s Articles, in reference to the territorial associations, spoke in broad terms of their "cooperating with" the A.A.R. and of the A.A.R.'s purpose to "coordinate" their "activities"; and the A.A.R. was authorized to modify any of their rules and regulations which provided "means for the settlement of disputes." The record contains no evidence of the A.A.R.'s specifically invoking any of these provisions in its relations with the territorial associations. (p. 343)

67. Except for the Traffic Advisory Committee recommendations of December 8, 1934 described in Finding 62 above, whose effects, if any, are not revealed in the record, the A.A.R. did not concern itself with the structure, functions or rules of procedure of the territorial associations until November 11, 1937, when the railroads' extreme financial distress, and their relations with the I.C.C., induced certain action described under "B" below. (p. 343)

B. *The Formation of the Traffic Executive Association-Southern Territory, the Strengthening of the Southern Freight Association, and Related Events in 1937-8*

[Georgia alleged that after a survey by Cleveland's A.A.R. Traffic Department of the regional rate mechanisms, President Pelley of the A.A.R. urged upon the Southern railroad Presidents the creation of a small and authoritative Traffic Executive Committee along the lines of the Traffic Executive Association-Eastern Territory (described in Finding 30) which could "better control the rate situation. . . ." Georgia further alleged that the Southern

Presidents followed suit, by establishing the Traffic Executive Association-Southern Territory, an "elite organization" of the twelve largest Southern railroads, with appellate jurisdiction over the Southern Freight Association. With the establishment of this new organization, Georgia charged, "the immediate purposes of the conspiracy were consummated. Regional machinery had been imposed on the South designed to insure that the proposals of the many should be reviewed only by the few. Regional machinery had been perfected in the North to guarantee that any interterritorial proposal that succeeded in running the rate bureau gamut in the South should not be effectuated until subjected to the prejudiced scrutiny of all Northern roads . . ." And the A.A.R., into which "the regional mechanisms were integrated," was "vested with extraordinary powers to quell any competitive traffic urge that might survive the hierarchy of regional pressures." (pp. 343-345) The defendants denied these allegations, and contended that the Southern roads formed the Traffic Executive Association-Southern Territory as a result of their own studies, and that this action grew out of a special chapter of history involving the railroads' relations with the I.C.C. Findings 68 to 76 inclusive, which here follow, relate particularly to that chapter of history.]

68. In 1931, and again in 1934 (just before the establishment of the A.A.R.) the railroads petitioned the I.C.C. for general rate increases. The I.C.C. denied these petitions but granted certain temporary emergency increases, in 1931 and in 1935 respectively. In 1936 the railroads petitioned the I.C.C. to continue the emergency increases indefinitely. The Commission granted only a short extension, to the end of 1936. Before this extension expired the railroads petitioned (a) for a further extension, which the I.C.C. denied, and (b) for permanent increases in rates on certain heavy basic commodities, which the I.C.C. granted in the main on October 19, 1937. Ten days later a meeting of the member roads of the A.A.R. voted to petition the

I.C.C. for a general 15 per cent permanent increase in freight rates and for certain increases in passenger fares in Eastern Territory. Such a petition was filed on November 7, 1937 and became known as *Ex Parte 123*. The action taken at the annual meeting of the member roads of the A.A.R. on November 19, 1937, referred to in Finding 67 above and described in Finding 72 below, was directly connected with the foregoing events, and particularly with the initiation of *Ex Parte 123*. (pp. 346-362)

69. Throughout the period 1931-1937, and particularly in the latter part of it, the railroads in general were in acute financial distress. In the series of cases referred to in Finding 68 the I.C.C. took note of this distress. The I.C.C. in these cases expressed its conviction that general rate increases would do the railroads more harm than good, because their chief trouble was that since 1929 they had been steadily losing traffic to competing forms of transportation, as a result of which they had been forced to make competitive reductions in their rates and fares, reflected in progressively declining revenues per ton mile and per passenger mile ("rate erosion"). (pp. 347-360)

70. In spite of these competitive difficulties, the I.C.C. emphasized in these cases the need of a thoroughgoing study by the railroads of their entire rate structure, with a view to (a) increasing depressed rates in particular instances where increases could be made without driving away traffic (an undertaking facilitated by the fact that competing truck rates had been subjected to control under the Motor Carrier Act, 1935), and (b) reducing rates wherever such action, by attracting traffic, might produce greater aggregate revenues. The I.C.C. also emphasized in these cases the necessity of concerted action to avoid competitive wastes in service and to improve operating efficiency; and when the A.A.R. was organized the Commission expressed its hope that the increased opportunities for cooperative action made possible thereby, together with the Federal Co-

ordinator's proposals for operating economies, would result in important reductions in the cost of railway transportation and other improvements in the railroad situation. (pp. 347-360)

71. In granting temporary emergency increases in 1935 the I.C.C. cautioned the railroads against permitting reductions to be made therein for the purpose merely of attracting traffic from one carrier or route to another or of favoring an industry on one line at the expense of industries on other lines. In the 1936 case (Finding 68) which extended the temporary emergency increases to the end of that year, Commissioner Aitchison criticized the railroads for having made many reductions in these emergency charges in favor of powerful shippers who were in a position to threaten diversion of tonnage—a policy prejudicial to the less powerful shippers. Later in 1936, in finally denying any further extensions of the emergency increases, the Commission stated that many reductions in the emergency charges had apparently been made primarily to give one carrier or group of carriers a temporary advantage—prejudicial in the Commission's eyes—over other carriers in the solicitation of traffic. On October 19, 1937, in granting permanent increases in certain commodity rates, the Commission expressed its impatience with the railroads' lack of progress in following the Commission's admonitions, particularly with regard to the revision of the rate structure and the determination of what high spots or low spots ought to be corrected by appropriate adjustments. (pp. 347-355)

72. At the November 19, 1937 meeting of the member roads of the A.A.R., just following the initiation of their new general rate increase case, *Ex Parte 123*, the railroads took note of the criticisms of their rate practices made by the Commission as described in Finding 71 above. At that meeting they adopted resolutions the substance of which was that, in order to keep to the fullest possible

extent whatever general increases the Commission might grant and thus to check the previous steady decline in revenues per ton mile, no reductions in rates should be made by any railroad without the personal approval of its traffic executive (normally the Vice-President in Charge of Traffic). (pp. 360-362)

73. In the subsequent proceedings before the Commission in *Ex Parte 123* the railroads' representatives repeatedly assured the Commission that they would endeavor not to fritter away such increases as the Commission might grant by improvident reductions for casual or competitive purposes, or because of the pressure of shippers threatening to divert traffic. They also promised to take concerted action to restore so far as possible the rates which they had previously reduced below the authorized maximum reasonable levels; and the Commission, in its decision on March 8, 1938, granted less than the railroads were demanding in the way of general increases, partly on the express ground that the railroads had it in their power to augment their revenues by thus restoring depressed rates to the previously authorized maxima. (pp. 363-367)

74. The Board of Directors of the A.A.R. on March 18, 1938 adopted resolutions referring to the Commission's attitude regarding the restoration of depressed rates, and urging that action be taken accordingly; and at about this time a temporary Traffic Executive Committee of Sixteen was established (5 from the East, 5 from the South, 6 from the West) together with temporary "low spot" committees in the respective territories, to do what could be done to advance subnormal rates. All these actions, described in Findings 72, 73 and 74, were consistent with the assurances given to, and the desires expressed by, the Commission as described in Findings 71 and 73 above. (pp. 368, 395-397)

75. At the November 19, 1937 meeting of the member roads of the A.A.R., referred to in Finding 72 above:

(a) It was decided that the Traffic Department of the A.A.R. should survey the set-ups of the territorial associations in the South, East and West and, after reviewing the results with the Traffic Advisory Committee of the A.A.R., recommend to the associations any needed steps for avoiding rate erosion to the fullest possible extent. (p. 362)

(b) During this discussion the President of the Louisville & Nashville Railroad Company, a Southern defendant, asked that, to avoid prejudicing the proceeding in *Ex Parte 123*, some new and temporary machinery be set up at once in the South, pending the study referred to in (a). (pp. 368, 369)

76. The actions described in Finding 75 were consistent with and were stimulated by the expressions of the Interstate Commerce Commission referred to in Finding 71 above, indicating Commission disapproval of reductions made for purely competitive advantage or under the pressure of shippers threatening diversion of traffic. Later, in the decision in *Ex Parte 123*, the Commission noted with approval assurances by the railroads, given in the course of that proceeding, that they would resist efforts to fritter away the increases authorized by the Commission by reductions of the sort just mentioned. (pp. 360-362, 365)

[Findings 77 to 89 inclusive, which here follow, cover the steps taken to form the Traffic Executive Association-Southern Territory, with other related changes in the Southern set-up.]

77. On November 22, 1937 President Pelley of the A. A. R. wrote to the Chairman of the Southeastern Presidents' Conference, setting forth the action taken at the November 19, 1937 meeting, as described in Finding 75 above. In this letter Pelley recommended that if additional rate machinery were to be made shortly available in the South, as requested by the President of the Louisville & Nashville Railroad Company, the necessary action would need to be

taken by the Southeastern Presidents' Conference. Pelley further proposed that there be placed before the members of that Conference a suggestion, the substance of which was (a) that there be established a special Appeal Traffic Executive Committee consisting of the chief traffic officers of five major Southern railroads; (b) that appeals from actions by the Southern Freight Association, or from proposed independent action by an individual line, could be appealed to the proposed committee by an individual line or by the Chairman of the Southern Freight Association (if he believed the action or proposed action to be detrimental to the interests of the Southern roads as a whole); (c) that similar appeals could be authorized from the proposed committee to a committee of presidents to be established by the Southeastern Presidents' Conference; and (d) that pending any such appeals publication of the rate proposals involved should be withheld. Pelley stated that this was substantially the plan which was operating successfully in Eastern Territory, and that it was also in line with suggestions received from some of the chief traffic officers in Southern Territory. (pp. 368-371)

78. Prior to Pelley's letter of November 22, 1937 the Southern rate association set-up was being studied by traffic executives of some of the major lines in the South. On December 17, 1937 the Southeastern Presidents' Conference approved in principle Pelley's suggestions, but resolved to defer action until the traffic executives just mentioned had completed their study and had submitted their recommendations to the Conference. (pp. 372, 373)

79. The suggestions contained in Pelley's letter of November 22, 1937 were made before the A. A. R. Traffic Department's survey of rate association procedures, which had been authorized at the November 19, 1937 meeting of the member roads, had been begun; and in the upshot the survey was not extended to the South. (pp. 389, 390)

80. On April 4, 1938 the Traffic Executive Association-Southern Territory was established, following unanimous

approval by a conference of Southeastern railroad presidents of a plan of organization recommended by the Southern traffic executives. On June 14, 1938 members of the S. F. A. adopted revised Articles of Association. (pp. 373-375, 381-384)

81. The changes in the Southern set-up which were brought about by the steps referred to in Finding 80 were in substance the same as those recommended in Pelley's letter of November 22, 1937 (the chief difference being that the new appellate body immediately above the S. F. A., namely, the Traffic Executive Association-Southern Territory, was composed of vice-presidents of 12 major Southern railroads, instead of 5, as proposed by Pelley). The changes were modelled upon similar provisions which had been in effect in Official Territory since 1920. (pp. 370, 375, 376, 384)

82. In view of the fact that Pelley's recommendations were in line with suggestions previously received by him from some of the chief traffic officers in Southern Territory (Finding 77), who had begun studying the Southern rate association set-up before his letter of November 22, 1937 was sent, it is possible that the Southern roads would have effected the changes in that set-up in the absence of any recommendations from Pelley. (p. 380)

83. In view, however, of Pelley's important position as the A. A. R.'s President, and of the concern expressed in the A. A. R. resolutions of November 19, 1937 over the need of surveying the several territorial rate association set-ups with a view to recommending any needed steps for avoiding rate erosion (Finding 75), Pelley's recommendations in his letter of November 22, 1937 to the Southern railroad presidents may fairly be regarded as a factor contributing to the action subsequently taken in the South as described in Findings 80 and 81. (p. 381)

84. The A. A. R., through Cleveland as the Vice-President in charge of the Traffic Department, also exercised some initiative and influence during 1938, in helping to bring

about procedural changes in the Illinois Freight Association and in Western Territory designed to check rate erosion more effectively; and pursuant to the A. A. R. resolutions of November 19, 1937 (Finding 72) the Official Territory roads, and those in the South, adopted temporary requirements of the signature of rate reduction proposals by chief traffic officers. (pp. 388-398)

85. Prior to the beginning of the A. A. R.'s efforts to deal with the problem of rate erosion at the November 19, 1937 meeting, steps in the same direction had been taken in some territories: in the South, some of the chief traffic officers were studying the Southern rate association set-up (Findings 77 and 78); in Official Territory, it was determined that (subject to the right of individual action by any railroad) no reduced rates should be authorized for the time being without approval by the appropriate Traffic Executive Committee (or where no such committee existed, without approval of the appropriate traffic executive or executives); and in Illinois Freight Association Territory a proposal was approved, though not effectuated, to authorize Chairman-appeals from subordinate committees to the Traffic Executive Committee. (pp. 398, 393, 394)

86. So far as the record discloses, none of the actions taken in 1937-38 which have been described in Findings 72 to 81 inclusive and in Findings 84 and 85 was specifically contemplated at the time of the organization of the A. A. R. in 1934. The A. A. R.'s actions, however, were consistent with the general purposes of the A. A. R. as declared in its Articles. (See Finding 62).

87. Each of the actions referred to in Finding 86 reflected and arose out of the revenue difficulties which concerned all of the carriers, without sectional distinction. In none of the actions was there any purpose of discriminating against Southern carriers or shippers. (pp. 360-362, 369, 375, 381)

88. Neither the A. A. R. nor any of its officials nor any of the Northern defendants, exercised any coercion upon the

Southern railroads or their associations in respect to any of the actions referred to in Finding 86. (pp. 380, 381)

[Findings 89 to 93 inclusive, which here follow, relate to the limited nature of the membership of the Traffic Executive Association-Southern Territory. Georgia charged that this limitation contributed to the coercive character of the new Association.]

89. The membership of the new Traffic Executive Association-Southern Territory was limited to the Chief Traffic Officers of 12 major Southern railroads, as compared with (a) 15 represented on the Executive Committee of the Southern Freight Association (which also included 2 short line representatives and 4 steamship line representatives, making a total Committee of 21) and (b) a total membership of 38 railroad and 6 steamship lines in the Southern Freight Association. This limitation of the membership of the Traffic Executive Association-Southern Territory was protested at the time by one steamship line (which was thereafter invited to attend and participate without vote in all meetings in which matters of interest to the line might be up for consideration) and by one small Southern railroad. There was no evidence of other protests. (pp. 375, 377)

90. The 12 railroads represented in the Traffic Executive Association-Southern Territory included approximately 33,000 miles out of 39,000 miles of Class I railroads in the South, and included all of the railroads in Southern Territory which reached the interterritorial gateways between the South and the various sections of the United States. Two of the railroads not represented were Northern defendants which were members of the Southern Freight Association because portions of their roads extended into Southern Territory; one of them specifically requested representation, which was denied while at the same time a specific request for representation by a relatively small Southern railroad was granted. (pp. 378, 379)

91. There was no evidence that the limitation of membership in the Traffic Executive Association-Southern Territory was imposed on the Southern defendants by pressure or threats of pressure on the part of any Northern railroads or of the A. A. R. Pelley's letter of November 22, 1937 (Finding 77) recommended the appointment of a temporary Appeal Traffic Executive Committee of five members; but the principle of limitation had been applied to the Executive Committee and the General Committee of the Southern Freight Association ever since 1922, and the membership of the new Association was in fact extended to twelve. (p. 380)

92. The purpose of the limitation of membership in the Traffic Executive Association-Southern Territory was to enable the new Association to discharge as effectively as possible, by concentrating responsibility on a small number of important officials, the primary function for which it was established. That function was to check rate erosion by discouraging rate reductions which were not absolutely necessary. (p. 380)

93. During the approximately eight years of its existence (up to the time of these proceedings) the Traffic Executive Association-Southern Territory held 25 meetings and acted upon 112 subjects of appeal from the Southern Freight Association. Only 33 of the proposals thus appealed were disapproved. Of these 33, 13 were independently announced by the proponents in disregard of the Association's action. Five of the remainder were appealed to the Southeastern Presidents' Conference. Of these one was independently announced, and of the remaining four proposals only one was disapproved and that was a proposed rate increase. (p. 384)

[The foregoing Findings have not dealt, except incidentally, with the *nature and alleged coerciveness* of the power said to have been acquired by the defendants. They have dealt rather with the origins and purposes of those

actions which in Georgia's view constituted the acquisition of the power complained of by Georgia. The following Findings deal with the nature and alleged coerciveness of that power.]

Part Two. The Nature and Alleged Coerciveness of the Power Acquired by the Defendants

I. *The Alleged Binding Authority of the A. A. R. in Rate Matters*

A. *The Nature and Effect of the Authority Conferred by the Articles of Association*

[Georgia contended that the defendants' objectives in organizing the A. A. R. had been to "eliminate competition in the rate-making process" and to "impose a private government, invested with power to discipline its subjects, on the railroads of the United States." Georgia further alleged that, in spite of the elimination from the Articles as adopted, of a provision for expulsion which had been contained in an earlier draft, the defendants had sought to achieve their coercive objective in a "more palatable form without changing the substance." (p. 403) The defendants denied the charges and contended that the Articles of Association contained no coercive features either express or implied.]

[*Note:* The Findings hereinafter set forth in this Section A do not relate to the revised form of Plan of Organization which the railroads adopted following the recent enactment of Section 5a of the Interstate Commerce Act.]

94. Under the Articles of the A. A. R. the members expressly agreed that in any case declared by the Board to be "controversial" and decided by a three-fourths vote after notice and an opportunity to be heard, the members involved in the case would accept and carry out the decision or institute arbitration proceedings and be bound by the award. (pp. 402, 403)

95. Arbitration was never resorted to in practice. The record discloses only one instance of a case which the Board declared to be "controversial", and in that case the Board made no decision and took no definite action. In one other instance (see Finding 123) Cleveland, Vice-President of the A. A. R., recommended that the Board declare a question to be "controversial", but the Board did not do so, and Cleveland later withdrew the case from the Board. In the instances in which the Board took action in rate policy matters the action was in the form of ordinary resolutions. (pp. 405, 406)

96. The provisions referred to in Findings 94 and 95 were eliminated from the Articles of the A. A. R. after these proceedings were initiated and before the hearings were closed (which was also before the passage of Section 5a of the Interstate Commerce Act). (pp. 407, 408)

97. In the Articles of the A. A. R. the members did not expressly bind themselves to comply with policy resolutions of the Board of Directors (as distinguished from decisions in "controversial" cases). The members declared in general terms their intention to recognize and support the Association as an authoritative body without, however, committing themselves in advance to abide by every action it might take. (pp. 408-412)

98. The Articles of the A. A. R. did not contain any provisions for expulsion (such as had been contained in earlier drafts—see Finding 54) or any other form of sanction or penalty. This omission was deliberate; and no specific sanctions or penalties were ever applied by the A. A. R. in practice. (pp. 403, 404)

99. The Articles of the A. A. R. did not contain any provision authorizing independence of action. This omission was deliberate; and the only two railroads which sought permission to join with reservations of the right to take independent action in various matters, including rate matters, were refused such permission. (pp. 412-416)

100. There was no evidence that this omission was due to the existence of an implied obligation to comply with all resolutions of the Board of Directors. The omission may have been designed to support the express obligations undertaken by the members as set forth in Finding 94 to accept, in "controversial" cases, three-fourths decisions of the Board or arbitration awards. (pp. 415, 416)

101. The Articles of the A. A. R. authorized members to withdraw from the Association upon ninety days notice. Several of the railroad officials who took a prominent part in shaping the Articles of the Association were doubtful at the time of its establishment whether a member could thus withdraw without losing its rights (subject to their being restored upon application to the I. C. C.) under the car service, per diem and interchange agreements which the A. A. R. (like the American Railway Association before it) administered and from which, as a practical matter, no railroad could afford to be excluded. These doubts were shared, as late as the time of these proceedings, by the President of the A. A. R. (pp. 416-423)

102. In actual practice the A. A. R. permitted railroads to participate in the agreements referred to in the preceding Finding even though such railroads had not become members and even though, after having joined, they had voluntarily withdrawn from membership. Such participation was permitted on the same terms as in the case of members; apart from the requirement of paying a pro rata share of the expenses incident to the administration of the agreements, such participation did not involve the assumption of any obligations to the A. A. R. (pp. 418, 419)

B. *The Nature and the Practical Effect of the Resolutions of the Board of Directors of the A. A. R. Relating to Rate Policy Matters*

[Georgia contended that the A. A. R. was "the repository of absolute power to dictate the rate when occasion re-

quires." (p. 423) In support of this charge Georgia cited certain resolutions adopted by the A. A. R. Board, which are the subjects of the following Findings. The defendants denied the coercive character of these resolutions.]

Joint Rates With Bus and Truck Companies

103. On August 9, 1935 the railroads were authorized by the Motor Carriers Act (Section 216(c) of the Interstate Commerce Act) to make reasonable joint rates with bus and truck companies. The making of these joint rates was permissive and not mandatory. On September 20, 1935, the Board of Directors of the A. A. R. adopted a resolution which by its terms expressly prohibited the establishment by one railroad of any such joint rates in a territory already served by another railroad, on the ground that such action would constitute an invasion by the proponent railroad of the territory of the other. This resolution, prior to its adoption, had been submitted to the member roads, and with very few exceptions had been approved by them. (p. 424)

104. The Interstate Commerce Act in Sec. 1(18) provides that a railroad shall not extend its "line" without obtaining from the I. C. C. a certificate of convenience; and the I. C. C.'s rule has been, and was at the time of the resolution referred to in Finding 103, that such a certificate will not be granted to one railroad to extend its "line" into the territory of another where adequate service is being given by the latter. The resolution in question, however, did not make existing adequacy of service within the meaning of Section 1 (18) of the Act the test of the prohibition against joint rates; moreover, under Section 216 (c), referred to in Finding 103 above, there are no restrictions upon joint rates between motor carriers and railroads other than that the rates shall be "reasonable." The resolution was therefore more restrictive in scope than both Sections of the Act. (pp. 424-428)

105. In 1936 the Chicago Great Western Railroad Company published joint rates with a motor carrier in violation of the resolution of September 20, 1935, referred to in Finding 103 above, in spite of protests by the President of the A. A. R., and in spite of the fact that the matter was on the docket of the Board of the A. A. R. for decision as being contrary to the Board's policy expressed in the resolution. Prior to the publication of the joint rates, the Board on April 24, 1936 referred the matter to its Executive Committee. No further action was thereafter taken by the Board or the Executive Committee. No threats of retaliatory action against the Chicago Great Western were made, and no such action was ever taken, by any organ or officer of the A. A. R. After publication of the joint rates, the I. C. C. suspended them on the application of certain unidentified railroads, and, after public hearings, authorized the rates to become effective. The application for suspension was not shown to have been instigated by the A. A. R. or to have been part of a common plan by A. A. R. members. (pp. 428-437)

106. On June 25, 1937 the Board of the A. A. R. adopted a substitute resolution in place of the resolution of September 20, 1935. The substitute resolution restated the September 20, 1935 resolution in clearer form and as a declaration of policy instead of an express prohibition. On the same day the Board resolved that a proposal by the Western Pacific Railroad to absorb certain trucking charges, which the Southern Pacific claimed would be an invasion of the latter's territory by diverting traffic from it, would constitute a violation of the policy announced by the Board. There is nothing in the record to show whether the Western Pacific complied with the resolution or disregarded it. (pp. 438-441)

107. On October 10, 1936 the Board of the A. A. R. adopted a resolution urging the Gulf, Mobile & Northern Railroad Company and its Transport Company subsidiary to with-

draw certain applications which they had filed with the Mississippi Public Service Commission. These applications were for franchises covering bus operations which were partly local to the Railroad Company and partly beyond its territory. The Board declared that in its judgment these operations would constitute an invasion of the territory of other railroads. The Gulf, Mobile & Northern thereafter amended the applications to eliminate the non-local operations. There had been prior to this action a conflict of policy within the Railroad Company's management as to whether the Company should engage in non-local operations, and the Mississippi Public Service Commission had indicated that franchises would not be granted for such operations. (pp. 441-443)

108. On October 25, 1939 the U. S. Government brought suit against the A. A. R. and its officers, directors and member railroads to enjoin the carrying out of the substitute resolution referred to in Finding 106 above. After the suit was brought the resolution was rescinded and a consent decree was entered. (pp. 443, 444)

109. After the resolution had been rescinded as described in Finding 108 the policy embodied in it continued generally to be followed. There was no specific evidence that this was due to any direction on the part of the A. A. R. or to any common plan among the roads. (pp. 444-447)

110. The history of this resolution shows (a) that the Board of the A. A. R. assumed that the Board had the authority and duty, in the interests of conserving revenue, to initiate a check upon competition for traffic between railroads through joint rates with trucks in each other's territories; (b) that the expression of this resolution as originally adopted in the form of a prohibition showed the belief of the Board that it was proper for the Board to direct the railroads to refrain from competitive practices calculated to reduce the railroads' revenues; (c) that the Great Western's independent action, without subsequent

retaliation by the A. A. R., demonstrated the non-mandatory character of Board resolutions in fact, whatever their form; (d) that the Board's subsequent restatement of the resolution as a declaration of policy may fairly be regarded as a recognition by the Board of the fact that in legal substance its resolutions amounted to no more than that; (e) that the subsequent declarations by the Board that particular railroad actions would violate the resolution expressed the expectation of the Board that all railroads would live up to the resolution; (f) that the A. A. R. regarded itself as authorized by its articles to place the weight of its influence against competitive inroads on rates; and (g) that independent action could be taken by a railroad desiring to do so without being coerced or penalized.

The Resolution of May 17, 1935

111. On May 17, 1935 the Board of the A. A. R. adopted a resolution to the effect that one group of lines should not request the I. C. C. to suspend the tariffs of another group until both groups had had a conference with officers of the Association (in practice this meant Cleveland, Vice-President in charge of the Traffic Department), and that wherever possible such conferences should be held in advance of the filing of tariffs. In practice room was left for two lines having a rate controversy in a given territory to ask for a conference, but no evidence was offered of any such request. The basic purpose of the resolution was to reduce the number of applications filed with the I. C. C. by one set of railroads seeking the suspension of rates of another set. (pp. 447-453)

112. Cleveland applied the May 17, 1935 resolution in such a way as to dispense with any conference except where the protesting group felt that it might be helpful. There was no evidence of pressure or coercion by Cleveland in the few examples given of the conferences conducted under the resolution. (pp. 454-458)

113. The resolution of May 17, 1935 was cast in mandatory form ("no further requests for suspension of tariff publications of one group of lines will be filed with the I. C. C. by other lines, unless there has first been a conference," etc.) Cleveland, and the territorial association chairmen in certain instances, used terminology appropriate to the existence of binding authority in the A. A. R. to hold or to dispense with conferences; and the railroads generally complied with the resolution. They felt free, however, in particular instances to proceed, and did proceed, before the I. C. C. without a prior conference with officers of the A. A. R. In such instances no penalty was visited upon them. (pp. 448, 455-460)

C. *The Allegedly Coercive Activities of the A. A. R. in the General Rate Increase Cases of 1934-1937 (Ex Parte 115 and Ex Parte 123)*

[References have previously been made to the proceedings known as *Ex Parte 115* and *Ex Parte 123*, in which the railroads sought rate increases and in which the Commission admonished them to raise depressed rates, to lower rates where more net revenues could thereby be gained, and to avoid frittering away revenues by improvident rate reductions. Georgia charged that in those proceedings the defendants took certain actions which well illustrated the manner in which the A. A. R. "has occasionally found it convenient to arrogate to itself the right arbitrarily to fix rates for the country as a whole without regard to the views of individual members." (p. 460) Again the defendants denied that the actions in question had any coercive character or were otherwise improper. The actions are reviewed in the Findings below.]

114. In 1934 the railroads petitioned the I. C. C. for authority to make certain increases of a general nature in their freight rates and charges. In the first of a series of decisions known as *Ex Parte 115* the I. C. C. authorized the railroads to make certain emergency charges from April 18,

1935 to June 30, 1936. These charges were permissive, not mandatory. Following this decision, the member roads appointed a General Rate Committee, pursuant to an established practice which antedated the A. A. R. The General Rate Committee, an *ad hoc* body, adopted a resolution with the approval of the A. A. R. Executive Committee, declaring that "all interstate rates will be increased effective April 18, 1935 in accordance with authority granted by the I. C. C. and that the matter of like increases on intrastate traffic will be progressed as rapidly as possible." The purpose of this resolution was to fix a uniform date for the inauguration of the emergency charges and not to compel their universal adoption contrary to the will of particular railroads. In at least one instance certain carriers refrained at the outset from putting the emergency charges into effect with respect to the handling of a particular type of traffic, and thereafter many removals of the emergency charges were made by many carriers covering much important traffic in all parts of the country. There was no evidence of coercion in connection with this resolution. (pp. 460-468)

115. In its First Supplementary Decision in *Ex Parte 115*, on June 9, 1936, the I. C. C., while permitting extension of the emergency charges only until December 31, 1936, stated that the railroads were not debarred from attempting to translate any of those charges into permanent rates. On August 7, 1936 the General Rate Committee, referred to in Finding 114 above, recommended that the railroads authorize it to revise the rates in any way which in its judgment would produce the greatest increase in revenues consistent with present conditions. This was subject to the proviso (among other provisos) that as soon as the revisions on any commodity were determined they should be translated into tariffs and immediately tendered for filing with the Commission, with a petition for the modification of any outstanding orders that might interfere with the revision. On August 8, 1936 the President of the A. A. R. submitted this recommendation by the General Rate Committee to the

member roads. The Elgin, Joliet & Eastern Railroad objected to giving the recommended authority to the Committee unless that railroad were given an opportunity to discuss in advance any rate proposals affecting its line. The President of the A. A. R., in an exchange of correspondence with the Elgin Railroad, advanced certain proposals for conferences which appeared to satisfy that railroad's objections. There was no evidence of coercion. (pp. 468-473)

116. On November 7, 1937 the railroads in *Ex Parte 123* petitioned the I. C. C. for certain general rate increases. On November 19, 1937 the A. A. R. member roads at their annual meeting adopted a resolution providing in substance that, in order to keep to the fullest extent possible whatever general increases the Commission might grant, and thus to check the previous steady decline in revenues per ton mile, no reductions in rates should be made by any railroad without the personal approval of its traffic executive. This resolution was a voluntary step unanimously taken by the member roads to conform to certain admonitions by the I. C. C.; it was likewise in accordance with their own desires to check rate erosion at a time when the roads were in acute financial distress; it was temporary in nature and was rescinded in January, 1939; and in formulating and recommending it to the member roads the A. A. R. did not threaten or exercise any coercion. (pp. 473-481)

D. *Action by the Board of Directors of the A. A. R. in Controversies About Specific Rates*

[The record discloses only two instances in which the Board of Directors of the A. A. R. took action to determine or affect the level of particular rates. These two instances are reviewed below.]

117. On December 18, 1926 the A. A. R. Board requested the President of the A. A. R. to direct the calling of a conference of Western roads for the purpose of reviewing the rates on *copper bullion* from the West and accomplishing a

constructive upward revision. The conference was held, but the Denver & Rio Grande served notice that it would not concur in any increases, and no increases were made. When the matter was subsequently placed on the docket of the A. A. R. Board the Western Pacific as well as the Rio Grande announced that it would not concur. The matter was then dropped. No penalty was visited upon the two roads. (pp. 481, 482)

118. In June, 1936 the Atlantic Coast Line Railroad, the Florida East Coast Railway, and the Seaboard Air Line Railway proposed that the rates on *citrus fruits* be reduced by 18 cents from Florida to all points in Official Territory, exclusive of the North Atlantic ports (to which reductions of more than 18 cents had previously been made because of truck-water competition, thus glutting the markets in those ports and depressing the prices received by shippers at interior markets). The Northern roads were willing to join in a reduction of only 8 cents. On October 25, 1936 the I. C. C., upon the application of the Northern and Southern roads, granted the necessary permission to make the 8 cents reduction. (pp. 482-484)

119. The Western roads, who, like the Northern roads, favored a reduction of only 8 cents, feared that the Southern roads, having direct access to St. Louis and Chicago, and being able therefore to control the rates to those points without the concurrence of Official Territory carriers, would proceed to make an additional 10 cent reduction effective to those points. The Western roads accordingly addressed themselves to the A. A. R. On October 30, 1936, the A. A. R. Board declared that a further reduction of 10 cents to St. Louis, Chicago and so-called interior territory was not justified and should not be made. (p. 484)

120. The Southern roads had no intention of effectuating the 10 cent reduction into the limited St. Louis-Chicago area, but sought only to effectuate it into all interior points in Official Territory. They were defeated in this object,

not by the A. A. R. resolution, but by the previously announced refusal of the Northern roads to join with them in the reduction—a refusal which was repeated when the Southern roads renewed their proposal, contrary to the A. A. R. resolution, two years later. The evidence failed to establish that the resolution was coercive in character. (pp. 485-487)

121. The resolution referred to in Finding 119 above was, so far as the record discloses, the only instance in which the Board of the A. A. R. recommended against a proposed reduction in rates. The resolution had no implications of sectional discrimination. This was not a case in which Southern producers were competing with Northern producers in Northern markets; in this case Florida, Texas and California producers were at odds as to the amount of a rate reduction into interior points in Official Territory, and the railroads were interested in the proposed reduction only from a revenue standpoint. (pp. 487-490)

122. The resolutions referred to in Findings 117 and 119 above were the only instances in the record in which the Board of the A. A. R. took action to determine or affect the level of particular rates. The possibility that the Board might align itself on the side of Northern manufacturers, in a competitive struggle against Southern manufacturers, could theoretically take place, but there is no evidence of its having taken place, and it cannot be regarded as a risk which has any substance or which could be presumed to influence producers in the choice of a locality. (pp. 481, 490)

E. *Action by Cleveland, as Vice-President in Charge of the Traffic Department of the A. A. R., in Particular Rate Matters*

[Georgia cited instances, covered in the following Findings, to illustrate the alleged coercive activities of Cleveland, Vice-President of the A. A. R. in charge of its Traffic Department. The defendants asserted that the activities were merely advisory or mediatory.]

123. *The Furniture Case.* In 1936 the Southern and Official Territory railroads asked Cleveland to arrange a conference with the Western and Southwestern roads. The Western and Southwestern roads in 1933 had reduced their rates on furniture to meet truck competition. This reduction had led to demands by shippers for similar reductions in Southern and Official territory, and the Southern and Official territory carriers wished the truck-depressed rates to be restored. Cleveland arranged and presided at the requested conference, and later, no action having been taken, recommended that the A. A. R. Board declare the question to be "controversial" and make a binding adjudication of it. Cleveland had reference (a) to the Board's authority under Article 4 of the A. A. R.'s Articles to declare questions "controversial" and to decide them by a three-fourths vote (Finding 94) and (b) to the provision in Article 19 that the members involved in the case would accept and carry out the decision or institute arbitration proceedings and be bound by the award. The Board of the A. A. R. did not act upon Cleveland's request and he later withdrew the case from the Board's docket. No coercive activity on his part was established. (pp. 491-499)

124. The Western and Southwestern roads persisted in declining to restore the depressed furniture rates. In 1931 the I. C. C., in establishing maximum furniture rates in the several territories, had invited any interests disadvantaged by subsequent competitive reductions to refer the matter to the I. C. C. The Southern and Official territory carriers, however, did not refer the question of the depressed rates to the I. C. C., nor did they increase their own rates. There was no evidence to connect Cleveland or the A. A. R. with this inaction of the Southern and Official territory carriers. (pp. 499, 500)

125. *Section 22 Quotations.* In 1939 the practice of granting secret rate reductions for carrying government property, under Section 22 of the Interstate Commerce Act,

gave rise to a complaint of discrimination which reached Cleveland. He requested the railroads, through their rate associations, not to quote Section 22 rates that would involve other lines and territories without prior conference with one another. Subsequently the rate associations agreed that that should be the policy. There was no evidence that in so doing they were coerced. (p. 501)

126. *Soda Rates.* In 1936, following a series of interterritorial controversies over soda rate adjustments, Cleveland called a conference at which special committees selected by each territory (Southern, Southwestern, Western, Transcontinental and Official) agreed that soda rate proposals would be interchanged, and that proposals in one territory objected to by another would be held in abeyance pending a conference of the carriers involved. The agreement broke down. Independent action was freely taken, and there was no evidence of coercion by Cleveland or by the associations. (p. 502)

127. *Citrus Fruits (1938).* In 1938 Cleveland, on behalf of the railroads, wrote to Secretary Wallace explaining why the railroads were unwilling to make rate reductions on citrus fruits, which Secretary Wallace had asked the various territorial rate associations to consider. There was no evidence that Cleveland's letter represented anything but the freely arrived at views of the railroads. (pp. 502-507)

128. In the *Paper* and *Iron and Steel Cases,* covered in Findings 217-225 and 240-251 infra, Cleveland acted only as a mediator in conferences and there was no showing of any coercion on his part.

II. *The Alleged Coerciveness of the Territorial Rate Association Procedure*

[Except where otherwise expressly indicated, all Findings under this heading relate to the procedure in both Official and Southern territory. All Findings relate to the

procedure as it obtained under the rate association agreements in effect at the time of the hearings; no references are made to the agreements later filed by the railroads with the I. C. C. under the recently enacted Section 5(a) of the Interstate Commerce Commission.]

A. *Delays*

[Georgia asserted that the record was "replete with instances of rate proposals which were held in abeyance for years by opposition in the hierarchy of rate bureaus." (Final Brief, p. 66) And Georgia included the element of delay among the alleged coercive features of the rate association set-up. The defendants minimized the seriousness and extent of the delays, sought to show the reasons why some delays were inevitable, and denied that the delays were coercive in character.]

129. In the case instances cited by Georgia (cotton linters, gums and resins, logs from Alabama to Alta Vista, Virginia, tin plate decoration-in-transit, wine from Atlanta to Official territory, agricultural implements, and paper and paper products) the evidence does not show that any of the proponents of rates were constrained, because of delays ascribable to association procedure, to acquiesce in unfavorable committee action. (pp. 508, 509)

130. The great bulk of rate proposals are approved in the territorial associations. During a representative period in 1945, in Official territory, on an average less than a month and a half elapsed from the receipt of proposals to the date of approval. The corresponding period in the case of disapprovals was less than two and a half months. After approval of a rate some three months on an average elapsed before the effective date of change. This lapse of time was due to various technical requirements incident to the translation of proposals into tariff publications, and due further to the thirty-day notice requirement of the Interstate Commerce Act and the necessity in some cases of

obtaining Fourth Section relief from the Commission before publication. (pp. 509, 510)

131. The rate association procedure makes it convenient for shippers to be heard and clearances to be made by participating carriers, and in these respects tends to promote expedition. (pp. 510-512)

132. There is no evidence that such delays as exist in rate association procedure cause railroads to announce or to refrain from announcing particular rates contrary to their desires. (pp. 508, 512)

B. *The Allegedly Binding Requirements of the Territorial Rate Association Rules*

[The defendants, as Georgia said, "deny the compulsive character of rate bureau procedure and point to the specific provision in each bureau reserving to the individual carrier the right to take independent action." According to Georgia, however, "analysis discloses" that "the asserted retention by each carrier of 'liberty of individual action' is, for a number of reasons, a shadow devoid of substance." (Final Brief, p. 67) These contentions are covered in the following Findings, which deal with the rules of procedure and the practice under them. These rules are to be taken throughout as constituting, in substance, in accordance with Finding 22, agreements between the members; but the true nature of these agreements can only be determined in the light of the practice under them.]

1. *Georgia's Charge that the Defendants Agree to Submit Rate Proposals to the Associations Before Filing Them with the I. C. C.*

133. In Trunk Line Territory the defendants agree through their association rules that "while it is, of course, understood that each carrier retains its full liberty of individual action, it is expected that" rate changes will not be made until the proposal has been passed on by

the appropriate committee. The right of an individual carrier to make changes without having them so passed upon, while thus recognized, is exercised extremely rarely. (pp. 513-515)

134. In Southern Territory the defendants agree through their association rules that "all proposals" for rate changes will be submitted to the Southern Freight Association, and the right to dispense with this step is not expressly stated in the rules. It is recognized in practice, but is rarely exercised. (pp. 515, 516)

135. In both territories it is the understanding of the carriers that the regular filing of rate proposals with the associations is in the general interest of carriers and shippers. Such filing is also called for under the railroads' agreement with the National Industrial Traffic League. (pp. 516, 517)

2. *Georgia's Charge that the Defendants, Having Submitted their Proposals to their Respective Associations, Agree to Obtain Association Approval of the Proposals Before Filing Them with the I. C. C.*

136. The rules of procedure in the associations in Official and Southern Territory contain express provisions preserving the members' right of independent action. (pp. 518, 519, 521, 524)

137. These provisions express the common understanding and desire of the members. (pp. 519, 520, 523)

138. The taking of independent action has not been restrained by coercive pressures or threats, and carriers taking independent action have not been penalized for so doing. (pp. 525, 526, 539)

139. The occasions for independent action by rate proponents are limited by the fact that the great bulk of rate proposals are approved by the associations. (pp. 530-536)

140. When rate proposals are disapproved independent action is taken in only a small fraction of the cases. This fraction is particularly small in the case of interterritorial proposals. (pp. 534-539)

141. The statistics in evidence show that interterritorial proposals from the South to the North are treated in about the same way, with about the same degree of acceptance, as interterritorial proposals from the North to the South, and that Southern proposals are not treated by Official Territory associations in a manner significantly different from the manner in which Northern proposals are treated by Official Territory associations or by the associations in Southern Territory. (pp. 531-534)

142. The general acquiescence of all roads in association recommendations disapproving rate proposals, as illustrated by the relative paucity of independent action in such cases, is further illustrated by the relative paucity of appeals in such cases. (pp. 536, 537)

3. Georgia's Charge that in the Course of Seeking Approval of their Rate Proposals the Defendants Agree to Follow Certain Hampering Appellate Requirements Laid Down by the Rate Associations' Rules

143. Only a small percentage of rate proposals become the subject of appeals. Appeals normally do not go beyond one stage in the committee procedure; they normally consist of an appeal by the proponent carrier from an adverse recommendation, and the majority of appeals result in favorable recommendations. (pp. 540-544, 546, 547)

144. The rules in Official and Southern Territory, as interpreted in practice, contemplate that carriers will exhaust the appellate procedures before taking independent action, but the right of members to take such action without processing appeals is recognized and is exercised from time to time at every stage. (pp. 540-542, 544-547)

145. While the rules in Official and Southern Territo permit a carrier not favoring the approval of a rate pr posed by another carrier to appeal from that approval to higher committee, the evidence does not disclose any exa ples of appeals of that sort. As a practical matter, wh appeals are taken by other than a proponent road, they a taken by Committee Chairmen who are paid officials their respective Associations. (p. 548)

146. The rules authorizing appeals by chairmen in Sout ern and Trunk Line Territory provide, at every stage of ra association procedure, and in substantially uniform la guage, that:

> Should the Chairman regard action by the .... Committee [or Association] as "inimical the best interests of the carriers as a whole," he sha [or may] appeal to the ..... Committe [or Association or Conference]. "Pending considera tion by the latter no action will be taken towards publ cation" [or, "the effectiveness of the proposed actio to be withheld by the interested carrier or carriers pending, etc.]. (pp. 549, 550)

147. The Chairmen have no vote in the disposition o proposals, including proposals which they have appealed (p. 551.)

148. Appeals by Chairmen are very rare and are limite to cases where the proposed rate, if effectuated, woul have wide consequences. (pp. 551, 553)

149. Chairmen may and do appeal not only from Commit tee actions but from announcements of independent actio by carriers. The members of the associations expect an hope that pending such appeals independent action will b withheld. While there is no way of requiring or enforc ing such withholding of action, the stay provisions of th rules noted in Finding 146 above are normally observed (pp. 551-555)

C. *The Railroads' Alleged Fear that the Bureau Membership May Launch Concerted Attacks Against Rate Proposals Filed Independently with the I. C. C.*

[Georgia charged, and the defendants denied, that "any carrier contemplating independent action contrary to the recommendation of its bureau must realistically face the fact that the *bureau membership may launch a concerted attack against the adjustment before the I. C. C.* In fact, it is not unusual for the chairmen, after obtaining the permission of the A. A. R., of course, to act as agents for the various complaining lines by filing a joint petition with the I. C. C. protesting a tariff disapproved by the bureau." (Final Brief, 68; emphasis added).]

150. The record contains two instances in which a request for suspension of a rate filed by a carrier was made to the I.C.C. by the Chairman of an Association on behalf of all the other carriers in the territory. In these two instances the action was taken by the Chairman of the Southern Freight Association because the Southern carriers were in accord and it was convenient for the carriers and the Commission to act on one petition. (p. 556)

151. There was no other evidence of bureau participation in requests for suspension. (p. 557)

152. There was no evidence to show that in the instances in which some railroads requested suspension of rates filed by another they were acting pursuant to a common plan, or that, if they were so acting, there were any among them whose interests were not directly affected by the rates in question, or that their action was requested or suggested by any rate association. (p. 556)

153. There was no evidence to show that carriers are deterred in fact from taking independent action for fear of concerted bureau membership attack before the I.C.C. (p. 557)

D. *The Alleged Obstacles in the Way of Obtaining Consents to Interterritorial Rate Proposals*

[Georgia charged, and the defendants denied, that the "coercive pressures just described at work in the South and the North apply with cumulative vigor to those interterritorial proposals which bulk so large in the instant case and which must separately run the gamut of bureaus in both regions." (Final Brief, p. 75).]

154. Interterritorial rates between North and South, as the result chiefly of a series of decisions handed down in 1926 and 1927 in *Southern Class Rate Investigation* (100 I.C.C. 513, 109 I.C.C. 300, 113 I.C.C. 200, 128 I.C.C. 567), have come to consist principally of joint through rates, in place of the former combination rates made up of the sum of local rates to the border gateways (pp. 557, 558)

155. Proposed joint through rates have to be considered first of all from the point of view of their effect on other carriers, localities, and shippers. They are acted upon first within the territorial association of the proponent carrier and then within the association of the other territory affected. With unimportant exceptions, they are handled in the territorial associations in the same way in which intraterritorial proposals are handled. (p. 558)

156. In the case of every proposed joint through rate the proponent road in one territory must find at least one road in the other territory willing to concur in it. Whether or not to concur is a question of bargaining, since not only rates but divisions of revenues are involved. Non-concurrence of Northern roads in Southern rate proposals is not in itself evidence of coercion, either on the part of Northern roads against the Southern, or on the part of Northern roads against other Northern roads. (pp. 560-562, 617, 618, 679)

157. Under the A.A.R. resolution of May 17, 1935 (see Finding 111 above) a group of roads in one territory opposed to the proposal of a group in another territory may ask for a conference with officers of the A.A.R. (in practice, the Vice-President in charge of the Traffic Department); but such conferences have been mediatory only and not coercive in character. See Findings 111 to 113)

158. There is no regular procedure whereby an interterritorial rate proposal, having been approved in the territorial associations or agreed to by particular carriers, may be appealed by any dissatisfied carrier or by any rate association official to the A.A.R. (See Finding 65)

159. The possibility that the A.A.R. might be induced to intervene for the purpose of trying to prevent the effectuation of such a proposal is too remote to be a significant factor in rate relationships. (pp. 563, 564)

160. The *Joint Conference of Contact Committees.* This Conference was arranged in 1928 for the purpose of facilitating the revision of interterritorial commodity rate structures necessitated by the action of the Commission in *Southern Class Rate Investigation* (supra, Finding 154) in prescribing a new class rate structure and in denying Fourth Section relief in connection with numerous commodity groups. (pp. 564-567)

161. The Conference has functioned intermittently, without formal rules of procedure. The greater part of its work was finished by the end of 1934, and today only a small fraction of interterritorial rate proposals are submitted to it. (pp. 567-569.)

162. When the Conference has occasion to meet, it consists of committees appointed by each of the territorial rate associations (New England, Trunk Line, Central Freight, Illinois, Western, Southwestern and Southern). The Conference acts upon proposals by majority vote, each constituent committee having one vote. (pp. 569, 570)

163. There is an expectation that majority action will be followed, but the right of independent action is recognized and from time to time exercised, and there is no evidence of coercion in support of majority views. (pp. 570, 571)

164. Within the Illinois Freight Committee, which is a member of the Joint Conference, there is a special arrangement whereby four negative votes may defeat a proposal. The Pennsylvania, Baltimore & Ohio, New York Central, and Nickel Plate lines are members of the Committee. So also is the Illinois Central, a Southern defendant, and several other lines which may from time to time be sympathetic toward Southern proposals. The evidence fails to establish discriminatory control of the Illinois Freight Committee, or of the Joint Conference through it, by Northern railroads. (pp. 572-576)

E. *Georgia's Example of Logs—Alabama to Alta Vista, Virginia*

[Georgia cited this case as an example of the "power of defendants to coerce, prevent, hinder and delay the filing of rate proposals . . ." (Final Brief, p. 156).]

165. In the above case the Southern Railway filed with the Southern Freight Association a proposed rate reduction on logs from certain stations in Alabama to Alta Vista, Virginia. The entire movement was over the Southern Railway's own lines. Certain other Southern lines objected on the ground that the proposal, if effected, would adversely affect other rates. The Southern Freight Association, after considering the objections, disapproved the proposal. The Southern Railway then voluntarily withdrew it. The facts established no coercion. (pp. 556, 557)

166. The foregoing case illustrates the fact that under rate association procedure rate changes covering a movement entirely on one line are submitted for action, and that such changes may affect other rates on other lines, thus

calling for joint consideration in advance of action. (p. 557)

III. *The Alleged Power of the Railroads to Coerce Dissenters Through the Routing of Traffic*

[Georgia's case on coercion rested primarily on the following proposition: the absence of express sanctions in the rate association rules is immaterial because sanctions are inherent in the power of railroads to route traffic against each other and thus to punish non-conformers. From the interdependence of the railroads upon each other for traffic, Georgia argued, "*the combination here derived its power to discipline its membership.* No individual railroad, depending upon joint and overhead * traffic from other carriers, could afford to withstand the *concerted threat of the rest of the industry to route against it.*" (Final Brief, p. 100); emphasis added.]

167. There is no evidence that in any of the numerous instances of independent action cited by the defendants the roads which took such action were disciplined by adverse routing of traffic. (p. 578)

168. The great bulk of traffic, 90 to 95 per cent or more, (the estimate varying somewhat with the different lines) is freely routed by shippers in accordance with the powers specifically vested in them by the Interstate Commerce Act, without carrier influences of any appreciable extent or significance. (pp. 578-582)

169. In the small fraction of cases in which shippers do not route the traffic for themselves in their own way, they are occasionally persuaded by the originating carrier to insert a particular routing designed to favor some connection of that carrier. The evidence does not support an

* "Overhead" traffic is a species of joint traffic carried by a railroad which is received at a particular junction point from some other railroad and is destined to be delivered at another junction point to a third railroad.

inference that this slight residual influence over routing either curtails the freedom of shippers or affords a weapon for coercion of other carriers. (pp. 582-584)

170. The choice of shippers is confined, as a practical matter, to the carriers operating over the several alternative routes specified in the published tariff by the participating carriers. There is no evidence, however, to show that shippers' choices have been unduly limited by that fact, or that shippers have been dissatisfied, either generally or in particular instances, with the routes which have been made available to them. (pp. 584-586)

171. In the instances cited by Georgia in which railroads limited routes or declined to join in through rates except via certain routes (Frisco-Southern Railway dispute; the Clewiston case; Crossings East of Cairo, Illinois; Rio Grande Crossings; Shipments from Fertilizer Plant at Blackshear, Georgia to Miami; Preferential Traffic Agreement Between the Atlantic Coast Line and the Southern Railway; Alleged Discrimination in Routing Against the Georgia & Florida Railroad; the Gin and Rum case; Green Coffee from Texas) the actions were not taken for the purpose of disciplining or punishing any railroads, nor had they any connection with rate association recommendations or procedures. The actions were motivated by economic considerations, and insofar as they involved controversies, the controversies were chiefly over divisions of revenues. (pp. 586-591)

172. Carriers are not deterred from taking divisions questions to the I. C. C. through fear of retaliation by diversion of traffic. (pp. 591-594)

173. There is no evidence that concerted solicitation of traffic has been used or could be used to coerce or penalize a railroad declining to abide by rate association recommendations. (p. 595)

174. There is no evidence to show that railroads refrain

from a larger degree of independent action because of fear that disapproving railroads might in the future discipline them either by the adverse routing of the small fraction of traffic not routed by shippers or by refusing to include them in future through routes. (pp. 595, 596)

IV. *The Railroads' Alleged Mutuality of Interest in "Preserving the Integrity of the Rate Bureau System."* [Quoted from Georgia's Final Brief, p. 71]

175. The railroads are constantly under the pressure of shippers to reduce rates for competitive purposes; and in addition, the railroads themselves have had to face increasing competition from other forms of transportation, and from time to time have had to make reductions in rates to meet this competition. The main business of the territorial rate associations is the consideration of proposals for rate reductions. In various representative periods, over 90 per cent of all rate proposals submitted to the rate associations in the South and in the North have been for reductions. (pp. 598, 599)

176. Proposals for rate increases are approved in the rate associations more frequently than proposals for rate reductions. In the Trunk Line Association, in a three-months period in 1945, 723 rate reduction proposals were acted on and 64 of them were disapproved; in the same period 59 rate increase proposals were acted on and none was disapproved. From 1938 to 1942 inclusive 3,707 proposals for rate reductions were filed with the Northern associations on behalf of Southern carriers and 682 were disapproved; in the same period 619 proposals for rate increases were so filed and only 3 were disapproved. (pp. 598, 599)

177. A major purpose of the earlier territorial associations at the time when they were fixing rates and attempting to enforce their decisions by sanctions (as described in Finding 14) was to conserve revenues by avoiding wide-

spread competitive rate-cutting. The substantial continuity of procedures (notwithstanding the abandonment of sanctions) in the territorial associations, as described in Findings 16 to 18, and 21 to 24, indicates a substantial continuity of purpose. (pp. 597, 598.)

178. One of the objects for which the Association of American Railroads was organized was to conserve and increase revenues. In connection with the general rate increase cases of 1934-1937, as described in Findings 75 to 85, the A. A. R.'s activities included efforts to check rate erosion and to encourage procedural steps in the territories toward the same ends. (p. 600)

179. Although the A. A. R. has no coercive authority and has exercised no coercive means in support of the policies referred to in the preceding Finding, the announcement of those policies helped to support and stimulate efforts toward the same ends on the part of the territorial associations. (p. 600)

180. In view of Findings 178 and 179, and because of the efforts of the A. A. R.'s Traffic Department to discourage unnecessary rate reductions (Finding 62), the A. A. R. constitutes a continuing influence in the railroad industry in support of territorial rate association efforts to slow down the pace and extent of rate reductions. (pp. 600, 601)

181. Particular procedural rules in the territorial associations in Official and Southern Territory are designed to slow down the pace and extent of rate reductions.

(a) The provisions authorizing secret ballot voting in Official Territory, and the understanding in both Official and Southern Territory (reinforced by a resolution of the A.A.R.) that the way in which votes are cast will not be revealed to shippers or others, are designed to protect from shipper-retaliation railroads which vote against reductions, and to keep other railroads from seeking shippers' favors on the strength of voting for such reductions. (pp. 601-604)

(b) Throughout the procedure of the territorial rate associations the counting of views for and against a given rate proposal and not merely the exchange of views is a basic feature and constitutes a method of persuading the minority to go along with the majority. (pp. 604-608)

(c) A major purpose of the provisions authorizing appeals by chairmen with accompanying stays, described in Finding 146, was to hold up rate reductions on which member roads had already obtained favorable committee action, by taking the proposals to higher committees (whenever the chairmen regarded the proposals in question as inimical to the best interests of the carriers as a whole). The provisions for stays and the general observance of those stays, so far as illustrated in the record, were in support of that purpose. (pp. 608, 609)

182. In the period 1937-1938 responsible spokesmen for the territorial associations in the South and in Illinois and in the A.A.R. affirmed and believed that the checking of rate reductions had been assisted in the East, and would be assisted in the South and elsewhere, by the establishment of separate Traffic Executive Associations and Presidents' Conferences as appellate bodies to which appeals could be taken by member roads, and by the chairmen from action deemed by them to be inimical to the interests of the carriers as a whole, with accompanying provisions to the effect that pending appeals by the chairmen, no action should be taken. These views were not peculiar to the period in which the particular urgency of checking rate reductions caused them to be uttered, and are further evidence of the fact that a major purpose of the territorial rate associations is to discourage rate erosion. (pp. 609-613)

183. The defendants have a mutual interest in achieving this major purpose. The interest is substantial, affecting as it does the railroads' revenues. The defendants recognize this mutuality of interest. (pp. 613, 614)

184. The railroads are contractually free to act inde-

pendently when it suits them to do so, and the right of independent action is not illusory, but the paucity of independent action (Finding 140) cannot, in the light of Findings 175 to 183 inclusive, be ascribed exclusively to the logical persuasiveness of majority arguments in particular cases. It is due also to a general realization that if majority recommendations were disregarded with much frequency the system would tend to break down, to the injury of all. (pp. 614-615)

185. The procedure of the territorial associations in its present form is a deterrent to the freedom of rate-making, a deterrent not coerced or enforced by threats of penalties but self-imposed as the result of influences born of history, habit, and strong mutual self-interest. (p. 615)

186. This deterrent does not destroy the right of independent action but to some extent dampens down its use. (p. 615)

V. *The Alleged Domination of the Southern Defendants by the Northern Defendants*

[As has been noted, Georgia's amended complaint alleged that the Southern defendants "generally are dominated and coerced by the Northern defendants. . . ." The defendants denied the charge.]

187. The Northern roads are normally debtors of the Southern roads, the traffic balance being in favor of the South. (p. 615)

[Georgia alleged that, as a consequence of the foregoing fact, the Northern roads are in a position to withhold from the Southern roads the joint through charges which the Northern roads collect as destination carriers, and that this capacity to withhold revenue "forges the last link in the chain of coercion binding the South." (Final Brief, (p. 114)]

188. The northbound traffic is valuable to, and is sought after by, the Northern roads, and there was no evidence of

any coercion or threatened coercion of Southern roads by any withholding of revenues due from Northern roads. (p. 616)

189. The Southern defendants are not dominated or coerced by the Northern defendants. (pp. 616-618)

FINDINGS OF FACT DERIVED FROM VOLUME THREE

PART ONE

THE NATURE OF THE ALLEGED DISCRIMINATORY THREAT AGAINST THE SOUTH, INCLUDING GEORGIA, INHERENT IN THE POWER ACQUIRED BY THE DEFENDANTS

(*First Installment,* Consisting of the Alleged Discriminatory Voting Arrangements, and the Alleged "Rate Wall" Policy of the Northern Defendants)

I. *The Alleged Discriminatory Voting Arrangements*

[Georgia alleged that the allocation of votes on the A.A.R. Board, as set forth in Finding 190 below, "automatically conveys to the Northern defendants domination and control of all freight rates, including rates to, from, or within Georgia." (Final Brief, p. 8) Georgia also alleged that certain voting arrangements within the Joint Conference of Contact Committees gave the Northern railroads discriminatory control.]

A. *Within the Association of American Railroads*

190. Under the Articles of the Association of American Railroads the Board of Directors consists of seven representatives of the Western railroads, six of the Northern, and four of the Southern, plus the President of the Association ex officio. Thus the representatives of the Southern railroads have less than one-fourth of the votes on the Board, whereas the representatives of each of the other regions have more than one-fourth; but the representatives

of no one of the three regions have a majority of the votes. (pp. 619-621)

191. There is no evidence or charge that representatives of the Northern railroads ever combined or threatened to combine with representatives of the Western railroads to form a majority for the purpose of imposing upon the Southern railroads action not desired by them or of blocking action desired by them. (p. 622)

192. There is no evidence or charge that representatives of the Northern or Western railroads ever blocked or threatened to block the adoption by a three-fourths vote of a resolution, desired by the Southern railroads, declaring a particular matter to be "controversial." (p. 622; and Findings 94, 95 and 96)

193. The allocation of representatives on the Board of Directors of the A.A.R. as between the Northern, Southern and Western railroads has not resulted in discriminatory acts, and does not constitute a threat of discrimination, against Georgia or the South. (p. 622)

B. *Within the Joint Conference of Contact Committees*

194. As set forth in Finding 164, the evidence fails to establish discriminatory control of the Illinois Freight Committee, or of the Joint Conference through it, by Northern railroads. (p. 623)

II. *The Alleged "Rate Wall" Erected by the Northern Defendants Against the Movement of Southern Products into Official Territory*

[In this branch of her case Georgia, after showing that the Southern rate structure, for various historical reasons, had been higher than the Northern, charged that "the rate differential was deliberately perpetuated by the refusal of the Northern lines to concur in rate adjustments that would permit Southern producers to reach Northern markets on rate levels equal to those enjoyed by Northern

producers." (Final Brief, p. 89) In support of this charge, Georgia relied primarily upon a statement by Oliver of the Southern Railway before the I.C.C. in 1932, described in Finding 195 below.]

195. In 1932 Oliver of the Southern Railway testified before the I. C. C. that certain east-west trunk lines in Official Territory, including the Pennsylvania, the New York Central, and the Baltimore & Ohio, had absorbed certain north-south lines which had been able to reach particular points in Official Territory from Southern Territory on their own rails, independently of the east-west trunk lines. Oliver testified that after the trunk lines had absorbed these smaller independent lines, they became more interested in the development of east-west traffic than of north-south traffic. The "new policy" of the east-west lines, he said, was "to build a rate wall at the Ohio and Potomac Rivers which will prevent or greatly curtail the movement of southern products into Official Territory." In 1939 in the *Southern Governors' Case* (Finding 203, infra) the Commission noted that since World War I "the northern carriers generally have insisted with success, inasmuch as they controlled the rates to most points in the North, that northbound rates on competitive commodities be maintained on higher levels than the rates on like commodities within the North." (p. 624)

196. Oliver's testimony referred to in Finding 195 occurred in the midst of certain controversies between the Northern and Southern railroads which had been precipitated by large-scale rate actions of the I. C. C. in the '20s, referred to in the next Finding. Until these actions Southern producers had had little reason to complain about northbound railroad rates. These consisted chiefly of specially constructed commodity rates, which were lower than the class rates and frequently consisted of the sum of the local rates to the borders between Southern and Official Territory. A great movement of manufactured products and

products of farms and mines moved northward on these commodity rates. (pp. 626, 627)

197. In the '20s the I. C. C. prescribed new class-rate structures in the South and the North, and interterritorially between these territories, and cancelled many commodity rates within the South and from South to North as in violation of the Fourth Section of the Interstate Commerce Act [the long-and-short-haul clause, Finding 10]. (pp. 627-629)

198. As interterritorial commodity rates were cancelled, the new class rates automatically took their places in all those instances in which the Southern and Northern roads could not agree on what the new commodity rates should be. In addition, the Commission expressed to the Southern carriers the desire that in framing new commodity rates the class rate distance scales should be utilized so far as possible, in order to avoid Fourth Section difficulties. (p. 629)

199. The negotiation, on terms satisfactory to Southern shippers, of the new interterritorial rates necessitated by these actions, either on the class basis or in relation to it, was made more difficult by the fact that the average of the Southern class rate level, as prescribed by the Commission, was about 39 per cent higher than that which the Commission had prescribed in the North. (The Southern class rate system, for historical reasons, had grown up independently of the Northern, and on a higher level. The I. C. C., in its rate actions of the '20s, took the class rate structures as it found them, and, without attempting to alter their relative levels, merely corrected incongruities within the respective structures.) (pp. 629, 630)

200. In the negotiation of the new interterritorial rates referred to in Finding 199, the Northern carriers frequently took the position, when confronted with requests for northbound rate reductions, that the rates southbound should be the same, mile for mile, as the rates northbound, in order to insure competitive equality for Northern and Southern

producers in each other's territories. The Southern carriers objected to this position on the ground that its adoption would result in undercutting and lowering the rate structure within the South, whose higher rate level they deemed necessary for revenue purposes. The Commission resolved this controversy by holding in several cases (for example, in *Hosiery from Southern Points to Points in Southern, Official, and Western Classification Territories* (1929) 156 I. C. C. 117; and in *Paper, Official-Illinois Territories to South* (1940) 238 I. C. C. 104) that so long as the Southern class rate structure was on a higher level than the Northern, it was proper that southbound rates should remain higher than northbound, even when the northbound rates were to be reduced to, or approaching, the Northern level. The controversy was not a fictitious or unsubstantial one, and the Commission itself was at times closely divided on its merits, as in the *Paper Case* just cited. (pp. 630, 631, 634-637, 706-714)

201. In the negotiation of the new interterritorial rates referred to in Finding 199, the Southern railroads, while seeking to obtain northbound rates at the northern level, mile for mile, generally desired to keep a disproportionate share of the divisions of the joint revenues, asserting that their transportation costs and financial needs were greater than those of the Northern roads. The Northern roads contended for equal divisions factors. In an investigation begun in 1931 but not concluded till July, 1939 (*Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175) the Commission sustained the right of the Northern carriers to an equal divisions factor in cases where the northbound interterritorial rate was fixed on the same mile-for-mile basis as the rate within Official Territory. In cases where the northbound interterritorial rate was to remain on a higher basis than the rate within Official Territory, the Commission, in lieu of permitting the Southern lines to receive the entire increment in the through rates over

and above the Northern levels, as the Southern lines desired, prescribed a compromise the substance of which was that the Southern lines should receive divisional factors 25 per cent higher than those for the Northern lines. (pp. 630-634)

202. In the negotiation of the new interterritorial rates referred to in Finding 199, the Northern carriers frequently contended, over the opposition of the Southern carriers, that the rates should reflect the class-rate relation previously prescribed by the Commission. (See Findings 197 to 199). In these controversies the Commission adopted a case-by-case approach, taking into account among other things the history and relationships of the rates in dispute, the competitive situation of the producers, North and South, and the varying transportation costs. In some instances the Commission prescribed northbound rates on the same mile-for-mile level as within the North, but in other instances rates higher than the Northern level were prescribed, sometimes on the basis of a formula known as the "stoves" formula. (pp. 634-647)

203. Finally, in the *Southern Governors' Case* (*State of Alabama, et al.* v. *New York Central Railroad Company, et al.*, 235 I. C. C. 255), decided in November, 1939, the Commission stressed the importance of Official Territory as the greatest consuming and producing section of the country; the retarded industrial development of the South; and the desirability, in the interests of the fullest economic development of all producing sections, of rate structures providing reasonably uniform levels of rates from such sections to common markets. The Commission in effect rejected the "stoves" formula and held that when the Southern carriers requested northbound rates on the same mile-for-mile level as the Northern rates on commodities which were not moving freely on all-rail routes into Northern markets or which, though moving, were encountering substantial price competition from Northern producers

in the Northern markets, the Northern carriers could not justly refuse to join in such rates. Applying these tests by a case-by-case approach, the Commission directed reductions to the Northern level on 10 commodities and denied it with respect to 10 others. (pp. 647, 648, 654-664)

204. The Commission in the *Southern Governors' Case* rejected the various contentions of the Northern carriers and interveners in opposition to the rate reductions, including the Northern carriers' demand that the northbound rates be not reduced without an equalization of the southbound rates. (pp. 652-654)

205. The position taken by the Commission in the *Southern Governors' Case* was substantially the same as that taken by the Southern carriers, but it did not go as far as the Southern Governors desired. The Southern Governors advocated the granting of northbound rate parity wherever a Southern-produced commodity was in competition with a Northern-produced commodity in a Northern market, without inquiry into whether or not the traffic was freely moving or into the degree of competitive difficulty confronting the Southern producer. (pp. 648-652)

206. Although the *Southern Governors' Case* did not lay down the inflexible rule of rate parity desired by the Southern Governors, as set forth in Finding 205, it represented a major concession to the Southern point of view, and it met the desires of the Southern carriers. (p. 665)

207. Several months before the decision in the *Southern Governors' Case* the Commission (a) decided the basic disputes surrounding the divisions of northbound rates, as set forth in Finding 201, and (b) launched two interconnected investigations, whose object was to bring about nationwide uniformity in classifications and class rates. This action, which was not concluded till 1945 (see Findings 264, 265) evidenced the Commission's determination, at about the time when the decision in the *Southern Governors' Case* was being drafted, to end one of the main historical sources of

conflict in the adjustment of interterritorial commodity rates, namely, the unequal class rate levels. (p. 666)

208. During the period of rate adjustments in the '20s and '30s three factors were operating as obstacles to the successful negotiation by the Southern carriers of northbound rates on a mile for mile parity with Official Territory rates on like commodities. These were:

(a) Disputes over the equalization of southbound rates with northbound rates, and over divisions, as set forth in Findings 200 and 201;

(b) The effect upon the Northern carriers' rate policies of the prescription by the Commission, in many instances up to the *Southern Governors' Case*, of northbound rates on a higher mile-for-mile basis than the Official Territory rates, as under the "stoves formula" (Finding 202); and

(c) The new interest of Official Territory lines in east-west traffic and their newly enhanced power to advance that traffic by blocking, through non-concurrence in Southern rate proposals, the effectuation of proposed joint through rates from the South to the North. (This interest and power resulted from the absorption after World War I of certain independent north-south lines by certain east-west trunk lines, including the New York Central, the Pennsylvania and the Baltimore & Ohio as set forth in Finding 195). (pp. 624, 625, 667, 669-673)

209. The exact degree of importance of each of the three factors described in Finding 208 cannot be determined from the record. (p. 673)

210. The actions of the Commission described in Findings 200 to 207 inclusive effectively removed factors (a) and (b) in Finding 208. (pp. 667, 668, 673)

211. With regard to factor (c) in Finding 208: whatever may have been the revenue interests of the Northern lines in advancing east-west traffic at the expense of north-south

traffic in the '20s and '30s, the Northern lines today have a positive interest in sustaining and augmenting the flow of traffic from the South. (p. 674)

212. With further regard to factor (c) in Finding 208: to the extent that the enhanced interest of the Northern lines in east-west traffic after World War I manifested itself in a policy of denying northbound mile-for-mile rate parity for the purpose of protecting shippers in Official Territory against competitive inroads from Southern shippers in Northern markets, the capacity of the Northern lines to pursue this policy was severely limited by the Commission's decision in the *Southern Governors' Case*. If the Northern lines still resist northbound mile-for-mile rate parity in order to protect Northern shippers from competition by Southern shippers in Northern markets, the existence and extent of that resistance cannot be established by reference to the situation which prevailed in 1932. (pp. 668, 675)

213. The actions of the I. C. C. described in Findings 200 to 207 inclusive had the effect of dissolving the so-called "rate wall" referred to by Oliver in 1932 (Finding 195), and since 1939 numerous reductions have been made in commodity rates from the South to the North, by voluntary agreement and by Commission action, in many instances to levels lower than the corresponding rates within the North. (pp. 667-669)

214. Disagreements over northbound rates have continued to arise from time to time, and Finding 213 is not to be taken as asserting that in such instances the Northern lines have not acted to protect Northern shippers from Southern competition; whether or not they have so acted, however, is a question to be determined by specific evidence and it cannot be answered merely by reference to what happened during the temporary "rate wall" period. (p. 675)

[Specific evidence of this sort, presented in certain case

material offered by Georgia, is considered in the Findings under Part Two, which here follow.]

PART TWO

The Case Material Relating to Rate Controversies Between the South and the North Introduced by Georgia to Illustrate the Defendants' Alleged "Coercive and Discriminatory Price-fixing"

[The case material which has been covered in certain preceding Findings dealt with Georgia's charges of *coercion*, and did not involve North-South rate controversies. The remaining case material presented by Georgia is covered below. It deals with North-South rate controversies and contains charges of both *discrimination* and *coercion*, intermixed.]

I. *Legal Standards To Be Applied in Judging the Cases*

[Paragraphs 215 and 216 below are Conclusions of Law rather than Findings of Fact. They are included here because the treatment of the case material depends on them.]

215. In considering whether in any given controversy over interterritorial rates from the South to the North the defendants engaged in *discrimination* within the meaning of Georgia's amended complaint as construed by this Court: (a) the basic question is whether or not the actions taken were motivated by a purpose to protect northern producers by preventing or hindering competition in northern markets by southern producers; (b) the question of whether or not, if the issue had been litigated before the Commission, the rates resulting from the defendants' actions would probably have been held lawful, as falling within the "zone of reasonableness", or unlawful, as in conflict with Section 3 of the Interstate Commerce Act, would be relevant only as it might cast light upon the defendants' purposes. (pp. 676-679)

216. In considering whether in any given controversy over interterritorial rates the defendants engaged in *coercion*, the basic question is whether or not any rate association involved in the case exercised any pressure or intimidation or other form of restraint upon the freedom of action of any railroads, including its own members. Adverse action by northern associations upon a southern rate proposal does not, standing alone, constitute coercion. (p. 679)

II. *The Paper Case (1936-1939; 1943)*

217. This case involved a settlement agreement between the northern and southern carriers, acting through their respective associations, which in turn were in continuous touch with the northern and southern producers. The agreement provided in substance that (1) the northbound rates into Official territory, which were then approximately 125 per cent of the northern level, and which the southern carriers and producers wished to reduce to 100 per cent, would be reduced to 110 per cent of that level; (2) that the northbound rates to the very competitive border points, which the northern carriers and producers wished to have kept at the higher southern level, but which the southern carriers in the course of the negotiations had reduced by independent action to the northern level, should remain at the northern level; (3) that the divisions, which had been in dispute from the outset of the rate negotiations, due to the demands of the southern carriers for a disproportionate share, would be compromised on a certain basis; and (4) that the southbound rates into Southern territory, which the northern carriers and producers, contrary to the wishes of the southern carriers and producers, wished to equalize with the reduced northbound rates into Official territory, would be left for determination by the I. C. C. (p. 680, and, generally, 681-725)

[Georgia's main contention in the *Paper Case* was that there existed a "zone of reasonableness" between 125 per cent of the Northern level and 100 per cent; that within this

zone any rates which the railroads saw fit to establish would have satisfied the Commission as not causing an "undue or unreasonable prejudice or disadvantage" within the meaning of Section 3 of the Act; that in this case, therefore, as in others, the railroads had a considerable area of discretion within which they were free to fix the rates; and that the "paper adjustment serves as merely one example of the way that discretion may be abused when entrusted to a *coercive and discriminatory rate mechanism* of the type complained of here." (Pp. 680, 681; emphasis supplied) Thus the Southern carriers' failure to obtain the 100 per cent northbound level was ascribed by Georgia to coercive and discriminatory factors operating within the rate associations. The defendants' principal contention was that the settlement agreement was a fair compromise of a difficult situation and that under the facts as developed by them the agreement was not tainted by either discrimination or coercion.]

218. The northern defendants' unwillingness to reduce the northbound rates into Official territory to a figure lower than 110 per cent of the northern level was due (a) to their desire to conserve revenues at a time when the railroads were facing a financial crisis and were seeking general rate increases from the Commission in *Ex Parte 115* and then in *Ex Parte 123* (Findings 114 to 116 supra); and (b) to the vigorous opposition of the northern producers to any northbound reductions. The evidence does not permit a finding as to how much of a part each of these factors respectively played in the motivation of the northern defendants' actions. (pp. 717, 718)

219. The substantial northbound rate reduction in which the northern defendants joined was objectionable to the northern producers and reasonably satisfactory to the southern producers, and it was made at a time when the southern paper industry was already well established, was marketing the bulk of its product in the North, and was rapidly growing. (pp. 719, 720)

220. The failure of any southern road to join with the Illinois Central in effectuating rates at 100 per cent of the northern level into Illinois Freight Association territory (which the Illinois Central had at the outset announced its willingness to do) was not due to the fear of any restrictive action by the Association of American Railways; and Cleveland of the A. A. R. in his several conferences acted only as a mediator. The evidence established no coercion by the A. A. R. (pp. 720, 721)

221. There was no showing that the Official territory associations or their members, in their negotiations with the southern carriers, coerced the latter into accepting the compromise agreement or into staying away from the I. C. C. or in any other way. (p. 722)

222. There was no showing that any of the northern railroads wished to effectuate northbound rates at the northern level, or to take other independent action, or that the freedom of action of any of them was restrained by the Official territory associations. (pp. 722, 723)

223. There was no showing that the Southern Freight Association acted in opposition to or restrained the freedom of action of any of the southern carriers. (pp. 723, 724)

224. The evidence in the *Paper Case* fails to establish coercion either in the form of force or intimidation, or in the sense that the will of any carrier, northern or southern, was overcome by the weight of any authority, while its judgment remained unconvinced. (pp. 724, 725)

225. That portion of Georgia's proposed decree which would prohibit negotiations and agreements over interterritorial rate changes between spokesmen for the Southern roads as a group and the Northern roads as a group would, if effectuated, present serious practical difficulties in the case of an important commodity like paper, having various origin and destination points; would tend to increase discriminations by encouraging fragmentary rate adjustments;

would force the Commission to assume a larger role in the prescription of interterritorial rates than was contemplated by the Interstate Commerce Act; and might well be less beneficial to southern producers than some form of interterritorial collective bargaining (assuming, as I have found to be the case, that there is no coercion of southern roads by northern). [In making this finding I do not pass upon other aspects of Georgia's proposed decree.] (pp. 725-731, Finding 244)

III. *The Wine Case (1943-45)*

226. In this case the northern carriers, following the recommendations of their rate associations, declined to reduce the rates on wine in packages shipped by a producer in Atlanta, Georgia to Official territory to the same mile-for-mile level as the northern level. The Atlanta producer also shipped wine to the North in tank cars; and he operated a plant at Brooklyn, New York, in the area of his chief competition. The northbound rates on wine in tank cars had earlier been reduced, with the concurrence of the northern carriers, to slightly below the Official territory level, in order to meet the competition of water carriers. Subsequently the northern carriers reduced the rates on wine in packages within Official territory in order to meet truck competition. It was this reduction which led to the request for a reduction in the northbound rates on wine in packages. (pp. 731-736)

227. The evidence, particularly that relating to the competitive situation of the Atlanta producer, failed to establish the probability that, if the case had been presented to the I. C. C., the I. C. C. would have held the northbound rates to be discriminatory within the meaning of the Interstate Commerce Act. (pp. 737-742)

228. The evidence taken as a whole failed to establish on the part of the northern defendants, in declining to concur in the proposed reduction, a purpose to protect northern producers by preventing or hindering competition in north-

ern markets by the Atlanta producer. The northern defendants may well have concluded in good faith that the Atlanta producer did not need the reduction in order to compete without difficulty in the North; that the I. C. C. would have so found; that in line with the *Southern Governors' Case* (see Finding 203) they were under no legal obligation to join in the reduction; and that they were justified under the circumstances in not sacrificing further revenue under the already truck-depressed rates on wine in packages. (pp. 742, 743)

229. The northern rate associations acted as a unit in opposition to the southern proposal, but there was no showing that any particular northern road desired to act favorably upon that proposal, or that there was any coercion within the northern associations. (p. 743)

230. There was no showing that the northern or southern associations exercised any pressure or intimidation upon each other, or upon each other's members, or in any way restrained the Southern Railway as the proponent of the reduction from seeking action thereon by the I. C. C. after the northern carriers had declined to join in the reduction. No coercion of any sort was established. (p. 743)

231. The failure of the Southern Railway to process the Atlanta producer's request until after he had complained about it to the I.C.C. illustrates the southern carriers' policy of conserving revenues by not acting on rate reductions requested by southern shippers where in the southern carriers' judgment the southern shippers do not need the reductions in order to move their products freely northward and to compete successfully in the northern markets. (The same policy was illustrated in the *Paper Case* by the southern carriers' refusal in 1943 to seek northbound rate reductions requested by the southern producers; see pp. 714-717). And the southern carriers followed the same policy in the basic position which

they took in the *Southern Governors' Case* (see Finding 205 above.) (pp. 743-744)

IV. *Agricultural Implements (1941)*

232. As a result of the I.C.C.'s actions in *Southern Class Rate Investigation* in 1926 and 1927 (Finding 154), it became necessary for the carriers to revise the commodity rates on agricultural implements and parts between Southern and Official territories. In 1930 the new rates were set at 37 per cent of first class on the main items, after the Southern Freight Association had unsuccessfully proposed 36 per cent. The equivalent rates within Official territory were about 29 per cent. The northern lines had contended that the new rates should not be less than 40 per cent, on the ground that the I.C.C. had approved 40 per cent rates to, from, and within Southwest territory. Several months after the above compromise of 37 per cent had been effected, the southern lines apparently sought but failed to obtain a reduction to 30 per cent on minimum weight carloads of 24,000 pounds. There is nothing to show what happened between 1930 and 1941, when the actions of which Georgia specifically complains in this case occurred; and the evidence is too fragmentary to support Georgia's allegation of a "twelve-year struggle" by southern manufacturers "to market their products in the North." (pp. 744, 745)

233. In 1941 the Chairman of the Tennessee Valley Authority delivered an address on the economic handicaps of southern producers resulting from the freight rate structure. In this address he cited as an illustration the rates on agricultural implements from Auburn, New York to Fort Wayne, Indiana, which were lower than from Chattanooga, Tennessee to Fort Wayne, though the distances were the same. At that time the northbound rates to *Illinois destinations* and to *Eastern port cities* were 30 per cent of first class, approximately the same as the northern level (which was about 29 per cent). However, the

northbound rates into the *interior sections* of Official territory were 37 and 40 per cent. Nearly all of the existing northbound traffic went to Illinois and Eastern port destinations, and there was practically no movement into the interior sections of Official territory. (pp. 745-747)

234. Following the address referred to in Finding 233, the Louisville & Nashville Railway, a southern defendant, proposed, and the Southern Freight Association approved, a northbound reduction into the interior sections of Official territory to 32 per cent, no change being proposed in the 30 per cent rates to Illinois destinations and Eastern port cities. The Central Freight Association and the Trunk Line Association disapproved the proposal and the northern carriers declined to concur in it. (pp. 744, 746, 748)

235. The purpose of the proposal was to forestall further public criticism of the rates on agricultural implements and a possible complaint to the I.C.C., while at the same time avoiding any sacrifice of revenues on the existing traffic to Illinois destinations and Eastern port cities. The proposed 32 per cent rate into the interior sections was the highest level which the southern carriers felt that they could publish and still forestall the ultimate publication of something lower. (pp. 746-749)

236. No southern producer had requested the proposed reduction; after it had been filed for rate association action practically no interest was shown in it by southern producers; and after it had been rejected by the northern carriers no southern producers, so far as the record shows, made any complaints about northbound rates. There were three plow manufacturers in Georgia; they sold their products primarily in the South and secondarily in the Southwest; they made no effort to sell in northern territory and had no plans for doing so. The quantity of agricultural implements produced in the South was much less than the quantity used in that section, and in producing for the southern market the southern manufacturers enjoyed a

substantial rate advantage over the northern manufacturers. (pp. 749, 750)

237. Under the circumstances stated in Findings 235 and 236 the proposed reduction was one which, in the light of the *Southern Governors' Case,* the I.C.C. in all likelihood would not have directed. (p. 750, and Finding 203)

238. The northern carriers were aware of the political nature of the proposal, as set forth in Finding 235, and of the want of southern shipper interest in it, as set forth in Finding 236, and they desired to avoid a reduction which they regarded on the one hand as not needed by southern shippers and on the other hand as likely to precipitate demands for unnecessary downward revisions in rates from Western Trunk Line territory. In declining to concur in the proposed reduction the northern carriers were not motivated by a purpose to protect northern producers by preventing or hindering competition in northern markets. (pp. 750-752)

239. No form of coercion was exercised by any rate association upon any other or upon any carrier, North or South, in any respect. (p. 752)

V. *Iron and Steel Articles (1939-40)*

240. In this case the southern rate proposal was not for northbound reductions into Official territory, as in the *Paper, Wine* and *Agricultural Implements* cases above, but for southbound reductions (on iron and steel shipments) from Southern and border points to Gulf ports. The original purpose of the proposal was to reduce the rates from Birmingham to New Orleans in order to meet water competition. Reductions to and from other points were included in the proposal in order to avoid discriminations which otherwise would have resulted from the effectuation of the Birmingham-New Orleans reduction. (pp. 752-756)

[Georgia charged, and the defendants denied, that Northern steel interests and the A.A.R. thereupon interfered to

block the proposed reductions, and that the interference was coercive, discriminatory and injurious to Georgia.]

241. The proposal affected Official territory points, as the Southern carriers realized it would when they made it. The Official territory carriers through their associations objected to the proposal. Ultimately a compromise was agreed to. (pp. 756, 757, 761, 762)

242. The compromise retained unchanged the basic part of the proposal, namely, the reduction from Birmingham to New Orleans, despite the northern railroads' objections and the objections of certain northern steel companies. The northern railroads objected because of the unsettling effect on the northern rate structure which they feared the proposal would produce if effectuated. The steel companies objected because Birmingham was a basing point and the reduction would reduce their delivered prices. (pp. 757-761)

243. The only substantial concession which the southern railroads made was to limit the reductions from northern (and southern) origin points to 15 cents, the same amount as the reduction from Birmingham. The original proposal called for percentage reductions, the same as the percentage reduction produced by the 15 cent reduction from Birmingham to New Orleans. In return for this concession, which was calculated to cause the northern carriers less revenue losses than the original proposal, the northern carriers agreed to support the entire proposal before the I.C.C. (pp. 762-764)

244. The proposal necessitated special action by the I.C.C. to authorize the railroads to depart from the long-and-short-haul provisions of Section 4 of the Interstate Commerce Act (see Finding 10). For this reason the proposal was destined from the outset to be heard by the I.C.C. and it was therefore to the advantage of the southern railroads to work out an agreement with the northern

railroads ahead of time, so that the northern railroads would not appear as objectors. Had that part of Georgia's proposed decree been in force which would prohibit such agreements, the southern carriers would have lost this advantage. (pp. 763, 764, 766, 775, 776)

245. In the working out of the compromise there was no showing that either group of railroads, through their associations or otherwise, exercised any coercive pressure on the other. (pp. 759-762, 773)

246. Cleveland of the A.A.R. initiated a conference between the northern and southern railroads as a result of the former's objections to the original proposal, and he presided over several meetings; but so far as the record discloses, he took no active part and the compromise was worked out between the northern and southern roads without any suggestions or pressure from Cleveland or the A.A.R. (pp. 767-769, 773)

247. The objecting steel companies did nothing more than to express to the southern carriers their respective points of view, which were not all uniform and which under Georgia's proposed decree all shippers would have a right to do. There was no showing of coercion. (pp. 757-759, 772, 773)

248. The I.C.C.'s Examiner, in his report on the Fourth Section application (see Finding 244) found that the flat 15 cent reduction from all origin points worked competitively to the disadvantage of the more distant points, including points in Official territory. There was no evidence, however, of any purpose to injure particular localities or shippers, least of all southern ones. Certain complaints by a representative of shippers in Atlanta regarding the effect of the proposal were satisfactorily adjusted by modifications in the proposal. (pp. 762-764, 773, 774)

249. The major objection of the I.C.C.'s Trial Examiner to the proposal was that in order to save some revenue on

shipments of steel from Birmingham to New Orleans, the proposal would cause the railroads in both Southern and Official territory revenue losses from other points which would far exceed what might be gained from Birmingham. In view of the Examiner's adverse report, and of the war-time curtailment of the water traffic from Birmingham to New Orleans which had led to the proposal, the southern carriers sought permission from the I.C.C. to withdraw their Fourth Section application without prejudice. The I.C.C., however, denied the application as not having been justified. (pp. 764-767)

250. The southern road's proposal was at first in two parts; it included not only Gulf port destinations, but also Mississippi River destinations above New Orleans, particularly Memphis. The preceding Findings relate to the Gulf port part of the proposal. With regard to the Memphis part, the southern roads, upon conditions satisfactory to them, agreed to a short postponement of action at the request of the northern roads in order to give the latter an opportunity to study the effects of the proposal more thoroughly. Thereafter the southern roads announced their intention to go ahead with the proposal without change, and the northern roads, notwithstanding the previous objections of various northern shippers, agreed to join with the southern roads in applying to the I.C.C. for Fourth Section relief, as they had done in connection with the rates to New Orleans. (pp. 769-772)

251. No coercion or discrimination in any of the senses charged by Georgia appeared in this case. (pp. 772-775)

VI. *Miscellaneous Cases*

252. The case of *Gums and Resins* involved a controversy between southern and northern lines over a proposed rate covering synthetic gums and resins from a new plant in Pensacola, Florida to the North. The controversy turned mainly upon the proper description of the commodities involved, but a dispute over divisions was also involved. In

the end a rate higher than the shipper desired was fixed. No coercion or discrimination of any sort was established. (pp. 776, 777)

253. The case of *Tin Plate—Decoration-in-Transit—At Savannah* involved a proposal by three southern railroads to establish decoration-in-transit privileges at Savannah, Georgia upon tin plate shipped from the Birmingham, Alabama district to Tampa, Florida. The case did not concern the northern carriers in any way. Two northern steel companies on the Illinois Central line forwarded to the Illinois Central their objections to the proposal, and the Illinois Central reported the objections to the Southern Freight Association, of which it was a member. The Association disapproved the proposed transit privileges, and they were not established. Under Georgia's proposed decree the steel companies would have had a right to register their objections. There was no showing of coercion or discrimination of any sort. (pp. 777, 778)

VII. *Import and Export Rates (1932-1934)*

254. In this case, after several years of controversy with the eastern railroads, the southern railroads proposed to establish between southern ports and "*Territory B*" (territory on and west of the "Monon" line—roughly Chicago-Indianapolis-Cincinnati—which the southern railroads could reach with their own rails), export and import rates on a basis more favorable to the southern ports than those which the eastern railroads were willing to join in effectuating between the southern ports and "*Territory A*" (points in Official territory east of the Monon line, which the southern railroads could not reach with their own rails). The I.C.C., over the protests of the eastern railroads, approved as reasonable and non-discriminatory the rates proposed by the southern railroads to and from Territory B. The I.C.C., over the protests of the southern railroads, approved as reasonable and non-discriminatory the rates proposed by the eastern railroads to and from Territory A. (pp. 778-784)

255. The rates between the southern ports and Territory B were lower, mile for mile, than the rates between the North Atlantic ports and Territory B. Thus with respect to Territory B the southern ports enjoyed a differential under the North Atlantic ports. This favorable differential reflected the capacity of the southern railroads to reach Territory B through their own rails. The rates between the southern ports and Territory A were approximately the same, mile for mile, as the rates between the North Atlantic ports and Territory A. This less favorable basis reflected the necessity which the southern railroads faced of effectuating joint through rates with the eastern railroads to and from Territory A. (pp. 784-788)

256. The fact that the eastern railroads were unwilling to join with the southern railroads in rates to and from Territory A on a basis as low as those which the southern railroads were willing to establish to and from Territory B did not constitute either coercion, or legal discrimination (since the Commission upheld the proposed rates), or discrimination of the invidious sort charged by Georgia since the proposed rates were mile for mile approximately the same between the southern ports and Territory A as between the North Atlantic ports and Territory A and Georgia does not claim and is not entitled to seek any more favorable treatment. (pp. 788, 789)

PART THREE

The Nature of the Alleged Discriminatory Threat Against the South, Including Georgia, Inherent in the Power Acquired by the Defendants

(*Second Installment*, Consisting of the Alleged Discriminatory Rate Structure Resulting from Differences in the Southern and Northern Rate Levels)

[As has been noted at p. 18 above, Georgia's basic contention with regard to discrimination, the "guts of her

case," as counsel for Georgia put it, rests upon the alleged disparity in rate levels between the North and the South, which is said to be maintained by the defendants' coercive mechanisms so that southern producers cannot reach northern markets on the same mile-for-mile rates as the northern producers. In considering the alleged disparity it is necessary first of all to differentiate between *class rates* and *commodity rates*, since they constitute two different systems of rates (see Findings 1 and 2) and since the methods of making them and of measuring them are not the same.]

I. *Class Rates*

A. *The Difference in Class Rate Levels, South and North (Prior to the 1945 Adjustments)*

257. Prior to the adjustments ordered by the Commission in 1945 (Finding 264 below), the difference between the arithmetical averages of the first class rates prescribed by the I.C.C. for application *within* Southern territory, and *within* Official territory, respectively, was approximately 39 per cent. (p. 791)

258. Prior to said adjustments, the difference between the first class rates prescribed by the Commission for application interterritorially, from *Southern to Official Territory*, and those prescribed within Official territory, averaged around 24 per cent. Differences in the respective class rate structures, including particularly differences in the freight rate classifications, prevent any exact comparison of these rate relationships. (pp. 791, 792)

B. *The Small Use of Class Rates*

259. Since class rates generally are but little used, and since only an insignificant portion (estimated at less than one per cent) of carload interterritorial traffic from South to North moves on class rates, no inference as to the degree of difference, if any, in the general rate levels, either

intraterritorially or interterritorially, can be drawn from a comparison of class rates. (pp. 792, 793)

C. *The Economic Importance of Class Rates*

260. In spite of their small use, class rates are of economic importance, because, being already in existence as prescribed by the Commission, they have to be utilized where lower commodity rates cannot be negotiated and agreed upon; consequently manufacturers, when considering the possibility of locating in the South, have to reckon with the fact that unless they succeed in obtaining lower commodity rates they will be subject to the class rates, which will normally put them on a higher mile-for-mile basis than their northern competitors when they seek to ship into the northern markets (p. 793)

D. *The Movement for Equalization of the Class Rate Levels, and for the Unification of Classifications as a Necessary Concomitant*

261. Classifications consist of lists containing descriptions of all the different commodities, and setting forth the particular class to which each commodity is assigned. The particular class determines the rate for any given distance, as shown by the mileage scales contained in published tariffs. Therefore uniformity in class rates cannot be achieved without uniformity in classifications (pp. 794, 795).

262. Originally, individual railroads established their own classifications. Over the course of many years the railroads, urged forward by the I.C.C., succeeded in establishing classifications which were uniform within each of the three major classification territories, the South, the West and the North. In two investigations launched in 1939 shortly after the decision in the *Southern Governors' Case* (Finding 203), in the proceeding known as *Class Rate Investigation, 1939*, the Commission itself undertook the dual task of establishing the principles upon which the rail-

roads collectively would be requested to work out a nationally uniform classification, and of prescribing nationally uniform class rate scales which would take effect as soon as the uniform classification had been established (pp. 796, 797).

263. In 1940 Congress, in several amendments to the Interstate Commerce Act, indicated its purpose to bring about a greater degree of equalization and uniformity in the different regional rate structures and to do away with regional rate discriminations (pp. 797, 798)

E. *The Effect on the Class Rate Structure of the Commission's Orders in Class Rate Investigation, 1939 ((1945) 262 I.C.C. 447)*

264. In the Commission's report in *Class Rate Investigation, 1939*, published May 15, 1945, after the commencement of Georgia's suit, the Commission found that a basic unity in classifications was essential to the establishment of properly related class rates; that the differences between the territorial classifications made them unduly prejudicial and therefore unlawful; and that, in the main, and as a general pattern, the Official territory classification would be just and reasonable for application uniformly throughout the country. The Commission, referring to the expert work of the railroads' territorial classification committees and encouraging them to go further in joint efforts to establish uniformity, gave the carriers 90 days in which to state whether they would undertake to make and tender such a uniform classification. The railroads in Official, Western and Southern territory replied that they would, and would collaborate with other carriers in the undertaking (pp. 798-800).

265. The Commission, in the report just referred to, found unlawful the class rates within and between Official (including Illinois), Southern, Southwestern and Western Trunk Line territories. In particular the Commission found unlawful the relationship between the interterri-

torial class rates applicable from the South (and from the Southwest and West) to Official territory, on the one hand, and the intraterritorial class rates within Official territory, on the other hand, on the ground that this relation unduly preferred Official territory shippers and could not be justified by transportation conditions, the costs being substantially the same in both territories. The Commission therefore prescribed new uniform class rates, to become effective within and between all of the above territories simultaneously with the adoption, when completed, of the new uniform classification (p. 800).

266. In view of the time which would be required to effectuate a new uniform classification, the task being a large and complex one in which shippers and state rate-making authorities as well as rail and water carriers would need to participate, the Commission prescribed interim class rate adjustments which would minimize as far as was then practical the preferences and prejudices which had been found unlawful. These adjustments, among other things, reduced by 10 per cent the class rates within Southern territory and between the south and Official territory, and increased by 10 per cent the class rates within Official territory (pp. 800-802).

267. In *New York* v. *United States*, 331 U. S. 284, this Court sustained the Commission's orders just referred to and held among other things that: (a) in spite of the small use of class rates, their relationships discriminated in favor of the North and injured the South (and Southwest and West), and this injury need not be established by showing actual discrimination against particular shippers; (b) the Commission's 10 per cent interim rate order did not attempt to bring about complete elimination of the discriminatory features of the class rate structure, but was only an approximation of that result, the complete step awaiting the new uniform classification (pp. 802-806).

268. The remaining class-rate discrimination cannot

feasibly be removed through road-by-road negotiation of particular rates; it can only be removed through the means directed by the Commission, namely, the completion of the new uniform classification by collective action of the railroads and other interested groups and the consequent taking effect of the new uniform class rates prescribed by the Commission. Therefore, so far as class rates are concerned, the question of the effect of the defendants' rate associations on the removal of discriminations through road-by-road rate negotiation does not arise (pp. 806-809).

II. *Commodity Rates*

A. *The Nature and Use of Commodity Rates*

269. Commodity rates are specially bargained rates, which are lower than the otherwise applicable class rates, and which apply to the carriage of some particular commodity between specified points (see Finding 2). "Exception rates" result from the transfer of a commodity out of its regularly assigned class in the classification into another, usually a lower, class. Another type of exceptions are "column" rates, which are fixed as definite percentages of first-class rates but are applied only to particular commodities and are assigned to no regular class. In a representative sampling of carload traffic moving from Southern to Official territory the Commission found that 94.2 per cent moved on commodity rates, 4.9 per cent on exception (including column) rates, and .9 per cent on class rates. For the purposes of this Report commodity rates are deemed to include exception rates, since the latter perform the same function of under-cutting the class rate structures (pp. 809, 810).

270. In establishing particular commodity rates the initiating carriers take into account, among other things, the rates on the same or analogous commodities in the same or neighboring territories, the shippers' need of rates that will enable the traffic to move freely, the require-

ments of the Interstate Commerce Act, and the carriers' revenue needs (pp. 810-812).

B. *The "Levels" of Commodity Rates from the South to the North, as Compared with the "Levels" in Official Territory*

271. Northbound interterritorial commodity rates consist of a mosaic of heterogeneous rates, some lower than, some equal to, and some above the northern rates mile for mile on like commodities (pp. 812-816).

272. It is probable that the over-all level of all the rates in Southern territory on which traffic moves (i.e., a conglomerate of class and commodity, intraterritorial and the southern portion of the interterritorial rates) exceeds by something less than 3 to 5 per cent the over-all level of all the rates in Official territory on which traffic moves (pp. 816, 817).

273. It is probable that the northbound interterritorial commodity rates average mile for mile somewhat more than the Official territory rates on like commodities, but less than the difference between the levels of the conglomerate of all southern rates and the conglomerate of all Official territory rates referred to in Finding 272 (pp. 817, 818).

274. It is not possible, however, from the data given in this record to extract from the conglomerate of all southern rates the portion represented by the northbound interterritorial commodity rates, or to know with certainty whether these latter rates on a through basis to northern points are on a higher average mile for mile level than the Official territory rates on like commodities (pp. 817-819).

PART FOUR

The Question of Injury to Georgia

I. *Summary of the Defendants' Uncontroverted Evidence*

275. During the period of the alleged conspiracy there has been a more rapid development in Georgia and the

South than in the North in manufacturing generally, and in special industries of importance to the South; and the Southern defendants have been active and successful in bringing industry to Georgia and the South (p. 820).

276. There was no specific evidence that any industry has been kept from locating in Georgia or the South by freight rate differentials, and the Southern defendants know of no such industry (pp. 820, 821).

277. The fact that the rates within the South on many raw materials are lower within the South than in the North, constitutes at least one inducement to the location in the South of industries utilizing such materials (p. 821).

278. Many new plants are presently being located, or are about to be located, in Georgia and the South (p. 821).

II. *Georgia's Theory of Injury*

[Georgia contended that the evidence on which Findings 275-278 were based was irrelevant, because more progress might have been made had it not been for the defendants' conspiracy. Georgia further contended that merely by acquiring *coercive power* to control freight rates in the given setting of certain *economic facts*, the defendants injured the South, including Georgia (p. 821).]

III. *The Extent to Which the Facts of Record Sustain Georgia's Theory*

279. The evidence on *coercion* (summarized in Findings 94 to 174, inclusive, and in Finding 189) failed to establish either actual or potential coercion of the southern defendants (or the northern) by the A. A. R., by the territorial rate associations, or by the northern defendants (or the southern).

280. The remaining evidence on coercion (analyzed in Findings 175 to 186, inclusive) showed: (a) that a major purpose of the official and southern territory rate associations is to discourage unnecessary rate reductions; (b)

that, given this purpose, certain factors in the procedure of these associations (in the form presented to me) is a deterrent to the freedom of rate-making which does not destroy the right of independent action but to some extent dampens down its use; and (c) that this deterrent is to some extent fortified by the continuing influence of the A. A. R. on the side of conserving revenues through the avoidance of unnecessary rate reductions.

[The question then arises as to the effect of this deterrent in the given setting of certain *economic facts*, which may be grouped under (A) the alleged inequality in rate levels, and (B) the practical marketing situation confronting the South. As to (A), the question is whether the alleged inequality constitutes, as Georgia alleges, an injury to the South, including Georgia, which the deterrent could then be held partly responsible for maintaining. This question of injury is dealt with in the following Findings. It arises only in the case of *commodity* rates, since the remaining class-rate discrimination has not been caused and is not sustained by rate association procedures (Finding 268).]

A. *The Alleged Inequality in Commodity Rate Levels*

281. The probability that the northbound interterritorial commodity rates, if lumped together, would be found to average mile for mile slightly more than the Official territory rates on like commodities, if lumped together, cannot fairly be regarded as in and of itself an injury to the South, since there is no evidence to show, and no rational basis for presuming, that the existence of the probability has had any effect upon the choice of localities, as between the South and the North, by producers (pp. 823, 824).

282. The possibility that, as a result of an excess of the average of the northbound interterritorial commodity rates over the Official territory rates on like commodities, a loss of profits to southern shippers is occurring which is injurious to the southern economy, is too speculative to warrant a finding of injury, real or presumed (p. 824).

283. In the light of Findings 281 and 282, it has not been established that the relationship between the interterritorial northbound commodity rates, as a whole, and the Official territory rates on like commodities, as a whole, constitutes discrimination against the Southern region, or against Georgia as a part of it (p. 824).

[Since the commodity rate relationships have not been shown to be injurious to the South, the rate association deterrent to rate reductions cannot be regarded, in its bearing upon those relationships, as injurious to the South any more than to the North. The question then arises whether the deterrent injures the South more than the North because of anything in the practical marketing situation confronting the South.]

B. *The Practical Marketing Situation Confronting the South*

284. While in recent years the pace of industrial development has been more rapid in the South than in the North, the South is still economically backward, compared with the North. Official Territory contains the greatest consuming markets in the country, and most Southern manufacturers desire to sell in those markets (pp. 825, 826).

285. Southern products move northward into the great consuming markets of Official Territory in much greater volume than Northern products move southward into the more limited markets of Southern Territory; and the Official Territory associations act on many more Southern proposals for northbound rate reductions than the Southern Freight Association acts on northern proposals for southbound rate reductions (e.g. in 1939, some 1760 as against 238). (pp. 826, 827)

C. *Consideration of the Qualitative Significance of the Quantitative Differences Found Under B Above*

286. The facts set forth in Findings 284 and 285 are not basically peculiar to the South. Shippers from all over

the country seek to reach the great consuming markets in Official Territory (p. 827).

287. Moreover, Official Territory is not itself uniform in its economy or in its rate structure; there are some backward areas within its boundaries, and its rate structure contains many and substantial differences between the rates per mile on like commodities for like distances. Within the territory of the Trunk Line Association, which centers in New York City, many more Northern than Southern shippers and carriers seek rate reductions, and many shippers and carriers in Central Freight Association and New England territories seek rate reductions to points in Trunk Line territory (pp. 827, 828).

288. It has not been established that, where Southern shippers seek and fail to obtain rate reductions to Official Territory points, they suffer proportionately any greater injury, because of the economic situation of the South, than do shippers from other parts of the country (including Official Territory) who seek and fail to obtain rate reductions to such points or to points in Southern Territory (pp. 828, 829).

289. It has not been established that, where Southern shippers seek and fail to obtain rate reductions to Official Territory points, the economy of the South suffers proportionately any greater injury, because of its relatively backward industrial development, than is suffered by the economy of the North or of any other region when shippers in such region seek and fail to obtain rate reductions to the South (or to particular consuming points in the North). The industrial development of the South has in fact been advancing more rapidly in recent years than that of the North (pp. 828, 829).

290. While the Official Territory Associations act on many more Southern proposals for northbound rate reductions than the Southern Freight Association acts on northern

proposals for southbound rate reductions, there is no significant difference in the treatment of each other's proposals by the two groups of associations; nor are Southern proposals treated by Official Territory Associations in a manner significantly different from the manner in which Northern proposals are treated by said Associations. (Finding 141). In the North, as in the South, about three-fourths of all interterritorial proposals for rate reductions are approved, and of those disapproved a very small fraction (5 to 10 per cent) are independently effectuated (p. 829).

291. Thus the only ground upon which Georgia can assert an injury, not equally suffered by the North, becomes a quantitative one: the deterrent effect applies to many more proposals for rate reductions addressed by the South to the North than by the North to the South (p. 829).

> [Since Georgia is suing only on behalf of her own citizens, and not as an agent of other states, it becomes pertinent to inquire into the general order of magnitude of the proposals for rate reductions from Georgia to the North which are disapproved each year.]

292. During the most representative pre-war period (1938-1942) an average per year of 127 proposals for rate reductions from the South to the North were disapproved by the Official Territory Associations and were not independently effectuated. The corresponding figure for 1945 was probably something over 92 (pp. 830, 831).

293. The average number of proposals for reductions in rates from Georgia to the North which are disapproved in the North (and not independently effectuated) probably do not exceed a couple of dozen a year (p. 832).

294. There is no way of telling whether these disapproved proposals in any year affect many of Georgia's producers or few; whether they affect large or small volumes of shipments; to what extent they relate to manufacturing; or what proportion of them would be concurred in if there

were no rate association deterrents to independent action (p. 832).

295. There is a fair chance, but no certainty, that of the few proposals a year which are in question, some fraction would be concurred in if there were no such deterrents (p. 832).

[The following questions are now presented: (1) whether, in view of the foregoing facts, Georgia has made a showing of threatened injury to her economy sufficient to sustain her right to sue as *parens patriae;* (2) whether, if such a showing has been made, the threatened injury is sufficiently different from that which is suffered by the public generally to give Georgia (as distinguished from the United States) the right to seek injunctive relief under the anti-trust laws. These questions, and others, are considered under Conclusions of Law, which here follow.]

IV. CONCLUSIONS OF LAW

A. *Georgia's Standing to Sue in a Proprietary Capacity*

As noted below, this Court treated as a "makeweight" Georgia's allegation of injury to the State as a proprietor of certain institutions and agencies. Georgia introduced no evidence of any injury of this sort, and, on the basis of the record as made, none can be inferred. Even if some injury could be inferred, it would not differ in kind from that suffered by members of the public at large, and so would not afford a basis for a suit in equity under *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, which is discussed at pp. 140-143 below. I conclude that Georgia must stand or fall on the establishment of her capacity to seek an injunction as *parens patriae*.

B. *Georgia's Standing to Sue as Parens Patriae*

In its opinion in this case the Court, after stating that "we treat the injury to the State as proprietor merely as a 'makeweight' ", held that the allegations of the amended

complaint were sufficient to give Georgia standing to sue as *parens patriae*. The Court said (324 U. S. 439, at 450-451):

> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in gravity the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia fields. There are substitute fuels to which the economy of a State might be adjusted. But discriminatory rates fastened on a region have a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote: it is immediate. If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction."

The defendants contended that in the foregoing passage the Court rested Georgia's right to sue as *parens patriae* upon a showing that the defendants had conspired to fasten discriminatory rates upon the South, including Georgia.

Georgia charged that the A.A.R. was the source and

fountain-head of the alleged conspiracy. In Finding 58, however, I stated that:

> "The record discloses no evidence that sectional considerations or an intent to discriminate against a region or its carriers or shippers motivated the establishment of the A.A.R. or the form of its organization."

I conclude that no conspiracy purposefully directed against Georgia or the South has been shown.

The defendants contend that, if such a conclusion is reached (as they urge it should be) Georgia's case must fall. They point not only to the above passage from this Court's opinion, but to this Court's construction of the amended complaint (quoted at the outset of this Report) as charging "a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed," in violation of the anti-trust laws (324 U. S. 439, 462). The defendants further point to the allegations of purposeful discrimination which were noted by this Court at pp. 444 and 462 of its opinion (see p. 10 above).

As has been noted, Georgia made no attempt to establish a purposeful conspiracy to fasten discriminatory rates upon the South, but sought only to show that the defendants had acquired private control over all freight rates with a view to preventing rate reductions, and that the acquisition of this control had irreparably injured Georgia's economy.

The first question that arises is whether Georgia's failure to prove a conspiracy purposefully directed against the South is fatal to her case. I conclude that it is not. This Court in its opinion used the terms combination and conspiracy in an interchangeable sense [1]; the evidence certainly

[1] E.g.: the Court spoke at p. 456 (324 U. S.) of "rate-fixing combinations"; at p. 459, of "a combination of the character described in this bill of complaint"; at p. 459, of "the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through rates"; at p. 460, of "the restrictive, dis-

established the existence of a combination, resulting from the fact that the rate association rules constitute procedures agreed upon by the members for the handling of their rate proposals; and taking the opinion as a whole I conclude that if Georgia had established by her proof that the alleged injury existed and was caused by the combination, the absence of proof of a specific purpose of discrimination against Georgia or the South would not have led this Court to deny Georgia the right to complain of the injury in her capacity as *parens patriae*. I do believe, as I shall explain hereinafter, that Georgia's failure to establish such a purpose places upon her the burden of showing that the injury suffered by Georgia is in some way different from that suffered by the public generally, in order to entitle her, as a person other than the United States, to an injunction under section 16 of the Clayton Act. But I have not yet reached that point. The question of whether or not the injury shown is sufficiently special to Georgia arises only after Georgia has shown that she is entitled to be in Court at all, in her capacity as *parens patriae*. If she is not, that ends her case.

In considering whether Georgia has established her right to sue in that capacity, the extended passage from this Court's opinion on the *parens patriae* issue, (quoted at page 132 above), seems to me controlling. In that passage the Court not only stressed the gravity of the alleged injury, but indicated that Georgia would be expected to prove the allegations in question, and that her right to invoke this Court's original jurisdiction, and to submit evidence, was conditioned upon such proof. Thus the Court said:

> "*If the allegations of the bill are taken as true*, the economy of Georgia and the welfare of her citizens

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criminatory, and coercive influences of the combination". On the same page 460, the Court said that the aim of the bill was "to free the rate-making function of the influences of a conspiracy over which the Commission has no authority . . .": also, that "this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration."

have seriously suffered as the result of this alleged conspiracy"; and that Georgia was complaining of a wrong "*which if proven,* limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States."[2] (Emphasis added.)

Georgia's case on injury, as actually proven, comes down to a showing that the deterrent effect upon the taking of independent action applies to many more proposals for rate reductions addressed by the South to the North than to like proposals addressed by the North to the South.[3] In considering the possible effect of this condition upon Georgia's citizens, on behalf of whom Georgia is suing, I found on the basis of the available figures in the record that the average number of proposals for reductions in rates from Georgia to the North which are disapproved in the North (and not independently effectuated) probably do not exceed two dozen a year.[4] I also found that there was no way of telling whether these disapproved proposals in any year affect many of Georgia's producers or few; whether they affect large or small volumes of shipments; to what extent they relate to manufacturing; or how many of

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[2] Elsewhere, as the defendants pointed out, the Court said (324 U. S. 439, 462): "The threatened injury is clear. The damage alleged is sufficient to satisfy the preliminary requirements of this motion to file." And at p. 463: "We are dealing with the case only in a preliminary manner. Cf. *Missouri* v. *Illinois*, 200 U. S. 496, 517, 518. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. We construe it with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues."

[3] Finding 291. Here and throughout I am concerned only with proposals for *commodity* rate reductions, having previously found that the unequal *class rate* structure cannot be ascribed to the defendants' rate associations, and can only be removed in the manner which has already been prescribed by the I.C.C. See Finding 268.

[4] Finding 293.

them would be concurred in if there were no rate association deterrents to independent action in the North. I found only that there was a fair chance, but no certainty, that, of the few proposals a year which are in question, some fraction would be concurred in if there were no such deterrents.

The defendants showed that during the period of the alleged conspiracy the South had advanced industrially faster than the North and that many new industries had located and were in the process of locating in Georgia, while witnesses for the Southern defendants testified that they were active in seeking to bring about the establishment of new plants along their lines and that they knew of no instances in which producers had been discouraged from locating in Georgia because of rate considerations. Much of this evidence was self-serving, but none of it was controverted, and Georgia met it only by the rejoinder that proof to the contrary was unnecessary and that in any event had it not been for the conspiracy the progress might have been faster.

The facts of record are in my opinion too shadowy and insubstantial to support a positive finding that but for the rate association deterrents to independent action, the economy of Georgia would have prospered more than it has prospered.

The facts seem to me rather to bring Georgia's case within the compass of *Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 277, which this Court distinguished in its opinion in Georgia's case. In the *Oklahoma* case, it will be recalled, the State of Oklahoma sued to enjoin the defendant railroad company from exacting greater rates upon certain products than, according to the State, the road was lawfully entitled to charge. Referring to that decision and its rationale, the Court in its opinion in Georgia's case said:[5]

> "The Court held that our original jurisdiction could not be invoked by a State merely because its citizens

[5] *Georgia* v. *Pennsylvania R. R. Co., et al.*, 324 U. S. 439, 452.

were injured. We adhere to that decision. It does not control the present one. This is no attempt to utilize our original jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of Federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers."

The claims which Georgia asserted in her amended complaint (as described by this Court in the passage quoted at p. 132 above) did indeed run far beyond the claim of damage to individual shippers. I conclude that the proof in Georgia's case, however, does not sustain these larger claims but amounts only to a showing of the existence of a fair chance, but not a certainty, that on an average a very limited number of Georgia's shippers each year may not obtain rate reductions to the Northern level mile for mile on like commodities because of non-coercive deterrents in the rate association machinery. The connection between this chance and the grave charges in the amended complaint is too remote, it seems to me, to lift the case out of the category covered by the decision in the *Oklahoma* case.

I conclude that Georgia has not established the injury alleged in her pleadings which this Court expected her to prove, and that she has not therefore established her right to bring suit in this Court in her sovereign capacity, and as a person entitled to seek injunctive relief under Section 16 of the Clayton Act.

I believe that a different conclusion would be warranted only if, from the given statistical facts above, there could fairly be derived a conclusive presumption of injury to Georgia's economy (as distinguished from mere injury to a small and indeterminate group of disappointed shippers). In the course of its opinion in Georgia's case this Court spoke of a presumption of damage, in the following language relied on by Georgia (324 U. S. 439, 461):

> "If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone [the zone of reasonableness]."

I conclude that in that passage the Court was speaking not of any conspiracy, but only of the alleged conspiracy —that is to say (in the Court's language at p. 462) "a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed." Clearly, if the defendants had conspired to use coercion and to discriminate against Georgia, as charged in the amended complaint, proof of that fact would have established a real and tangible threat of injury which would have been enjoinable without proof of actual injury. The quoted passage from the Court's opinion seems to me to say no more than that.

As I have found, however, and as I have hereinafter concluded as a matter of law, the proof falls short of establishing such a conspiracy. The proof has established no more than the existence of a combination operating in a substantially uniform manner throughout the North and the South, designed to avoid unnecessary rate reductions and to deter, through non-coercive procedures and influences, the establishment by independent action of rate reductions disapproved by one or another of the territorial associations. The proof further shows that this combination did not have as its purpose "an invidious discrimination against a region or locality" (324 U. S. 439, 462) such as the Court expected Georgia to show, and that it affected the South no differently than the North, except that it impinged upon many more proposals for northbound rate reductions than for southbound rate reductions. Finally, so far as the effect on Georgia was concerned, the evidence, as I have said, established no more than a fair chance, but no certainty, that on an average per year some fraction of a

couple of dozen non-concurred-in requests by Georgia shippers for northbound rate reductions fail of concurrence because of impediments in the rate associations. Against this was the defendants' evidence of rapid industrial advance in the South, including Georgia.

This state of facts is so far watered down from that pictured by Georgia in her amended complaint and described by this Court in its opinion that I would not feel warranted in extending the Court's presumption of damage to cover it.

If the Court should decide that the presumption should be so extended, it would become necessary to consider:

C. *Whether Georgia Has Shown That the Threatened Loss or Damage is of a Sort Which a Person Other Than the United States Can Seek to Enjoin Under Section 16 of the Clayton Act.*

The pertinent provisions of Section 16 are those which authorize a person other than the United States to seek injunctive relief "against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . ."[6] The Court in its opinion in this case,

[6] 15 U.S.C. Sec. 26. The full text of the section is as follows: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief

citing *Georgia* v. *Evans*, 316 U. S. 159, held that Georgia was a "person" within the meaning of Section 16 (324 U. S. 439, 447). The nature of the requirements of that Section must therefore be considered.

1. *The Necessity of Showing Threatened Loss or Damage that is Special to the Plaintiff.*

The defendants contended that under the quoted language a plaintiff other than the United States must show threatened loss or damage that is special to the plaintiff, as distinguished from threatened loss or damage to the public generally. In support of this proposition the defendants cited a number of authorities, the relevant portions of which will now be summarized.

The defendants laid principal stress on *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48. This case was decided in 1904, prior to the enactment of Section 16 of the Clayton Act. The question was whether, upon general principles of equity jurisdiction (by which Section 16 according to its terms is likewise to be governed), the State of Minnesota could have injunctive relief in the Federal courts against an alleged consolidation of the Great Northern Railway Company and the Northern Pacific Railroad Company. The complaint charged that the consolidation destroyed competition between the two railroads, to the injury of Minnesota. In support of the allegation of injury the complaint asserted that the State owned lands which the two railroads had previously assisted in developing; that this development would be delayed by the consolidation; that the State owned institutions whose supplies had to be shipped over the lines of the two railroads; that the amount of taxes which the State could collect, the successful maintenance of its institutions, and the performance of its governmental functions, depended largely on the

against any common carrier subject to the provisions of chapters I and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." (38 Stat. 737).

prosperity of its citizens; and that this prosperity in turn depended largely upon maintaining competition between the two railroads.

At that time there was no express provision in the law whereby any person other than the United States could seek injunctive relief against a violation of the Sherman Act. Section 4 of that Act did provide in general terms that the circuit courts "are hereby invested with jurisdiction to prevent and restrain violations of this act," but the section went on to add the following, without mentioning suits by individuals: "and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." The only express authority to sue conferred upon persons other than the United States was in Section 7, which permitted a treble damage suit to be brought by "any person who shall be injured in his business or property" by another person's violation of the Act.

As the Court pointed out, Minnesota's suit was neither a suit by the United States under Section 4 nor a suit under Section 7 for treble damages by a person injured in his business or property. Minnesota's right to sue therefore had to be based upon the general proposition that the Sherman Act was for the benefit of all the States and all the people and that therefore a State injured in its proprietary interest by a violation of the Act should be given a standing to seek injunctive relief, at least in the absence of any express statutory provision to the contrary.

The Court, after reciting the allegations of the complaint which have been summarized above, held that the suit could not be maintained. The Court said at p. 70, in a passage relied upon here by the defendants:

> "The injury on account of which the present suit was brought is at most only *remote and indirect;* such an injury as would come alike, although in different degrees, to every individual owner of property in a state by reason of the suppression, in violation of the

> act of Congress, of free competition between interstate carriers engaged in business in such state; not such a *direct, actual injury* as that provided for in the 7th section of the statute." (Emphasis added)

In this passage the Court construed the injury referred to in Section 7 (the treble damage section) as a "direct, actual injury" and seemed to leave open the question whether, if a person could show such a direct, actual injury, he could have equitable relief in the Federal courts, even though the Act did not expressly authorize such relief. The question appeared to be left open again in subsequent passages in which the Court said that the intention of the Act was to permit only the United States to enjoin "such violations of the antitrust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states . . ."; and that Congress may have thought that "by such a limitation upon suits in equity of a general nature to restrain violations of the act, *irrespective of any direct injury sustained by particular persons or corporations*," commerce would not "be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes." 194 U. S. 48, at p. 71. (Emphasis added)

Following this decision there arose a conflict of view among the lower Federal courts as to whether or not a person, even though showing such direct injury to himself, could seek an injunction to restrain a violation of the Sherman Act. I shall summarize this development, which led to the passage of Section 16 of the Clayton Act, a little later. Meanwhile the policy grounds upon which the Court rested its decision in the *Northern Securities* case should be noted. The Court said at p. 70:

> "If Minnesota may, by an original suit, in its name, invoke the jurisdiction of the circuit court, because, alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on

> by interstate carriers within its limits, then every state, upon like grounds, may maintain, in its name, in a circuit court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view, every individual owner of property in a state may, upon like general grounds, by an original suit, *irrespective of any direct or special injury to him*, invoke the original jurisdiction of a circuit court of the United States, to restrain and prevent violations of the antitrust act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the anti-trust act." (Emphasis added)

The Court then stated its conclusion, previously noted, that the intent of Congress was to give authority only to the United States to enjoin violations that caused injury to the general public, or to all alike, "thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country"—and at the same time avoiding the disturbance of commerce by a multiplicity of suits.

While it is true that in the *Northern Securities* case the Court was dealing only with a charge of injury to the State in its proprietary character, the decision is nevertheless authority for the conclusion that prior to the enactment of Section 16 a plaintiff other than the United States, if permitted to sue at all for an injunction against violations of the Sherman Act, would have to show a "direct, actual injury" to itself. The question then arises whether by the enactment of Section 16 of the Clayton Act Congress intended to give a plaintiff other than the United States any broader right to equitable relief than that expressed in the *Northern Securities* case, and, if Congress had no such intention, whether Georgia has shown such direct, actual injury to herself as to sustain her right of action under Section 16.

I shall now summarize the developments following the decision in the *Northern Securities* case. As I have said,

there ensued a conflict of view in the lower Federal courts as to whether or not, even if a private plaintiff could show a direct, actual injury, he would be entitled to seek injunctive relief against a violation of the Act.

This conflict was soon set at rest by the enactment of Section 16 of the Clayton Act and it is not necessary to trace the decisions which led up to it.[7] One case, however, that of *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, should be noted.

This case was tried in the United States District Court for the Southern District of New York shortly prior to the passage of Section 16 (*Paine Lumber Co.* v. *Neal*, 212 Fed. 259). The plaintiffs consisted of a group of eight non-union manufacturers, located at various points outside of New York, engaged in making wood trim used in buildings. The defendants consisted of agents of the United Brotherhood of Carpenters and Joiners, five manufacturers of wood materials who had closed-shop contracts with the union and were competitors of the plaintiffs, and a group of New York City builders. The plaintiffs sought an injunction to restrain the defendants from acting under certain agreements among themselves precluding the use of non-union-made trim in buildings in New York City. The plaintiffs alleged that the agreements violated the Sherman Act as well as certain New York statutes. Judge Mayer's decision (as summarized by Justice Holmes in his opinion written for the majority of this Court) held that "although it appeared that the agreements above mentioned were parts of a comprehensive plan to restrain commerce among the states, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large."[8]

The Circuit Court of Appeals in a *per curiam* opinion by Judges Lacombe, Rogers and Hunt, affirmed the District Court, saying:[9]

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[7] They are summarized in the dissenting opinion of Justice Pitney in *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 472, at 481-483.

[8] *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 470, 471.

[9] *Paine Lumber Co.* v. *Neal*, 214 Fed. 82, 83.

> "We agree with Judge Mayer that, since it clearly appears—indeed, the proposition is not disputed—that defendants' acts were not malicious nor personally directed against the individual complainants, injunctive relief, which is all they pray for, cannot be granted in this suit. The bill was, therefore, properly dismissed. Any discussion of the other questions raised, viz., whether the particular agreements or combinations are obnoxious either to the common law or to one or more of these statutes would be academic and need not now be entered into."

The plaintiffs then appealed to this Court. During the interval between the affirmance by the Circuit Court of Appeals and the decision of this Court, Congress enacted the Clayton Act. The majority of this Court, in affirming the decision of the Circuit Court of Appeals, treated Section 16 of the Clayton Act as inapplicable (because passed too late) and held simply that under the *Northern Securities* case, as the majority construed it, the plaintiffs as private parties had no standing to seek an injunction under the Sherman Act, whether or not they were able to show special damage. The majority did not therefore pass upon the question of whether or not special damage had been established, Justice Holmes merely noting in a dictum that:[10]

> "No one would maintain that the injunction should be granted to parties not showing special injury to themselves."

In a dissenting opinion by Justice Pitney, in which Justices McKenna and Van Devanter joined, the question of special injury was examined at more length, because the minority construed the *Northern Securities* case as not precluding a private plaintiff suffering such injury from suing for an injunction; and the minority believed that on principle a private plaintiff should have that right. The minority concluded that special injury had been shown because the conspiracy was deliberately aimed to prevent a particular

[10] *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471.

class of manufacturers, of which the plaintiff was one, from selling in the New York market.

Thus it is clear that, prior to the passage of Section 16 of the Clayton Act, those judges who believed that a private plaintiff should be entitled to injunctive relief against Sherman Act violations required the plaintiff, upon general principles of equity jurisdiction, to establish threatened loss or damage that was in some way special to the plaintiff.

Section 16, when enacted, did not expressly provide that the threatened loss or damage must be special to the plaintiff, but the section did provide, as noted previously, that injunctive relief could be granted only "under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ." It was to be expected, therefore, that in applying the new section the courts would continue to require proof of special injury; and this they have done, as set forth below.

The defendants cited several cases in which stockholders sought to enjoin alleged antitrust violations by their own corporations in combination with others, and in which the Courts dismissed the actions on the ground that the plaintiffs had not shown any particular injury to themselves—e.g., *Union Pac. R. Co.* v. *Frank*, 226 F. 906 (C.A. 8th, 1915); *Ketchum* v. *Denver & R. G. R. Co.*, 248 F. 106 (C.A. 8th, 1917); *Continental Securities Co.* v. *Michigan Cent. R. Co.*, 16 F. (2d) 378 (C.A. 6th, 1926); *National Supply Co.* v. *Hillman*, 57 F. Supp. 4 (W.D. Pa., 1944). These cases are not very helpful because in such situations the real injury, if any, is to the corporation.

More significant are two patent infringement cases in each of which the defendant filed a counterclaim alleging a violation of the antitrust laws by the plaintiff and praying for an injunction under Section 16: *Connecticut Telephone & Electric Co.* v. *Automotive Equipment Co.*, 14 F. (2d) 957 (N.J., 1926) and *R. C. A.* v. *Hygrade Sylvania Corp.*, 10 F. Supp. 879 (N.J., 1934). In the first of these

cases the counterclaim contained in substance the following allegations. (1) The plaintiff had falsely advertised that certain repair parts of its igniter for automobile starters (which the defendant likewise manufactured) were patented and that the repair parts sold by its competitors, including the defendant, were inferior and infringed upon the plaintiff's patents. (2) The plaintiff sought to prevent the sale of competing repair parts by requiring its own buyers to promise that they would not buy parts from other concerns. (3) These acts of the plaintiff were done for the purpose and with the effect of substantially lessening competition and creating a monopoly in favor of the plaintiff, to the irreparable damage of the defendant. In dismissing the counterclaim the Court said at pp. 967, 968:

> "The counterclaim does not allege that the defendant suffered any specific or individual damages by reason of the recited acts. The only reference to injury is that these acts constitute unfair competition and that a continuation thereof is threatened by the plaintiff to defendant's irreparable damage. This is but a characterization and a conclusion, and insufficient as a pleading. *Buckeye Powder Co.* v. *E. I. Du Pont Co.* (D.C.), 196 F. 514, and cases cited at page 517. But, worse than that, because not curable by amendment, the evidence is no more specific. It does not show that the defendant sustained damages different from those which the general public suffers as a result of the supposed wrongdoing. To maintain an action to recover damages, or to restrain a continuation of wrongdoing, specific injury resulting to the suitor must be alleged and proven." (citing cases including *Paine Lumber Co.* v. *Neal*, supra)

In the *R. C. A.* case the defendant's counterclaim alleged (1) that the plaintiffs were violating the antitrust laws by refusing to grant the defendant a license on reasonable terms because of an agreement between the plaintiffs restricting licensing; (2) that the agreement and the acts taken thereunder constituted an illegal combination for the enforcement of a monopoly and the domination of the radio indus-

try; and (3) that by denying the defendant a license and instituting this patent infringement suit against the defendant, the defendant "has suffered a direct, special and unique injury and damage which is both substantial and irreparable and which does not affect the public generally" (p. 881). In dismissing the counterclaim the Court said (p. 884):

> "It is established that the defendant must show a threatened loss or damage to itself to obtain relief under the statute. *Connecticut Telephone & Electric Co.* v. *Automotive Equipment Company* (D.C), 14 F. (2d) 957, 967; *Radio Corporation* v. *United Radio & Electric Corporation* (D.C.), 50 F. (2d) 206. This the defendant is unable to do for the reason that it does not show as a matter of right that it is entitled to be licensed by the plaintiffs and the allegations of the pleadings will not support the argument that it could have obtained a license but for the alleged unlawful agreement. . . ."

In another, very recent patent infringement case, *Revere Camera Co.* v. *Eastman Kodak Co.*, 81 F. Supp. 325 (N.D. Ill. 1948), the plaintiff sought treble damages under Section 4 and injunctive relief under Section 16 of the Clayton Act. The plaintiff alleged that the Eastman Kodak Co.'s monopoly on amateur motion picture films, and its system of allocating films through the channels of merchandising, effected discrimination in trade and caused injury to the plaintiff as well as to other manufacturers of cameras using the same type of film, and to the public. The defendant moved to dismiss the complaint insofar as it purported to set forth a claim on behalf of the public. The Court granted the motion and said, in the course of the most extensive discussion of Section 16 which has been brought to my attention (at p. 330):

> "The courts seem consistently to have held that a suit may not be maintained by a private person merely because of violations of the anti-trust laws which have resulted in injury to the public. On the contrary a plaintiff must allege and prove that these violations have been the proximate cause of special injury to his

business or property, as distinguished from injury resulting to the public generally. In *Beegle* v. *Thomson*, 7 Cir., 138 F. 2d 875, 881, certiorari denied 1944, 322 U. S. 743, 64 S. Ct. 1143, 88 L. Ed. 1576, the court said:

"'Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. * * * the mere existence of a violation is not sufficient ipso facto to support the action.'

"Section 16 of the Clayton Act authorizes injunctive relief for private persons. The language of this section also provides that a plaintiff thereunder may obtain injunctive relief only against threatened special loss or damage to him, differing from the injury which may be suffered by the public at large."

Then, after quoting from the text of Section 16, the Court (in the *Revere Camera* case) went on to say (at p. 331):

"The rule in equity is that injunctive relief against threatened conduct that will cause loss or damage will not be granted where the injury complained of is a public injury, and the plaintiff cannot show that he suffers a special injury differing from that suffered by the public at large. Section 16 also authorizes relief only to prevent special injury to the plaintiff differing from the injury which may be suffered by the public at large and does not authorize a suit on behalf of the public."

The defendant also moved to strike from the complaint as irrelevant all allegations purporting to assert claims on behalf of the public and others. The Court granted this motion also.[11]

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[11] As to this the Court said at p. 332: "Whether or not the suit is in the public interest and whether the various unlawful acts alleged are injurious to other competitors or other manufacturers is immaterial

It will be observed from the last quoted sentence above that the Court's construction of Section 16, namely, that there must be a showing of "special injury to the plaintiff differing from the injury which may be suffered by the public at large," was the same as its statement, in the preceding sentence, of the traditional rule in equity. As has previously been noted, the very language of Section 16 ("when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity") indicated the intention of Congress that the section should be applied in accordance with traditional equitable principles.[12]

From the foregoing authorities I conclude that a plaintiff other than the United States, to be entitled to injunctive relief under Section 16 of the Clayton Act, must show either:

1. That loss or damage to the plaintiff is threatened by acts, violating the anti-trust laws, which are aimed and directed at the plaintiff, or at a special class of persons of whom the plaintiff is one (the liberal view taken by Justices Pitney, McKenna and Van Devanter in *Paine Lumber Co.* v. *Neal* supra); or

2. That (since injuries to the public at large are subject to injunction only at the instance of the United States) the

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to the question of whether the plaintiff here has suffered special injury for which he may recover treble damages or obtain injunctive relief under the provisions of the Sherman and Clayton Acts."

[12] Cf. the statement of Judge Learned Hand in *Graves* v. *Cambria Steel Co.*, 298 Fed. 761, 762 (S.D. N.Y. 1924): "The purpose of section 16 of the Clayton Act certainly was to fill a hiatus left in the Sherman Act, under which the courts had held that private suits, as distinct from private actions, did not lie. When Congress came to amend that situation, they expressly limited the equitable relief to injunctions for threatened loss and damage. That was language apt, and apt only, to answer the case of a threatened multiplicity of torts at law. With the knowledge before it of the prior attitude of the courts toward the statute, there can be no question that the words were used in the conventional sense which tradition would impute to them."

threatened loss or damage to the plaintiff is a direct injury differing from that suffered by the public at large (the *Minnesota Securities* and later cases, particularly the *Revere Camera* case).

I conclude that Georgia has not met the first test because the evidence does not show that the activities of the defendants' rate associations are aimed and directed at Georgia, or at the South including Georgia.

The basic question is whether Georgia has met the second test.

At this point, however, it is necessary to consider a contention by Georgia to the effect that a sovereign state does not, with regard to the damage requirements of Section 16, occupy the position of an ordinary individual plaintiff, but occupies instead a position similar to that of the United States as plaintiff.

2. *Whether a Sovereign State Need Meet the Damage Tests Required of an Ordinary Individual Plaintiff under Section 16*

Georgia contended that:[13]

> "The distinction defendants draw between the capacity of the State and the United States to sue under the Anti-Trust laws is largely a distinction without a difference. The State sues as parens patriae; so does the United States. The State cannot recover damages here;[14] neither could the United States, *U. S.* v. *Cooper Corp.*, 61 S. Ct. 742 (1941). Both necessarily sue to protect their citizens from injury due to unlawful restraints."

Continuing the argument further, Georgia contended[15] that it if were necessary for her to show specific injury she would then be required "to substitute for the only criterion known to the anti-trust law, namely competition, some alien standard of injury. But this Court has repeatedly

[13] Final Brief, p. 193, foot-note 1.
[14] As held by this Court, 324 U.S. 439, 453, 461, 462.
[15] Final Brief, p. 194.

held that the Sherman Act is its own measure of right and wrong and its beneficent purposes cannot be subverted by the substitution of any other standard. As this Court observed in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 49:

> "The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

In the above case cited by Georgia the United States was, of course, the plaintiff, and it is elementary that where the United States sues to restrain an alleged violation of the anti-trust laws, the presence or absence of damage is irrelevant, and the only issue is the existence of the violation. Georgia in substance contends that where a State sues to restrain an alleged violation of the anti-trust laws affecting its citizens, the State's position is in all respects similar to that of the federal government, and that the State, like the federal government, need prove no more than the existence of the violation.

In *United States* v. *Association of American Railroads, et al.*, 4 F.R.D. 510 (D.C. Neb. 1945), in which, as previously noted, the United States brought suit against the A.A.R., the Western railroads and others under the Sherman Act, the Court was called upon to determine whether the government should be required to answer a bill of particulars of an unusually extensive character. The Court recognized the fact that in the *Georgia* case (whose objects and basic averments the Court described at p. 525 as "strikingly comparable to those of the complaint before this court") the Supreme Court had granted requests for statements of particulars, "in certain instances extending to details which this court is not requiring the plaintiff to set out." (p. 537) The court said, however, that Georgia's amended complaint was much less detailed than the complaint filed by the government against the A. A. R. et al. The court added:

"Then, the variety of capacities in which the State of Georgia undertakes to maintain its action imposes upon it as plaintiff the burden of pleading and establishing—*beyond the existence of conspiracy or combination or monopoly,* whether attempted or accomplished —*the adverse consequence to itself and its citizens of the illegal actions that it challenges.* And this obligation involves further and more detailed pleading than is required of the United States, proceeding in its sovereign capacity under 15 U.S.C.A. § 4." (Emphasis added)

In this passage the court seems to have taken it for granted that Georgia as a plaintiff would have to show damage to itself which the United States as a plaintiff need not show.

If Georgia were right in contending that a State, like the United States, need not prove injury, a State would in effect be relieved from the necessity of complying with Section 16 (since the damage requirements of that Section constitute its essence), and forty-eight separate state agencies, in addition to the United States, would be authorized to obtain injunctions against anti-trust law violations affecting their citizens, without having to show anything more than the existence of the violations.

This, I take it, would run counter to the policy of the scheme of enforcement of the Sherman Act as outlined by this Court in the *Northern Securities* case (pp. 142, 143 above). It would also render meaningless the holding by this Court in Georgia's case that Georgia was a "person" within the meaning of Section 16 (324 U.S. 439, 447, 452); that the requirements of Section 16 were, on the pleadings, "sufficiently satisfied to justify a filing of this bill" (ibid at 460), and, specifically, that the "damage alleged is sufficient to satisfy the preliminary requirements of this motion to file" (ibid at 462).

I conclude that Georgia must, like other individual plaintiffs, meet the special damage test; i. e., she must show that the threatened loss or damage to her economy is a direct injury differing from that suffered by the public at large.

3. Whether Special Damage to Georgia Has Been Shown

The question here seems to me to be simply this: is the presumed injury to Georgia's economy (without which, I concluded, Georgia would lack standing to sue as *parens patriae*) such that it can fairly be considered as a direct injury to Georgia differing from that suffered by the public at large?

This question in turn depends, I think, upon whether a State's economy should be regarded as a separate entity, with a particular life and character of its own, so that any injury to it necessarily differs in form and in results from the injury to any State's economy; or whether when we talk about a State's economy we are actually talking about the activities of a multitude of citizens stretching and interweaving across State lines to such an extent that the consequences of impediments in the way of rate reductions, flowing out of a nationwide policy such as is here present, become at once so diffused and generalized as to be no more peculiar to one State than to another.

The allegations in Georgia's amended complaint, it seems to me, pictured, and were expected by this Court to show, an injury of the first sort, vivid and tangible and very special to Georgia; whereas the evidence, as I found it to be, consisted only of certain statistical probabilities of a small and shadowy nature. And in my view, even if this Court should derive from those statistical probabilities a conclusive presumption of injury to Georgia's economy, sufficient to sustain her standing to sue as *parens patriae*, the presumed injury would lack that quality of differentiation from the injury suffered by the public at large which is necessary to permit a person other than the United States to sue for injunctive relief.

If, as the evidence indicates, it is probable that not more than a couple of dozen proposals for rate reductions from Georgia to the North are annually on an average disapproved in the Northern associations and not independently announced, and that there is a fair chance, but no certainty,

that some fraction of these might be independently announced were it not for the deterrents in the rate association machinery, any presumed injury to the State's economy would seem to be still too general to permit the enforcement of the anti-trust laws by the person injured rather than by the Attorney General on behalf of all persons injured.

When all of the proposals from all of the Southern States are added together, a measurable statistical difference of real substance appears between the possible number of Southern shippers who may be disadvantaged by the deterrents in the rate association machinery and the number of Northern shippers who may be thus disadvantaged. But no doubt the same thing would be true in the case of the Western States, since judicial notice may be taken from I.C.C. reports which have been previously quoted that the great consuming markets in Official Territory are those which shippers all over the country wish to reach with their products. Viewed thus, the case of any Southern State is no different from that of any Western State.

But the matter does not stop there. Official Territory itself is not from the point of view of rate structures a uniform territory. As has been noted in Finding 287, within its boundaries there are many and substantial differences between the rates per mile on like commodities for like distances; and within the Trunk Line portion many more Northern than Southern shippers and carriers rate seek reductions.

Georgia's claim of special damage as a part of the Southern region could in my opinion take on real meaning if there could be added to the statistical differences between the outflow and the inflow of rate reduction proposals a showing that the Southern proposals were treated proportionately more severely in the North than the Northern proposals in the South; or that the mere quantitative differences caused more injury to the Southern economy than to the Northern; or that there was some element of con-

spiratorial intent to discriminate against Southern producers by hindering them from competitive access to Northern markets.

The evidence, however, establishes none of these additional elements. Viewed in the large, it pictures a nationwide and largely unsuccessful effort on the part of the railroads, through their associations, for revenue purposes and without sectional bias, to discourage rate reductions; an effort whose economic effects upon the public at large appear to be so generally diffused that no one State, whether in the South or elsewhere, is in a position to show that its particular segment of the public suffers therefrom in any way peculiarly different from that of the public generally.

4. *The Damage Question Further Explored: Review of the Evidence Relating to the Association of American Railroads*

In this section I have been dealing with Georgia's case as if only the activities of the territorial associations were involved; I have not mentioned the Association of American Railroads, because of my finding that Georgia had failed to establish either coercion or discrimination on its part, and that the closest approach to coercion and discrimination was the showing of the deterrents to independent action inherent in the territorial rate mechanisms and applicable in practice to a greater number of proposals from South to North than vice versa.

Now, in justice to Georgia, since Georgia has charged the A.A.R. with being the capstone of the alleged conspiracy, and since she has further argued with cogency that the whole rate association apparatus beginning with the territories and funneling on up into the A.A.R. should be judged in its entirety, and not by artificially dividing it up into separate chunks (as I have hitherto had to do for purposes of clarity), I think it my duty, even at the cost of some repetition of what has been set forth in the Findings, to appraise the effect of the A.A.R. in the total rate as-

sociation set-up and then to ask whether in the light of this larger analysis any different answers should be given to the questions of law which have hitherto been discussed.[15a]

The evidence has shown that the A.A.R. is a national organization which has concerned itself from time to time, and which may concern itself in the future, with the adoption by the railroads of general rate policies, and procedures for the handling of rate proposals, designed to conserve and augment the revenues of the whole industry. The allocation of representatives on the Board of Directors of the A.A.R. as between the Northern, Southern and Western railroads has not been shown to have been discriminatory in purpose, or to have resulted in discriminatory acts, or to constitute a threat of discrimination against Georgia or the South.

The members of the A.A.R. have agreed to support its policies. They have not, however, expressly committed themselves to comply with all the resolutions of the Board of Directors. Particular railroads, including Southern as well as Northern and small as well as large, have from time to time acted independently in respect to particular rate policies laid down by the Board. It is expected that members will comply with all such resolutions, but no retaliatory action has been taken against non-complying carriers; none is provided for in the Articles; and there is no basis for supposing that retaliatory action may be taken in the future. Since the chief object of the Association is to conserve and promote railroad revenues, mutual self-interest, as well as the general pledge of support given to the Association by the members, combine to induce, without coercion, a generally high degree of compliance with the policies from time to time announced.

On the other hand, the A.A.R., unlike the territorial rate

[15a] The summary which follows is based upon Findings 58 to 62 and 94 to 128; specific citations to these Findings appear only where statements in the text might be likely to occasion a reference to them.

associations, acts only intermittently in the field of rate policies, on a strictly ad hoc basis, and the record reveals instances in which particular actions by the Board have proved completely ineffective in practice.

So far as the record discloses, the A.A.R. has shown no sectional discrimination in the field of rate policies and there is no basis for supposing that the existence of the A.A.R. constitutes an overhanging threat of rate policy determinations directed against the South. Finally, the A.A.R. Board has acted so rarely in respect to particular rates that the risk of possible interference by the Board in the future with the efforts of particular Southern producers to obtain particular rate reductions must be regarded as only theoretical.

The only real question presented by the evidence in this case is as to the influence of the A.A.R. in discouraging rate reductions generally, as an industry policy. From Georgia's point of view three portions of the evidence may be particularly stressed as showing that the A.A.R. serves as an overall influence against rate reductions. In reviewing this evidence I shall also comment upon certain aspects of it which according to Georgia established coercion or discrimination.

(a) *The resolution of May 17, 1935* (one group of lines not to request the I.C.C. to suspend the tariffs of another group until both have had a conference with officers of the A.A.R.).[16] While this resolution was from time to time disregarded, by Southern roads as well as others, it is clear that by and large the resolution was effective; and it is possible that in the conferences held by Cleveland under the resolution, settlements of rate controversies were arrived at on a higher rate basis than might have resulted from litigation. There was no evidence, however, that the purpose of the resolution was to accomplish that particular result. All that can be said with any assurance is that as a

[16] See Findings 111 to 113.

result of the passage of the resolution more conferences were held under Cleveland's auspices in the hope of settling inter-territorial rate controversies without resort to the I.C.C. than would have been held if the A.A.R. had not initiated this mode of procedure by the resolution in question. This brings us logically to:

(b) *The effect of Cleveland's conferences.* The record shows that Cleveland conducted many conferences with groups of carriers about proposed rate actions, not only under the foregoing resolution but sometimes on his own initiative, in the hope of avoiding rate actions which might have serious downward repercussions. It appears from one of his own reports to the Board, in which he took credit for helping to bring about a number of rate actions to conserve revenue, that he was to a considerable extent successful in his efforts.[16a] While, as has been said, there was no evidence that Cleveland attempted to exercise any coercion, and while he is not shown to have had any sectional bias or any interest other than that of generally promoting the financial welfare of the industry, the record as a whole warrants a finding that he did exercise some influence in the industry in staving off rate reductions which, without the existence and activities of his office, might have been effectuated. The continued existence of that office, given the functions in rate matters which have been assigned to it, may therefore fairly be regarded as a factor operating under the aegis of the Association of American Railroads which tends to discourage large-scale rate reductions.

On the other hand, Cleveland, like the Board of the A.A.R., is shown to have acted upon particular rate matters only in an ad hoc manner and not, like the territorial rate associations, with day-to-day regularity; and the record indicates that the matters upon which he acted were of a varied character, each presenting special problems of its own. There are no statistics with respect to his activi-

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[16a] See Finding 62.

ties, such as were supplied in the case of the territorial rate associations, and there is no way of telling from the record with what frequency he acted in controversies involving proposed rate reductions from the South to the North or whether, relatively speaking, he dealt with more controversies of that sort than with similar controversies involving other sections of the country.

Indeed, in the entire record the only example given of conferences presided over by Cleveland, in which proposed rate reductions from the South to the North were in issue, were the conferences which he held in the *Paper Case*.[17] The record showed that in that case, early in the controversy, he held a conference of the representatives of the Northern, Southern and Western lines at which he sought merely to find common ground on which an agreement could be reached. Several months later, he called another conference (which proved fruitless) at the specific request of the Southwestern lines, who complained to him about the dilatory tactics of the Northern lines. Some two months later he called another meeting of the interested roads from the different territories. When no agreement resulted he indicated his interest in avoiding reductions that would cause loss of revenue by writing to the Chief Traffic Officers of the Southern lines (at a time when some of them were projecting the publication of rates at the Official Territory level into points on and west of the Monon Line, which they could reach with their own rails—Chicago, St. Louis, Indianapolis, etc.) saying that he was "very much disappointed in the outcome, as I believe it will result in rates lower than the necessities require and therefore give to the railroad industry less revenue than they might reasonably expect to receive." He expressed his belief that the actual competitive situation at the destination points just mentioned did not make it necessary to effectuate reductions to the extent proposed. He suggested accordingly that the

[17] See Findings 217 to 224 and the page references therein to Volume Three of this Report.

Southern carriers should give serious consideration to the proposal of the Northern lines, involving a reduction in the rates from the existing northbound level of approximately 125 per cent of the level within Official Territory to 110 per cent, together with a certain basis of divisions.

This attempt by Cleveland to discourage proposed independent action by Southern lines and to promote a settlement on the terms put forward by the Northern lines comes closer than any other portion of the evidence to establishing discriminatory and coercive interference by the A. A. R. with efforts of Southern producers to obtain northbound rates on a mile for mile parity with the Northern level. However, the example is weakened by the fact that at the time of Cleveland's letter the Northern producers had protested the 110 per cent proposal and had accused the Northern lines of giving the Southern producers what they wanted, and by the further fact that Cleveland's concern over the continued impasse was clearly motivated not by a purpose to protect Northern producers at the expense of Southern producers but to conserve railroad revenues, as evidenced by the concluding paragraph of his letter, in which he said:

> "This letter is written with some hesitancy, and I hope you will extend to me the charity of believing that it is only sent with the object in view of retaining revenues which I think the conditions warrant you to expect and is not to be construed as any intention or effort on my part to substitute my judgment for yours. I believe that if you will make the investigations suggested you will reach the same conclusions that I have in regard to this situation."

Moreover, Cleveland's essential role as a mediator with a dominant interest in conserving revenues was recognized by the Southwestern lines when, a month later, he suggested the calling of another conference and the Southwestern lines expressed themselves as "very much interested in your offer to arrange another joint conference and to assist in every way possible to promote cooperation and effect a compromise in the interest of conservation of revenue."

It will be recalled that throughout the later stages of the *Paper Case* the real stumbling block to a settlement was a long drawn out controversy between the Northern and the Southern lines over the divisions of revenues, and when this was settled a compromise agreement on the rates at the 110 per cent level was readily worked out. Cleveland presided at one of the final meetings but the record does not indicate that he played any part in working out the terms of settlement.

When the case is studied in its entirety Cleveland's role as a mediator without sectional bias and concerned only with revenue considerations stands out as clearly established.

It is true that at the point in the negotiations at which he wrote the letter, quoted from above, his interest in conserving revenue led him to cast his influence in favor of a solution which gave the Southern producers less than mile for mile parity with their Northern competitors in the Northern markets. On the other hand, his influence was certainly not decisive, and the weight of the evidence is in favor of a conclusion that the compromise that was finally achieved would have been worked out had he never expressed any views of his own.

The real significance of his role in the *Paper Case* is that by virtue of his office and of his repeated efforts to bring about a negotiated settlement, and his availability to the several groups of carriers as the man who could most easily bring them all together, he may very well have been partly responsible for the withholding of independent action by Southern and Southwestern lines and for the lack of any application to the I. C. C. by the Southern carriers seeking northbound rate parity.

On the other hand, at the time when all these negotiations were taking place the Interstate Commerce Commission was still two years from its decision in the *Southern Governors' Case* and was still from time to time applying the "stoves" formula by which, generally speaking, north-

bound interterritorial rates in controversies between Southern and Northern producers were fixed at a substantial percentage above the Northern level. There was therefore at that time no assurance that the Southern roads would gain anything more from the I.C.C. if they had litigated the case than the 110 per cent which the Northern roads were willing to join in establishing. Moreover, throughout the record the desire of the Southern and Southwestern carriers to work out a negotiated settlement, quite apart from any interest of Cleveland in the matter, was apparent. Finally, the Southern and Southwestern roads had no hesitancy in going to the Commission upon issues which they could not negotiate to a satisfactory conclusion with the Northern roads, namely: in the case of the Southwestern roads, their dispute with the Northern roads over divisions and over the northbound rate; and in the case of the Southern roads, their dispute with the Northern roads over the equalization of southbound with northbound rates.

I have spent so much time on the *Paper Case*, here and elsewhere in the Report, because of Georgia's reliance upon it as epitomizing her whole case and because, as I have said, it is the only instance in which Cleveland appears in a straight-out controversy between Southern and Northern interests over the attempt of Southern producers to reach Northern markets on a rate parity.

Given all the circumstances which have been summarized above, I find that Cleveland's actions in this case cannot be regarded as either discriminatory or coercive, or be pointed to as evidence of an overhanging risk of discriminatory and coercive intervention by the A.A.R. in South-North rate controversies to the injury of Georgia.

It is true, as Georgia has argued, that the evidence available to Georgia comprised only a small fraction of all the activities of Cleveland and the A.A.R.[18] On the other hand,

[18] According to Mr. McGovern, Georgia had no documentary evidence of A.A.R. activities after 1938, except certain documents

Georgia's case must be decided upon evidence and not upon conjecture; and there must be some showing of a continued course of action or, at the very least, of one clear-cut example of discrimination and coercion before a threat of injury can be spelled out. That showing has not been made.

(c) *The A.A.R.'s initiative in 1937-1938 in strengthening the territorial rate association set-ups in the South and West.* It does not seem necessary to recapitulate here the steps taken in the South and West, which were prompted by A.A.R. action beginning at the November, 1937 meeting of the member roads in connection with the general rate increase proceedings before the I.C.C.[19] These steps constituted an emphatic demonstration of the official interest of the A.A.R. in discouraging rate reductions to the fullest extent possible and in throwing the weight of its influence behind specific procedural steps toward that end. There was, however, no evidence of sectional discrimination in these efforts and no substantial basis for charging that Southern producers suffered therefrom or were impeded thereby in obtaining desired northbound rate reductions from the Official Territory carriers, whose own associations remained unchanged.

From Georgia's point of view, it seems to me, the only use which could be made of the 1937-1938 activities of the A.A.R. (outside of demonstrating the A.A.R.'s interest in checking rate erosion) would be to argue that what had happened once might happen again; that the A.A.R., having shown that it could, when it wanted to, induce changes in territorial associations for the purpose of checking rate erosion, might at some future time take still further measures along these lines, to the injury of Georgia; and that this possibility constitutes a threat of damage against which Georgia should be entitled to seek injunctive relief.

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from the files of the Southern Freight Association bearing upon particular cases in which that Association figured (e.g.: the *Paper Case*, the *Iron and Steel Case*), XXII, 7853.

[19] These steps are traced in Findings 77 to 85.

Here again the possibility seems to me too remote and theoretical to be regarded as a threat of loss or damage within the meaning of Section 16 of the Clayton Act. The acts in question took place over ten years ago and have not, so far as appears, been repeated since, and they grew out of a particular chapter in history which does not seem likely to repeat itself in all of its conjoined elements—namely, the railroads' acute financial distress following the great depression of the '30s; their intense competition with rival forms of transportation which were then unregulated but have since become regulated; their repeated but unsuccessful efforts, up to that point, to obtain general rate increases from the I.C.C.; the I.C.C.'s admonitions to them to take more vigorous steps in the way of raising depressed rates and avoiding improvident rate reductions; and the assurances given by the railroads to the I.C.C. that they would respond to these admonitions.

I cite these historical factors not in justification of what was done, if it needs justification, but rather as casting light upon the likelihood of a repetition in the '50s of what was done in the late '30s. And I conclude that no sufficient showing of the likelihood of action has been made to constitute a threat of loss or damage. Whatever the degree of likelihood of some future action along these lines may be, there is in any event nothing in the 1937-1938 chapter to indicate that such action would be given a discriminatory direction against the interests of Southern producers.

What then, in the last analysis, does the evidence with regard to the A.A.R. add to Georgia's case? Only this, I think: that in the light of the A.A.R.'s purposes and past activities, particularly those of its Traffic Department under Cleveland, the A.A.R. unquestionably stands in the railroad world as an overall influence on the side of conserving revenues through the avoidance of unnecessary rate reductions. This influence is non-coercive and without sectional bias. It cannot be measured, but that it exists

and is a part of the atmosphere of the railroad world cannot, I think, be doubted. But the only way in which it can make itself felt in the actual day-in and day-out business of adjusting interterritorial rates is in strengthening the purpose of the territorial rate associations to stand guard over the making of unnecessary rate reductions, and to maintain their procedural deterrents to independent action.

How far in this direction the influence of the A.A.R. may actually be felt, it is impossible to say. It is not unlikely that if the A.A.R. were to be divorced entirely from anything to do with rate policies and rate procedures, the territorial associations, given their long history and their well-established mores, would continue to function in rate matters precisely as they do now, with no more looseness in the joints and no more readiness to acquiesce in rate reductions than they now exhibit. This is possible; yet it seems to me, in the light of the whole record, reasonable to ascribe to the A.A.R.'s existence and rate activities some slight portion of the vitality possessed by the territorial rate associations in efforts to avoid rate erosion.[20]

In any event it is upon the effects of the territorial rate association procedures that Georgia's case must in the last analysis depend, for in the set-up of the A.A.R. she has failed to establish elements of discrimination or coercion or threatened injury to Georgia. To put the matter another way: if the territorial associations were abolished, Georgia would have no standing to seek injunctive relief against any of the activities of the A.A.R. since these in no way touch Georgia or the South in any manner different from the way they touch the other portions of the country.

It is in the territorial associations, not in the A.A.R., that Southern producers' proposals for northbound rate reductions are acted upon for better or worse. It is in the territorial associations and not in the A.A.R. that procedural deterrents to independent action exist in an estab-

[20] I so found, in Finding 180.

lished way. And it is only in the territorial associations that there is any appreciable difference between the fate of Southern producers seeking northbound rate reductions and the fate of Northern producers seeking southbound rate reductions, and that difference is merely quantitative: there are more proposals for northbound reductions than for southbound and, therefore, more nonconcurrences in the one case than the other.

I have previously explained my conclusions (1) that this quantitative difference, being non-discriminatory in character, does not constitute threatened loss or damage of a sort special to Georgia within the meaning of Section 16 of the Clayton Act, and (2) that even if injury to Georgia's economy should be presumed (because of the possibility that some Georgia shippers occasionally fail to obtain northbound rate reductions as a result of the deterrents in question) the injury is still of such a general, diffused and national character as not to fall within the ambit of Section 16.

These conclusions are ventured with some diffidence. The precedents on which they rest are neither very numerous nor, for the most part, very recent; in none of them was the plaintiff a sovereign state, except in the *Northern Securities* case, which was decided before the passage of the Clayton Act; and in that case Minnesota sued only in its proprietary capacity for an injury to itself and not, like Georgia, as *parens patriae* for an injury to the economy of its citizens. Nor did Minnesota allege that the wrong complained of affected a whole region of which the state was a part. Finally, none of the cases, with the exception of the *Northern Securities* case, dealt with railroads, whose rates enter into so many other prices and affect the marketing opportunities of so many producers.

Recognizing the relative novelty of the issues presented and the relative paucity of authority, I nevertheless have felt it to be my duty as Special Master to adhere as faithfully as I could to the theory of the scheme of enforcement of the anti-trust laws as it has seemed to me to have been developed by the cases thus far. I have also felt it to

be my duty, in framing my conclusions of law, to follow closely the findings of fact and not to erect upon them any presumptions which would reach further than those contained in the Court's opinion in this case, believing that if any further extensions are warranted, it would be more appropriate for the Court to make them after full argument than for the Special Master to do so on the basis of a record in which the arguments lacked the benefit of findings of fact.

If this Court should finally decide, contrary to the conclusions set forth above, that Georgia has proved her standing to sue as *parens patriae* and has established threatened loss or damage within the meaning of Section 16 of the Clayton Act, it would be necessary to consider the extent to which, if at all, the defendants have violated the Sherman Act.

D. *Whether the Defendants Have Violated the Sherman Act*

1. *Propositions on Which the Parties Agree*

The parties agree, of course, that the Sherman Act does not exempt railroads from its operation.[22]

Having in mind the requirements of the Interstate Commerce Act as well as of the Sherman Act, the parties also agree that organized territorial rate conferences at which proposed rate changes can be discussed by interested shippers and carriers before steps are taken to effectuate the proposals, are, in some form or other, necessary and lawful. I have previously found as a fact that such conferences are essential to the carrying out of the purposes of the Interstate Commerce Act. Without trying at this point to define how far it may be permissible for such conferences to go

[22] This Court said in its opinion in Georgia's case (324 U.S. 439, 456): "These carriers are subject to the anti-trust laws. *United States* v. *Southern Pacific Co.*, 259 U. S. 214. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290; *United States* v. *Joint Traffic Assoc.*, 171 U. S. 505."

beyond the mere provision of means for the advance discussion of rate proposals, I conclude as a matter of law that, if there be any repugnance between the existence of conferences in that minimum form and the prohibitions of the Sherman Act, the latter should give way to the necessities of the Interstate Commerce Act.

2. *Georgia's Requested Conclusions of Law*

Georgia charged the defendants with having violated both section 1 of the Sherman Act (which prohibits contracts, combinations or conspiracies in restraint of trade) and section 2 (which prohibits the monopolization of trade, or an attempt, combination or conspiracy to monopolize trade).[23]

In her two requested Conclusions of Law set forth in her Final Brief at p. 267, Georgia charged, respectively, that the defendants had "*conspired*", in contravention of section 1, and had "*acquired power*", in contravention of section 2, "to coerce the fixing of all freight rates and to discriminate against Georgia in the rates so fixed."

The alleged *conspiracy* (under section 1) consisted of "agreeing to organize coercive regional rate mechanisms" and "agreeing to integrate such regional rate mechanisms into a coercive national association of railroads [the A.A.R.] in such fashion as to enable that association to discriminate against Georgia and the South in decisions affecting Southern interests."

The alleged *acquisition of power* (under section 2) consisted of carrying out the agreement to "organize" and to "integrate."

The two conclusions were really merged into one by Georgia's contention that when the defendants signed the Articles of the A.A.R. they at one and the same time conspired to acquire and did acquire coercive power to discriminate against Georgia.[24]

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[23] 15 U.S.C. §§ 1, 2.

[24] Final Brief, p. 278. For reasons which will appear, it seems unnecessary to consider the defendants' contention that they could not be guilty of a "monopoly" under section 2.

3. *Analysis of Georgia's Requested Conclusions of Law in the Light of the Findings of Fact*

(a) *As to the alleged conspiracy.* I found that a "conspiracy" to coerce and discriminate, in the sense of a conspiracy purposefully directed against Georgia and the South, had not been established.[25]

Georgia's broader charge of a "conspiracy to coerce the fixing of all freight rates" depended upon the two alleged agreements set forth above in her requested Conclusions of Law, namely (1) "to organize coercive regional rate mechanisms," and (2) "to integrate such regional rate mechanisms into a coercive national association."

As to the first alleged agreement, I found that historically there had been no change in the territorial rate associations between 1920 (when they were re-established after the termination of government control) [26] and 1938 (when certain procedural changes were made in the Southern and Western territorial set-ups).[27]

Georgia, of course, is not complaining of a 1920 conspiracy, but of one that occurred at the time of the formation of the A.A.R. in 1934.[28]

The record discloses no agreement at that time "to organize coercive regional rate mechanisms."

As to the second alleged agreement, "to integrate such regional rate mechanisms into a coercive national association," Georgia's case as developed really turned upon the 1938 changes just referred to.[29] I found that these changes were not contemplated when the A.A.R. was established.[30] The second alleged agreement, therefore, did not exist.

I did find, however, that the A.A.R. exercised some initiative and influence in helping to bring about the 1938 changes and that its actions in this respect were consistent with its

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[25] Finding 58, and pp. 138, 139, *supra*.
[26] Findings 23, 24, 63.
[27] Findings 63, 80, 84.
[28] Pp. 13, 14, *supra*.
[29] See generally Findings 63-88.
[30] Finding 86.

general purposes of conserving and increasing the revenues of the railroad industry.[31] I also found that one of the objects of the A.A.R. although not specifically declared, was to deal at the national level with rate questions of importance to the industry; that the A.A.R. had other purposes related to the economic well-being of the industry which bulked much larger in the record; that the activities of Cleveland in helping to stimulate particular rate increases and to discourage particular reductions were consistent with the general purposes of the A.A.R. to conserve and increase railroad revenues;[32] and that the members of the A.A.R., when they formed and joined it, declared in general terms their intention to recognize and support it as an authoritative body without, however, committing themselves in advance to abide by every action it might take.[33]

In actual historical terms, therefore, what the defendants agreed to at the time of the conspiracy alleged by Georgia, was that they would form and support a national association with the broad purposes just mentioned, of which the "coercive fixing" of freight rates was certainly not one. The promotion of railroad rate policies favorable to revenues was, in a general way, among the contemplated objects; but no specific policies nor (at that time) any procedural changes were contemplated in the territorial association set-ups. The agreement, such as it was, was made in the full light of day and in harmony with various governmental promptings, against a background of extreme financial distress.[34]

This agreement did not, I conclude, constitute a "conspiracy" of the sort charged by Georgia, either in the sense of a conspiracy directed against the South or in the sense of a conspiracy to coerce the fixing of freight rates generally.

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[31] *Ibid.*
[32] Findings 60, 62.
[33] Finding 97.
[34] Findings 45-58.

(b) *As to the alleged coercion.* I found, in examining the procedures and activities of the A.A.R. and the territorial associations, no "coercion", taking that term in its ordinary, natural sense as implying some overcoming of the will by some form of external force or pressure.[35]

Georgia sought to establish that under the Sherman Act coercion in some sense less than the foregoing may be unlawful, but the cases do not seem to me to bear out Georgia's contentions.

The agreements which this Court held illegal in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 and in *United States* v. *Joint Traffic Association*, 171 U.S. 505, conferred upon the associations powers of an obligatory and compulsive character. No such powers have ever since been conferred on the associations, and the two cases are clearly distinguishable from the case at bar.[36]

Georgia relied upon certain language having to do with the power to suppress competition, contained in the opinions in *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48; *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61; and *United States* v. *Reading Co.*, 253 U.S. 26. These cases, however, each involved some form of consolidation in which pre-existing smaller units were brought under the operating control of a wider unit of enterprise. The controls in these cases, effected through statutory consolidation or through the formation of holding companies, bore no relationship to anything in the set-up of the defendants' rate associations, either internally or in the relationship between the territorial associations and the A.A.R., or in the relationship between the associations and their members.

Distinguishable also are the cases, relied on by Georgia, in which Sherman Act violations involved such coercive activities as a boycott or a black list, e.g.: *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U.S. 600; *Paramount Famous Lasky Corp.* v. *United States*,

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[35] See generally Findings 88, 94 to 189, 224, 239, 251-253, 256.
[36] See Volume Two, pp. 237, 241, 270; 519 (Note 11) and 520; 597.

282 U.S. 30; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457. In Georgia's case the defendants' general support of their rate associations is not enforced by any similar form of duress.

In *United States* v. *General Motors Corp.*, 121 F. (2d) 376 (C.A. 7th, 1941) cert. den. 314 U.S. 618, the Court found that the "supervision and control" over the business operations of dealers, exercised by General Motors through franchise agreements subject to annual renewal and cancellable on short notice without cause, were "almost as complete as if the dealer were an agent in all respects." By these means the dealers were forced to finance the purchase and sale of all cars they handled through a finance company owned by General Motors. Here again, in Georgia's case there was no such element of force; there were no principal-agency controls, and no provision for expulsion from any of the associations.

At times in the presentation of her case Georgia seemed to be equating coercion with the mere illegality of an agreement under the Sherman Act.[37] At other times Georgia sought to show a positive element of coercion in the alleged dependency of every railroad upon every other for the greater part of its traffic—a dependency enabling any given combination of railroads to coerce a dissenter by routing traffic over the lines of others. The evidence on routing, however, failed to establish that coercive action of this sort, in the case of the small fraction of traffic not routed by shippers, had ever been taken, or could as a practical matter be taken, or that the fear of possible action of this sort actually motivated railroads in complying with their rate association recommendations.[38]

Georgia's failure to establish any positive element of

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[37] In *American Column Co.* v. *United States*, 257 U. S. 377, relied on by Georgia in support of her charges of coercion, the combination was held illegal not because it coerced its members but because this Court spelled out of the combination's activities an agreement to restrict production and raise prices.

[38] Findings 167 to 174.

coercion deprives of legal support her contention that, when Northern railroads as a group disapprove a proposal by a Southern road for a reduction in a northbound joint through rate, the act of disapproval is in and of itself coercive.

By way of further distinguishing the boycott, black list and other cases involving coercive combinations from the case presented by Georgia, the defendants drew attention, I think correctly, to the evidence which showed that the southern defendants have repeatedly and vigorously presented a united front on matters at issue between themselves and the northern defendants,[39] and that they have not hesitated to avail themselves of the administrative and legal remedies available to them under the Interstate Commerce Act.[40]

Considering the evidence as a whole, and the cited precedents, I conclude as a matter of law, as I previously have found as a matter of fact, that Georgia has not established any actual or threatened coercion, either of the southern defendants by the northern, or of the railroads generally by their rate associations. I also conclude that in the absence of proof of actual or threatened coercion, the alleged "power" to coerce is in this case too theoretical to afford a basis for a charge of illegality.

In the light of these conclusions Georgia's charge of a violation of the Sherman Act cannot be based on the theory of a coercive conspiracy or coercive combination, but only on the theory of the existence of unlawful agreements among the defendants for the establishment of rates. Whether or not such unlawful agreements exist will be discussed in a moment. It seems unnecessary at this point to consider Georgia's charges of *discrimination*, since those charges relate rather to the questions of injury to Georgia which have already been analyzed above, than to the legality or

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[39] E.g.: in the *Paper Case*, *supra*, pp. 107-110; and see Findings 187 to 189, to the effect that the southern defendants are not dominated or coerced by the northern.

[40] E.g.: Finding 172 and supporting text material.

illegality under the Sherman Act of the defendants' activities.

It does become necessary at this point, however, to consider parenthetically, before continuing with the examination of the alleged Sherman Act violations:

4. *The Defendants' Contention that Georgia Has Not Proved the Case Which This Court Gave Her Leave to File, and That Upon That Ground Alone the Case Should be Dismissed*

The defendants contended that if Georgia failed to prove the existence of a conspiracy to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed, but proved some other kind of a case, the case should be dismissed as not that which this Court gave Georgia leave to file.

As already stated, I have found that a conspiracy deliberately directed against the South has not been established, and that no coercion in fact or in law, actual or threatened, has been shown. I have found only the existence, as a result of the rate association set-up, of a non-coercive deterrent to the making of rate reductions. With regard to discrimination, I have found no more than the fact that the deterrent just mentioned impinges upon many more requests for reductions from the South to the North than in the opposite direction—a phenomenon which, if the term "discrimination" can be applied to it at all, can be applied only in a loose and non-invidious sense.

Is the case which thus emerges from the proof so far different from that which was alleged that the amended complaint ought now to be dismissed? I have already given my reasons for concluding that the proof fails to establish either Georgia's standing to sue as *parens patriae*, or the kind of threatened loss or damage necessary to entitle her, as a person other than the United States, to injunctive relief for alleged Sherman Act violations; but if these

conclusions are found to be erroneous, the question just put would still remain.

This Court has stated that Georgia's amended complaint should be construed "with that liberality accorded the complaint of a sovereign State" (324 U.S. 439, 462). The defendants have not been prejudiced in the preparation or presentation of their defense by such shifts of theory as have caused Georgia to stand upon a more attenuated and generalized case than that outlined to this Court in the amended complaint. At the outset of her own presentation Georgia sufficiently set forth the theory to which she generally adhered thereafter, and to the extent that this theory may have changed in emphasis as the case proceeded, the defendants had ample opportunity to meet it, and they were in fact alert to respond to every such change.

It is true that Georgia did not attempt specifically to make out a case based merely on the impinging of noncoercive rate reduction deterrents upon a larger number of proposals for rate reductions from South to North than from North to South—which, as I have found, is basically all that is left of Georgia's case. And it is also true that insofar as these deterrents are considered in this Report as in any way violative of the Sherman Act, the defendants are confronted with a legal question which has not specifically been argued before me.[41] But they will have full opportunity to argue it before this Court, and the question is not one of my own invention but one which emerges inevitably out of the residue of the facts remaining after the larger charges have been eliminated.

I conclude, therefore, that Georgia's case should not be

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[41] In December, 1949, after the completion of this Report save for the Conclusions of Law, I discussed at an informal conference of counsel for the parties the pros and cons of submitting to them for further argument the Report in its then form. I concluded that such a course would inevitably have led to a virtual re-trial of the whole case, and that in view of the unavoidable delays which had already occurred my duty to this Court would be better discharged by dispensing with such a submission and bringing the Report to a finish as expeditiously as possible.

dismissed merely on the ground that the proof falls short of the facts alleged or that the final theory departs from that on which the amended complaint appeared to be based.

5. *Extent of the Lawfulness of the Defendants' Territorial Rate Association Agreements*

As previously stated, the only remaining legal question is whether or not there exist unlawful agreements among the defendants for the establishment of rates. As to this the defendants contend:

1. That the rules of procedure of the territorial rate associations are not really agreements at all, but are established practices which the members normally follow, though not obligated to do so.

2. That under these rules the members merely confer about proposed rates prior to the independent exercise by each railroad of its own judgment as to what it ought to do in its own interest consistent with its obligations under the Interstate Commerce Act.

3. That each railroad initiates its own rates.

4. That no officials or committees "fix" rates or direct the railroads what rates to establish.

5. That uniformity of action that will avoid discrimination between competing shippers, localities and regions is required by the Interstate Commerce Act.

6. That the knowledge of the railroads participating in a rate association conference, when the conference is over, of what each will do with regard to a given rate proposal, is not a price-fixing agreement within the meaning and reach of the Sherman Act, for if it were, advance consultation about rates, made necessary by the Interstate Commerce Act, would be impossible.

These propositions are sustained, in fact and in law, by the record, with the following important qualifications.

In the first place, I have found as a fact, and here conclude as a matter of law, that the defendants' territorial rate association rules of procedure constitute agreements by the members that they will follow them, subject to their reserved right of independent action.[42] Insofar as these agreements relate only to advance consultation about rate proposals, I conclude, for reasons already stated, that they are essential to the carrying out of the Interstate Commerce Act and are lawful.

Secondly, a major purpose of these associations, both Southern and Northern, is to conserve revenues by discouraging rate erosion, and in furtherance of this purpose the defendants have included in the agreed upon procedures of their territorial rate associations certain provisions which I found to constitute a deterrent to the freedom of rate-making. I found that compliance with these provisions is not coerced or enforced by threats of penalties but is self-imposed as the result of influences born of history, habit, and strong mutual self-interest; and that the provisions do not destroy the right of independent action but to some extent dampen down its use.[43] These provisions, except as otherwise indicated below, are summarized in Finding 181. With respect to the impact of these provisions upon proposals for rate reductions, the defendants may be considered as saying to one another:

"In order to discourage rate erosion for the purpose of conserving revenues we agree with each other as follows, subject to the reserved right of independent action whose exercise is referred to below:

"(a) We will submit each proposal for rate reduction to a vote of all the members of our particular association, including members who may have no direct interest in the proposal;

"(b) Lest some of us be unduly put upon by shippers

[42] Finding 22.
[43] Findings 185 and 186.

or be tempted to curry favor with particular shippers by promoting reductions for competitive purposes which can only end by dragging down the existing rate level for all of us, we will, upon the request of any of us [in Official Territory], take the vote by a secret ballot, and [in both Territories] we will not reveal to outside parties what took place;

"(c) If the outcome of the voting at any given lower level of the territorial association set-up is adverse to the proposal, the one of us that proposed the reduction will either abide by the decision or appeal it to the next higher committee or association, and either abide by the vote there or again appeal, and so on to the end, finally abiding by the majority will;

"(d) If the outcome of the voting at any given lower level of the territorial association set-up is favorable to the proposal, and if a member road [44] or the Chairman, upon those very rare occasions when he may regard such action as inimical to the best interests of the carriers as a whole, decides to appeal the action to the next higher committee or association, the one of us that proposed the reduction will refrain from publishing it pending final disposition of the appeal; and if the result of the appeal is finally adverse to the proposal, the proponent will abide by the decision;

"(e) If in consequence of adverse action at any given lower level the proponent should announce its intention to publish the reduction independently, and if upon such announcement the Chairman should, as in the preceding paragraph, appeal, the proponent will withhold independent action pending the final outcome,[45] and will abide by the outcome unless the proponent decides in the end to take independent action;

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[44] I noted in Finding 145 that while appeals of this sort by member roads are permissible, no examples of such appeals appear in the record.

[45] Finding 149.

"(f) Believing that above the level of the primary associations comprising in their respective layers standing rate experts, General Freight Agents and Freight Traffic Managers, the influence of separate Traffic Executive Associations and of separate Presidents Conferences, in the North and the South, would help to check rate erosion, we established such agencies in the North in 1920 and in the South in 1938, and we agree that the system of appeals described above shall operate not only within the primary associations but as between them and these newer agencies;[46]

"(g) While each of us reserves the right, at every given stage of the procedure set forth in paragraphs (a) to (f) above, to take independent action, either as the initiator of a rate or as a joint participant in it, we will rarely exercise that right when appeals are taken or the votes go against the proposal, since we realize that if the appeal provisions and majority recommendations were disregarded with much frequency the system would tend to break down, to the injury of us all."[47]

I conclude that, unless the foregoing agreements in paragraphs (a) to (g) inclusive are needed to enable the railroads to discharge their duties under the Interstate Commerce Act, they would constitute price-fixing agreements of the sort held unlawful under the anti-trust laws by the two cases upon which Georgia has principally relied, *United States* v. *Trenton Potteries*, 273 U.S. 392, and *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

The defendants sought to bring their arrangements within the permissible area of consultation and other concerted action with respect to prices, held to be lawful in *Chicago Board of Trade* v. *United States*, 246 U. S. 231; *Maple Flooring Association* v. *United States*, 268 U. S. 563; *Cement Manufacturers' Assn.* v. *United States*, 268 U. S.

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[46] Finding 182.
[47] Finding 184.

588; and *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344. An analysis of these cases would be of doubtful value to the Court, since each was decided upon the basis of the particular facts, and the question at issue was largely one of degree. It is enough, I think, to point out that the defendants in none of these cases went as far in their attempts to stabilize prices as the defendants in Georgia's case have gone in their territorial rate associations. I conclude that if in an unregulated industry the defendants had done what they have done here their agreements (summarized in paragraphs (a) through (g) above) would have been held unlawful under the *Trenton Potteries* and *Socony-Vacuum* cases.

The real question, it seems to me, is whether these agreements are needed to enable the railroads to perform their duties under the Interstate Commerce Act. If they are needed, that act should govern and the agreements should be upheld. If they are not needed, the Sherman Act should prevail.

The question thus posed requires the Special Master, who has no expert knowledge of the railroad industry, to form a judgment which, it might well be argued, should be made in the first instance by the Interstate Commerce Commission or should at least be made only after hearing the Commission's views. However, until the recent enactment of Section 5a of the Interstate Commerce Act, the Commission lacked authority to pass any judgment, except of a purely advisory nature, upon the necessity or propriety of the defendants' agreements, so that the responsibility for such a judgment necessarily became mine as Special Master when this case was referred to me for findings of fact, conclusions of law and a proposed decree. I have already stated at pp. 29-34 above why in my opinion the recent enactment of Section 5a did not operate to relieve me of the duty of completing and submitting my report in accordance with this Court's instructions and on the basis of the record

made before me by the parties. Under the terms of the order of reference it would have been proper for the Special Master to have invited expert testimony by the Commission, but neither the defendants nor Georgia suggested that this be done, and in view of certain allegations in Georgia's original complaint criticizing the Commission's attitude toward the defendants' associations I concluded not to seek such testimony on my own initiative. In any event, as a consequence of the enactment of Section 5a, the Commission will be passing upon the need and propriety of the defendants' agreements, so that if this Court should, as recommended at pp. 191, 192, infra, withhold any decree (other than a decree of dismissal) in Georgia's case until the Commission's action has been taken, the Court will be duly informed of the Commission's expert views and can give to them such weight as it deems proper under the circumstances then existing.

With these prefatory comments, I recur to the question whether the defendants' agreements (summarized in paragraphs (a) through (g) above) are needed to enable the railroads to perform their duties under the Interstate Commerce Act.

The defendants contend (1) that the railroads, in initiating rate changes, are under a duty to observe the standards prescribed by the Interstate Commerce Act and applied by the Commission when it is called upon to determine the legality of rates;[48] (2) that, therefore, the railroads, no less than the Commission, must heed the statutory declaration of the policy of Congress "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or *unfair or destructive com-*

[48] The defendants rely principally upon statements to that effect in *Anadarko Cotton Oil Co.* v. *A. T. & S. F. Ry. Co.*, 20 I.C.C. 43 (1910), and *Sloss-Sheffield Steel & Iron Co.* v. *Louisville & N. R. R. Co.*, 51 I.C.C. 635 (1918).

petitive practices";[49] and (3) that, just as the Commission in prescribing just and reasonable rates must give "due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the *need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service,*"[50] so the railroads, in initiating rates, must give due consideration to the same factors.

It seems clear that in discussing rate proposals within the rate associations the defendants may properly, and perhaps also have the positive duty to, consider the statutory factors and standards referred to above; but in order that such consideration may take place, it is not in my judgment necessary for the defendants to be parties to the agreements described in paragraphs (a) through (g) above.

Those agreements, as I have found, have a purpose that extends beyond mere discussion and exchange of views. They are designed to check the scope and frequency of rate reductions by guarding railroads against the importunities of their customers; by bringing the influence of adverse majority votes (including the votes of railroads not directly concerned with the given proposal) to bear on the proponent and on any roads disposed to join with the proponent; by vesting authority in paid officials (and not merely in member roads) to hold up favorable majority action when they deem the reduction inimical to the best interests of the railroads as a whole, by appealing the action to a higher body; and by providing separate organizations of Traffic Executives and of Presidents to each of which such appeals may be taken.

I find and conclude that the railroads could do away with

[49] Preamble to the Interstate Commerce Act added by the Transportation Act of 1940 (Act of September 18, 1940, 54 Stat. 899, 49 U.S.C. 27); emphasis added.

[50] Section 15a(2) of the Act; emphasis added.

these particular agreements and still perform their duties under the Interstate Commerce Act, and that therefore the agreements fall into the class of those held by this Court to be unlawful under the Sherman Act.

6. *Examination of Georgia's Proposed Decree in Relation to the Territorial Rate Association Agreements*

Georgia's proposed decree, set forth at pp. 21, 22 above, would preclude the defendants from agreeing among themselves upon rates, with two exceptions. The first exception is that two or more connecting carriers participating in a joint interline movement may agree on the rates to cover it. The second exception is that in each territory the defendants may refer proposed rates to one rate conference for "public discussion at a single public meeting to be held within ten days of the date of submission of the proposal." This decree goes too far in the following respects.

(a) Since the railroads must be permitted to confer freely about all proposed rates in order that they may perform their duties under the Interstate Commerce Act, it would unduly hamper them and place them under unreasonable jeopardy of violating the law to permit none but the connecting carriers directly involved in a given movement to "agree" upon any rate. Suppose, for example, that at a particular conference, composed of connecting and non-connecting carriers, none of the carriers objected to a proposed reduction. All might then be held to have "agreed" upon the new rate. Or suppose that all objected to it, including even the proponent after considering the others' views. Then all might be held to have "agreed" upon the existing rate.

It would seem, therefore, that under Georgia's decree each given conference would have to be limited to the connecting carriers directly involved in the particular proposal. Such a limitation would, however, be impractical, because every rate proposal may seriously affect related rates on routes of non-connecting as well

as of connecting carriers. As has been noted, even a rate change between two points reached only by the rails of one carrier may necessitate corresponding changes by other roads between other points on their own lines in order to avoid improper discriminations between competing shippers.[51] Clearly these other roads ought to be free to participate in the conference and to arrive at a common understanding as to what should be done.

I conclude that it would not be practical or consistent with the purposes of the Interstate Commerce Act to frame a decree in terms of limiting by particular categories the railroads who may confer and "agree" upon rates within their territorial associations. This conclusion relates to both intraterritorial and interterritorial rate proposals.

(b) In the case of interterritorial proposals, after the conferences within the territorial associations have taken place, there often are additional conferences between representatives of the Northern railroads as a group and representatives of the Southern railroads as a group, in an endeavor to reach an agreement. It may even happen, as in the *Iron and Steel* case (Findings 240 to 251), that a proposed intraterritorial change will directly concern shippers and carriers in another territory, because of the extensive interrelations of a rate fabric covering a basic commodity; and in such instances, as was found to be true in that case, group conferences and negotiations between carriers' representatives from the respective territories may be necessary to work out a non-discriminatory adjustment. Since Georgia's decree would limit rate conferences to one *in each territory*, it would preclude negotiations between Northern and Southern carriers other than connecting carriers directly participating in the movement. Georgia regards as particularly dangerous group conferences involving both Northern and Southern carriers, alleging that because of the superior coercive power of the Northern carriers the Southern carriers are always apt to lose out in the negoti-

[51] Finding 7, and see generally Findings 1 to 13.

ations; that the Southern carriers would do better never to deal with the Northern carriers as a group; and that if controversies arise over proposed changes in interterritorial rates the Southern carriers ought to go directly to the I. C. C., instead of attempting to arrive at a settlement through collective bargaining with the Northern roads.

I have previously found that the coercive elements alleged by Georgia have not been established, and that as a practical matter collective bargaining between representatives of all the Northern roads and representatives of all the Southern roads is often necessary where interterritorial rate changes affecting important commodities and numerous producing and consuming points are at issue.[52]

I conclude that it would not be practical or consistent with the purposes of the Interstate Commerce Act to limit conferences and "agreements" upon interterritorial rate changes to representatives of only the connecting carriers directly involved in the particular movement.

(c) The limitation of conferences to a single one for each proposal, to be held within ten days of its submission to the particular association, is too restrictive. Numerous examples appear in the record of a succession of conferences, made necessary by the ramifications (sometimes not fully foreseen, as in the *Iron and Steel* case supra) of a proposed reduction. A ten-day limit between submission and public discussion would wipe out the first stage of procedure in the territorial rate associations under which proposals, having been publicly docketed, are analyzed by a group of full-time rate experts and are then submitted by mail to the member railroads and to shippers' organizations. The utility of this procedure can scarcely be doubted; it results in the approval of the great majority of proposals without the necessity of formal meetings.[53] Yet these mail approvals, evidenced by the absence of objections, could be construed under Georgia's decree as "agreements" upon

[52] Findings 225 and 244.
[53] Findings 26 (Official Territory) and 39 (Southern Territory).

the particular rates, and these agreements would be outlawed if not arrived at in a single public conference held within ten days of submission of the proposal. Even if the decree were construed to permit the mail approval procedure, the ten-day limitation between submission and public conference would obviously not leave time for the preliminary analysis and for its consideration by correspondence.[54]

The requirements desired by Georgia were framed in the light of Georgia's contention that delays in the territorial rate association procedure are serious, and coercive in their nature. I found, however, that the procedure makes it convenient for shippers to be heard and clearances to be made by participating carriers, and in these respects tends to promote expedition; and that such delays as exist in rate association procedure do not, so far as the record discloses, cause railroads to announce or to refrain from announcing particular rates contrary to their desires.[55]

I conclude that it would not be practical or consistent with the purposes of the Interstate Commerce Act to limit rate conferences to a single one for any given proposal, or to require that the conference be held within ten days after the submission and public docketing of the proposal.

(d) The limitation of conferences to a single one for any given proposal would further result in the elimination of all appeals and of the hierarchic structure of the territorial associations. If, as I have concluded, the provisions for voting and for appeals by member roads and by the paid

[54] E.g.: In Trunk Line Association shippers and carriers are given twelve days in which to file objections, after the standing rate experts have received and docketed the proposal, have analyzed and summarized it, and have prepared and distributed a report thereon to the member roads and shippers' organizations (pp. 257, 258). This preliminary work, which in the end expedites consideration, takes some time over and above the twelve days given to the shippers and carriers within which to object.

[55] Findings 131, 132; see also Finding 129, regarding particular case instances of alleged coercive delays, and Finding 130 with respect to average time periods in Official Territory.

Chairmen should be held invalid (except as the I.C.C. may approve them under the new Section 5(a) of the Interstate Commerce Act) one of the reasons for the existence of the hierarchic structure would disappear. But the structure in part serves another purpose. The defendants have pointed out that proposals for rate changes are so numerous that even the minority that are not approved at the correspondence stage could not possibly be considered by the topmost officials (Traffic Executives and Presidents) if these officials were to perform their other functions; that some proposals, however, because of their importance and complexity, should be considered by these officials; and that therefore there must be some system of preliminary handling and weeding out of proposals at the lower levels of officialdom (General Freight Agents and Freight Traffic Managers).[56] This is incontestably true, but it does not follow that the elaborate apparatus of voting and appeals has to be maintained. It should be enough for any road to request that a given proposal under consideration by the lower levels of officialdom be referred, because of its serious nature, to higher officials—normally the Traffic Executives—not as an "appeal" from a decision, but as a matter of appropriate handling; and that any such request would place the proposal on the agenda of the higher-level conference, to be considered at its next meeting unless in the meanwhile the proponent elected to file the proposal with the I.C.C. With Chairman-appeals from rate reduction *approvals* (and from proposed independent effectuation of disapproved reductions) eliminated altogether,[56a] there would normally be only two occasions for requesting consideration of a rate proposal at a higher level: (i) if the proponent, after some discussion had been had, concluded that the repercussions

[56] Findings 29 and 42 state that only a very small percentage of proposals survive these lower levels.

[56a] As to Chairman-appeals from the *disapproval* of a proposed rate reduction, no example of such an appeal appears from the record, and the Chairman's authority in this respect seems academic; see Findings 145, 148, 149, 181(c).

of the proposal would be greater than anticipated and would be of sufficient gravity to justify consideration by higher officials, or (ii) if some road other than the proponent, deeming itself or its shippers to be particularly and adversely affected, desired such consideration. In case (i) consideration at the higher level would seem appropriate and helpful to an informed discussion of the proposal, and therefore proper. (And, of course, as under the present practice, the proponent should be free to refer the rate *in the first instance* to the higher authorities). Case (ii) is more debatable, since it might be argued that the objecting road would occupy in substance the position previously occupied by the Chairman, whose authority to appeal from rate reduction approvals would be removed. However, the record has shown no instance of an appeal by an objecting road from a rate reduction approval;[56b] and the very fact that the carriers thought it important to give the Chairman appellate powers from rate reduction approvals, to be exercised in the interests of the carriers as a whole, for the purpose of avoiding rate erosion, indicates that a similar appellate function had not in fact been exercised by individual member roads, and that if and to the extent that appeals were taken by individual roads from rate reduction approvals, they were taken because the particular proposal affected the particular road or its shippers in some objectionable fashion. On balance, therefore, it would seem that case (ii) should be considered proper for the same reasons as case (i). On the other hand, the hierarchical structure appears from the record to be needlessly elaborate; in Southern Territory, for example, prior to 1938, rate proposals were referrable to only two layers of officials after the preliminary sifting by correspondence,[57] and the super-addition of two appellate bodies in 1938, with limited membership, was designed to discourage and check the extent of rate reductions.[58]

[56b] See Finding 145.
[57] Findings 34, 35.
[58] Findings 75, 80, 81, 182.

I conclude that it would not be practical or consistent with the purposes of the Interstate Commerce Act to do away with the hierarchical structure of the rate associations, but that a simplified set-up, and one which would be open to all roads at each level, could be effected consistent with the due performance of the railroads' duties under that Act.

(e) Georgia's decree would limit rate conferences to *public* discussions, at which shippers and carriers might express themselves in the open; no agreements upon rates could be arrived at otherwise (except between the connecting carriers participating in the interline movement). The object is to keep the railroads from shielding each other against reprisals from shippers demanding rate reductions which even the proponent road may not really wish to make; by deliberating in private a common stand can be taken against the reduction and the decision can be blamed on the majority view.[59] The provisions in Official Territory permitting secret ballot voting, and the understanding in both Official and Southern Territory that proceedings in executive session are confidential, are designed to the same end, and I have already concluded that they could be eliminated without hampering the railroads' discharge of their duties. Would it be feasible to go further and eliminate executive sessions altogether from the rate association set-up, as Georgia would do? Much may be said in favor of requiring all rate discussions to be in public. Public con-

[59] In the case of rate reductions proposed by railroads in their own interests *to meet truck and water competition*, the same need for protection does not arise because in such instances the proponents are actively seeking the reductions, and the initial publication of the proposals shows their purpose. There is also no similar need of protection where one road seeks a reduction in order *to capture traffic handled by another road*—a form of competition which, however, seems to be rare (no example of it appearing in the record) and which is apt to be self-defeating because the anti-discrimination provisions of the Act may merely result in a reduction of the rates of the other competing road to the same level. The I.C.C. in the '30s admonished the railroads against this type of competition because of its adverse effects on railroad revenues (see Finding 71).

ferences would assure all shippers of a voice in the final conclusions arrived at; and would make more effective the elimination of the voting and appeal provisions, which otherwise might be perpetuated in substance by a mere change in form. On the other hand, to forbid all group conferences except in public would seem unduly hampering. Emergencies might arise, for example, calling for speedy action which could not be taken if notice had to be given to shipper organizations of the time and place. Moreover, the negotiation of divisions, though it sometimes may affect the outcome of a controversial rate negotiation, as in the *Paper* case supra,[60] is essentially a matter for private bargaining. Finally, there may be instances in which private conferences would facilitate the orderly and effective discussion of rate proposals at public conferences. It would seem feasible to provide that no final consideration of a rate proposal could take place except at a public conference, subject, however, to certain exceptions in the case of emergencies. As matters now stand, shippers are heard on request in both Official and Southern Territory, but final action is taken in executive session.

7. The Question of the Timeliness of a Decree Dealing with the Defendants' Territorial Rate Associations

Although this Court may decide that the record in this case warrants a decree dealing with the defendants' territorial rate associations, it would seem premature for me to attempt now to recommend a specific form of such a decree. For, as I stated at the outset, agreements replacing those here at issue are now pending before the Commission for approval under Section 5a of the Interstate Commerce Act; and though the new agreements as submitted are basically similar to the old, changes may be made in them as a result of Commission action; and, of course, the Commission may

[60] Finding 217 et seq.

approve them, with or without changes, and such approval, if reviewed, may be judicially upheld.

Moreover, there may later be before this Court, in consequence of developments under the new Section whose course cannot now be foreseen, additional material to guide it in formulating a decree, including the views of the Commission, and also the views of shippers, whose stake in a proper rate association set-up is obvious since through the National Industrial Traffic League they are parties to an agreement with the railroads covering the handling of rate proposals.[61] As has been stated, no representatives of shippers appeared in the proceeding before me.

8. *Examination of the Questions Arising Out of the Defendants' Participation in the Association of American Railroads*

(a) *Nature and Scope of the Relief Sought by Georgia*

The defendants have not, as of this writing, filed with the Commission for approval under Section 5a of the Interstate Commerce Act the articles ("Plan of Organization") of the A. A. R. So far as that section is concerned, therefore, Georgia would be in a position to press for immediate relief, to the extent that the defendants' participation in the A. A. R. violates the anti-trust laws. There are other impediments, however, in the way of relief at this time which will be set forth hereinafter.

The A. A. R. is not a party defendant and is not mentioned in Georgia's requested decree. As previously noted, that decree in general terms simply prohibits the defendants from "agreeing among themselves or with other railroads upon freight rates, rules, regulations or other practices to be filed with the I. C. C.," subject to the exception about connecting carriers and the permissibility of a single

[61] Findings 19 and 20.

public rate conference in each territory. The decree is not very aptly aimed against the defendants' activities in the A. A. R., but broadly construed it would forbid every conference or meeting for the discussion of proposed freight rates (subject to the connecting carriers exception).

So construed, it would require the defendants either to resign from the A. A. R. or to induce substantial changes in the A. A. R.'s set-up. For the members of the A. A. R., while not expressly committing themselves to comply with all the resolutions of the Board of Directors, have agreed to support its policies,[62] and since the A. A. R. is an unincorporated association, the members are principals, and are responsible for the actions of their agents taken within the general scope of their authority. In the rate field this authority certainly includes among other things Board action upon specific rates and upon policies to be pursued by railroads in establishing rates, and the calling of rate conferences and meetings of various sorts by the Board or the Vice-President in charge of the Traffic Department (Cleveland).[63] To the extent that practices of this sort were held to violate the anti-trust laws the defendants as principals would either have to induce the elimination of the practices or withdraw from the Association.

(b) *Applicability of the Anti-Trust Laws to the Defendants' Practices*

I conclude that at least some of the practices mentioned in the last paragraph violate the anti-trust laws, on the ground that if engaged in by an unregulated industry they would fall under the ban of the *Socony-Vacuum* and *Trenton Potteries* cases supra, and that as engaged in by the railroad industry they are not necessary to enable the railroads to perform their duties under the Interstate Commerce Act.

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[62] Finding 97.

[63] See Findings 60 and 62.

But because of what follows I shall not go into this question further at this point.

(c) *The Dependency of the Relief Sought by Georgia (In Respect to the Defendants' A.A.R. Activities) Upon the Granting of Relief in Respect to the Defendants' Territorial Rate Association Activities*

In a general review of the main body of the evidence relating to the A.A.R., at pp. 156 to 166 above, I stated, beginning at p. 165:

> "What then, in the last analysis, does the evidence with regard to the A.A.R. add to Georgia's case? Only this, I think: that in the light of the A.A.R.'s purposes and past activities, particularly those of its Traffic Department under Cleveland, the A.A.R. unquestionably stands in the railroad world as an overall influence on the side of conserving revenues through the avoidance of unnecessary rate reductions."

I also stated that "the only way in which it can make itself felt in the actual day-in and day-out business of adjusting interterritorial rates is in strengthening the purpose of the territorial rate associations to stand guard over the making of unnecessary rate reductions, and to maintain their procedural deterrents to independent action."

I further stated that "it is upon the effects of the territorial rate association procedures that Georgia's case must in the last analysis depend, for in the set-up of the A.A.R. she has failed to establish elements of discrimination or coercion or threatened injury to Georgia. To put the matter another way: if the territorial associations were abolished, Georgia would have no standing to seek injunctive relief against any of the activities of the A.A.R. since these in no way touch Georgia or the South in any manner different from the way they touch the other portions of the country, including Official Territory.

"It is in the territorial associations, not in the A.A.R., that Southern producers' proposals for northbound rate

reductions are acted upon for better or worse. It is in the territorial associations and not in the A.A.R. that procedural deterrents to independent action exist in an established way. And it is only in the territorial associations that there is any appreciable difference between the fate of Southern producers seeking northbound rate reductions and the fate of Northern producers seeking south-bound rate reductions, and that difference is merely quantitative . . ." [1]

I conclude, for the reasons set forth above, that only if the defendants' territorial rate association agreements are held unlawful by this Court, does Georgia have a right to relief against the defendants' activities in the A.A.R. Georgia's case in relation to the A.A.R. cannot therefore be finally decided until this Court has definitively disposed of Georgia's case in relation to the territorial associations.

It might perhaps be urged that, (1) if the defendants' rate association agreements should be approved by the I.C.C. under Section 5a, and (2) if the I.C.C.'s order of approval were not judicially reviewed or if so reviewed were not set aside, then (3) the order would not be an adjudication of the validity of the agreements under the anti-trust laws but would merely relieve the defendants from the operation of those laws in making and acting under the agreements (p. 33 supra); therefore (4) this Court could still find that the agreements violated the anti-trust laws although the defendants were immune from suit thereunder; and therefore (5) this Court could enjoin the defendants from any violations of the anti-trust laws committed by them through their participation in the A.A.R., on the theory that such violations supported and re-enforced the violations existing under the territorial association agreements, to the injury of Georgia. I do not believe, however, that this Court would consider it to be a proper exercise of the Court's equity powers to restrain certain action that encouraged other action approved as "in furth-

erance of the national transportation policy"[64] by an administrative body authorized by Congress to declare that policy.

(d) *The Bearing on Georgia's Case of the Pendency of United States v. Association of American Railroads, et al., in the U. S. District Court for Nebraska*

As has been pointed out, since the A. A. R. is not a party, a decree in Georgia's favor could run only against the defendant railroads. The defendants constitute a minority of the Association's membership.

If therefore a decree in Georgia's favor were issued, the interests of the majority would be adversely affected without their having been heard, since the decree would result either in the partial dismemberment of the Association through the withdrawal of the defendants, or in the induced re-doing of its set-up.

In the government's pending anti-trust suit against the A. A. R., the Western railroads and others in the U. S. District Court for Nebraska, referred to at p. 152 above, in which, as Judge Delehant stated, the "object" and the "basic averments" are "strikingly comparable" to those of Georgia's suit, all interested carriers are represented through the Association as a party defendant; and accordingly, if when that case is decided the Association is found to have violated the law, the decree will run directly against the Association, instead of indirectly through an injunction against a minority of its membership. For this reason alone it would seem desirable in Georgia's case, if this Court should conclude that some form of decree should issue with respect to the defendants' participation in the A. A. R., to postpone action pending the outcome of the government's suit against the A. A. R. Indeed, if the government should finally prevail in that suit, the nature of the decree might be

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[64] Section 5a(2) of the Interstate Commerce Act.

such as to render unnecessary a decree in Georgia's case with respect to the defendants' participation in the A. A. R.

There are further reasons, it seems to me, why justice would be served by withholding action in Georgia's case pending the outcome of the government's suit against the A. A. R. In that suit additional light will undoubtedly be cast upon the nature of the A. A. R.'s activities; and it will be necessary (if violations of law are found) for the parties to address themselves directly to the questions of what specific activities should be enjoined in the decree. This process should enable the Court to deal with the A. A. R. (if injunctive relief is held to be warranted) in a more informed, comprehensive and precise way than would be possible by a decree against the defendants on the basis of the record in Georgia's case alone.

That record leaves in doubt some questions that presumably will be clarified in the government's suit, if for no other reason than that the A. A. R. is a party defendant. These questions have to do with how far the Sherman Act should be held to bar particular rate activities of the A. A. R., as for example the following (in all of which the defendants in Georgia's case could probably engage only at their peril if Georgia's decree were adopted):

(i) General rate increase committees formed to agree upon and present to the I. C. C. requests for general increases in freight rates, and to agree upon and effectuate the revisions of rates after the I. C. C.'s authority has been obtained. (See Findings 114-116)

(ii) Facilitation of agreements upon freight classifications for rate purposes, through classification committees in the several territories. (See Findings 1, 10, 258, 261-264)

[Agreements upon classifications are technically not agreements upon rates, but since the classification assigned to a particular commodity automatically determines its rate (in the case of class rates), changes in classifications do

in fact result, in and of themselves, in rate changes. It does not appear from the record whether the A. A. R. has thus far attempted to stimulate or coordinate the undertakings of the railroads' territorial committees to agree upon uniform classifications in response to the I. C. C.'s action in *Class Rate Investigation, 1939* (see Finding 264); but there may well be need in the future of some centralized leadership to induce agreement, given the complex nature of the task and the interterritorial differences in viewpoint that may arise.]

(iii) Various ad hoc committees formed by or at the instance of the A. A. R. to agree upon particular rate adjustments pursuant to the suggestions or with the knowledge and approval of the I. C. C., as in the case of the "low spot" committees formed to seek agreements upon increases in artificially depressed rates in connection with the general rate increase cases of 1937-38. (See Findings 70-74)

(iv) Resolutions designed to preclude the adoption of particular rate reductions, as in the 1936 *citrus fruits* case (Findings 118-121), or of rate reductions of a particular type, as in the case of the resolutions aimed against the establishment by one railroad of joint rates with bus and truck companies in a territory served by another railroad. (Findings 103-110)

(v) Resolutions, not adopted under the aegis or at the prompting of the I. C. C. in connection with some pending proceeding before the I. C. C., designed to bring about agreement upon rate increases applicable to some particular commodity, as in the *copper bullion* case. (Finding 117)

(vi) Efforts by the A. A. R.'s Traffic Department, with or without the backing of resolutions, to induce particular roads to agree to refrain from rate reductions or to agree to make rate increases. (Finding 62)

(vii) Actions designed to promote procedural changes in territorial associations to check rate erosion. (Findings 72-89)[65]

(viii) Resolutions designed to hold up the filing with the I. C. C. of rate proposals favored by one group of lines, and opposed by another, or of petitions by one group for the suspension of rates filed by another, pending conferences with A. A. R. officials. (Findings 111-113)

(ix) Mediatory rate conferences convoked and presided over by the Vice-President in charge of the Traffic Department. (Findings 112 and 123-128)

On the basis of the present record it would seem reasonable to conclude that the actions described in paragraphs (i), (ii) and (iii) above are so tied in with the successful functioning of the Interstate Commerce Act that they should be regarded as beyond the reach of the Sherman Act. It would also seem reasonable to conclude that the actions described in paragraphs (iv), (v), (vi) and (vii) are not so tied in, and are designed to check rate reductions or induce rate increases, and that they are therefore within the reach of the Sherman Act.

The actions described in paragraphs (viii) and (ix) are in a more doubtful category. The conferences under (viii) are not necessary for the purposes of the Interstate Commerce Act, which makes them suspect, but the record does not show that their purpose is to check rate reductions or induce rate increases which otherwise would not be made. On the other hand, the conferences are designed to hold up controversial rate proposals from being filed with the

[65] Literally such actions, being neither agreements upon rates, nor rate conferences, would not be covered by Georgia's decree, but since their end purpose would be to induce agreements to keep rates stationary wherever possible, and since such agreements would be barred, the act of inducing them would presumably fall within the area of acts embraced in the decree.

I. C. C. pending discussion with the A. A. R., *at the request of protesting groups*, and not at the request of the proponents. Since most rate proposals are for reductions, the long-run tendency of such conferences should be to produce agreements to maintain the existing level of rates contrary to the original desires of the proponents.

On the other hand, where a mediation conference is sought *by the proponents of a rate change*, as under (ix), and not by the protestants, in the hope that through further discussion under neutral auspices the opposing roads may come to an agreement with the proponents, the shoe would seem to be on the other foot. If the proponents think that such conferences may help them to obtain the necessary concurrences, they are apt to be right, at least sometimes, so that the long-run tendency should be to obtain concurrences that could not otherwise be obtained by agreement.

In other words, mediatory conferences convoked at the behest of opponents of rate changes would tend to result in halting or slowing up such changes, while mediatory conferences convoked at the behest of proponents of such changes would tend to facilitate them. On the basis of these differences it might be contended that the Sherman Act should ban the former type of conference while permitting the latter.

I cannot say, however, that on the record before me it would be possible to form a conclusion either way, and I mention the question only to illustrate the need of exploring more thoroughly the nature of the varied rate activities of the A. A. R., and the specific points that must be covered in the framing of any decree. This exploration can most readily be made in the government's pending suit against the A. A. R., in which the A. A. R. is itself a party.

For the reasons indicated I recommend that, if this Court should determine that Georgia has made out a case for an injunction against the defendants' activities in the A. A. R., the issuance of a decree should in any event be postponed

until the government's pending suit against the A. A. R. is finally concluded.

V. SUMMARY OF CONCLUSIONS

The conclusions set forth below under each heading are based on the analysis set forth under the corresponding heading in Part IV above. Certain other conclusions stated earlier at pp. 106, 107 are not repeated below.

A. *Georgia's Standing to Sue in a Proprietary Capacity*

1. Georgia's standing in Court depends upon the establishment of her capacity to seek an injunction as *parens patriae.*

B. *Georgia's Standing to Sue as Parens Patriae*

2. The evidence does not support the claims of injury to Georgia's economy, asserted in the amended complaint and noted by this Court as charging an injury beyond that suffered by particular individuals; nor is the evidence sufficient to warrant a conclusive presumption of injury to Georgia's economy.

3. Therefore, Georgia has not established her right to bring suit in this Court in her sovereign capacity, and as a person entitled to seek injunctive relief under Section 16 of the Clayton Act.

[If the foregoing conclusion should be held erroneous, the following question would then arise]:

C. *Whether Georgia Has Shown That the Threatened Loss or Damage is of a Sort Which a Person Other Than the United States Can Seek to Enjoin Under Section 16 of the Clayton Act*

4. A plaintiff other than the United States, to be entitled to injunctive relief under Section 16 of the Clayton Act, must show either:

(a) That loss or damage to the plaintiff is threatened by acts, violating the anti-trust laws, which are aimed

and directed at the plaintiff, or at a special class of persons of whom the plaintiff is one, or

(b) That (since injuries to the public at large are subject to injunction only at the instance of the United States) the threatened loss or damage to the plaintiff is a direct injury differing from that suffered by the public at large.

5. Georgia has not met test (a) above, because the evidence does not show that the activities of the defendants' rate associations, including the A. A. R., are aimed and directed at Georgia, or at the South including Georgia.

6. Georgia has not met test (b) above, because, viewed in the large, the evidence pictures a nationwide effort on the part of the railroads, through their associations, including the A. A. R., for revenue purposes and without sectional bias, to discourage rate reductions; an effort whose economic effects upon the public at large appear to be so generally diffused that no one State, whether in the South or elsewhere, is in a position to show that its particular segment of the public suffers therefrom in any way peculiarly different from that of the public generally.

7. Georgia therefore has failed to establish threatened loss or damage within the meaning of Section 16 of the Clayton Act, and consequently is not entitled to relief.

[If the foregoing conclusion should be held erroneous, the following question would then arise]:

D. *Whether the Defendants Have Violated the Sherman Act*

8. The Sherman Act does not exempt railroads from its operation, but activities by them that are needed to enable them to perform their duties under the Interstate Commerce Act must be regarded as made lawful by the Interstate Commerce Act, even though if engaged in in an un-

regulated industry they would be held unlawful under the Sherman Act.

9. Judged by the foregoing standard, advance discussion by railroads of rate proposals, in organized conferences, since it is essential to the framing of non-discriminatory and otherwise lawful rates, is not, without more, unlawful.

10. Georgia has not established her charges of a coercive conspiracy directed against the South or of a conspiracy to coerce the fixing of freight rates generally; and therefore her charge of a violation of the Sherman Act can be based only upon a showing of the existence of unlawful agreements among the defendants for the establishment of rates.

11. If Georgia can make such a showing she should be entitled to do so (if it is also held that she has met the *parens patriae* and damage requirements), notwithstanding her failure to prove the existence of the aforesaid conspiracy.

12. The defendants' territorial rate association rules of procedure constitute agreements by the members that they will follow those rules, subject to the members' reserved right of independent action.

13. Portions of these agreements have a purpose that extends beyond mere discussion and exchange of views of the sort that would be deemed lawful under paragraph 9 above. These portions are designed to check the scope and frequency of rate reductions by guarding railroads against the importunities of their customers (through secret ballot votes and the confidentiality of proceedings); by bringing the influence of adverse majority votes (including the votes of railroads not directly concerned with the given proposal) to bear on the proponent and on any roads disposed to join with the proponent; by vesting authority in paid officials to hold up favorable majority action (or threatened independent action against unfavorable majority action) when

such officials deem the reduction inimical to the best interests of the railroads as a whole, by means of an appeal to a higher body; by providing separate organizations of Traffic Executives and of Presidents to each of which such appeals may be taken; and by a common understanding that, while each member reserves the right, at every given stage of rate association procedure, to take independent action, either as the initiator of a rate change or as a joint participant in it, the members will rarely exercise that right when appeals are taken or the votes go against the proposal, realizing that if the appeal provisions and majority votes were disregarded with much frequency the system would tend to break down, to the financial injury of all.

14. Unless the portions of the agreements referred to in paragraph 13 are needed to enable the railroads to discharge their duties under the Interstate Commerce Act, they would constitute price-fixing agreements of the sort held by this Court to be unlawful under the Sherman Act.

15. Said portions are not so needed and therefore fall into the class of agreements held to be unlawful under the Sherman Act.

16. In reference to Georgia's proposed decree, it would not be practical or consistent with the purposes of the Interstate Commerce Act:

(a) To limit conferences and agreements, whether within or outside the territorial associations, and whether concerned with intraterritorial or interterritorial rate proposals, to representatives of only the connecting carriers directly participating in the particular interline movement;

(b) To limit conferences to a single one for any given proposal, or to require that the conference be held within ten days after the submission and public docketing of the proposal;

(c) To do away altogether with the hierarchical structure of the territorial rate associations;

(d) To eliminate executive sessions altogether from the rate association set-up.

17. Since agreements replacing those here at issue are now pending before the Commission for approval under the new Section 5a of the Interstate Commerce Act, it would be premature to formulate a decree dealing with those agreements.

18. Since the defendants have not filed with the Commission for approval under Section 5a the articles of the A. A. R., Georgia would be in a position, so far as that section is concerned, to press for immediate relief, to the extent that the defendants' participation in the A. A. R. violates the anti-trust laws.

19. At least the following practices of the A. A. R. that are authorized or engaged in by the defendants violate the anti-trust laws because they are not needed for the purposes of the Interstate Commerce Act and are designed to check rate reductions or induce rate increases: resolutions designed to preclude the adoption of particular rate reductions; resolutions, not adopted under the aegis or at the prompting of the I. C. C. in connection with some pending proceeding before the I. C. C., designed to bring about agreement upon rate increases applicable to some particular commodity; efforts by the A. A. R.'s Traffic Department, with or without the backing of resolutions, to induce particular roads to agree to refrain from rate reductions or to agree to make rate increases; and actions designed to promote procedural changes in territorial associations to check rate erosion.

20. There are, however, the following impediments in the way of issuing an injunction at this time against the defendants' participation in the A. A. R.:

(a) Georgia having failed to establish coercion or discrimination or threatened injury to Georgia in the set-up of the A. A. R., and having shown (as the only possible ground for injunctive relief at the instance of

Georgia) merely that the A. A. R.'s activities help to fortify the territorial rate associations' purposes reflected in their agreements described in paragraph 13 above, Georgia's case in relation to the A. A. R. cannot be finally decided until this Court has definitively disposed of Georgia's case in relation to the territorial associations.

(b) The A. A. R. is not a party to Georgia's suit and the defendants constitute a minority of its membership; hence a decree would result either in the partial dismemberment of the Association through the withdrawal of the defendants, or in the induced re-doing of its set-up. Either step would adversely affect the interests of the majority without their having been heard. This difficulty is not present in the government's pending anti-trust suit against the A. A. R., et al., in the District of Nebraska.

(c) The record in Georgia's case leaves in doubt certain questions which have to do with how far the Sherman Act should be held to bar one or another of the varied rate activities of the A. A. R., and which presumably will be clarified in the government's suit.

21. For the reasons set forth in paragraph 20 above, it is recommended that, if this Court should determine that Georgia has made out a case for an injunction against the defendants' activities in the A. A. R., the issuance of a decree against the A. A. R. should be postponed until this Court has definitively disposed of Georgia's case in relation to the territorial associations and until the government's pending suit against the A. A. R. is finally concluded.

VI. RECOMMENDED DECREE

In accordance with the Conclusions of Law I recommend dismissal of the amended complaint.

The decree, in addition to its formal parts, its confirmation or modification of findings, and (if this Court should decide to dismiss) its dismissal part, should make appropriate provisions with regard to the expenses of the proceedings.

Georgia and the defendants heretofore deposited with the Clerk of this Court from time to time funds sufficient to de-

fray the out-of-pocket expenses of the Special Master incurred for stenographic reporting, travel, room and clerk hire, and telephone calls and incidentals. The Clerk in turn made sums available to the Special Master for these purposes. The funds were deposited under an informal agreement between the parties on June 6, 1946, which provided that:[66]

> "The fact that the contributions by the Plaintiff and the Defendants respectively are now being made in equal amounts is not to be taken as affecting in any way the final determination by the Court of the way in which the burden of the expenses should properly be allocated; and if any different allocation is finally directed by the Court, the expenditures previously made will be so adjusted by the interchanges of payments as to conform to the Court's order. Any surplus remaining will be paid to the party or parties entitled thereto in accordance with the Court's order."

The agreement also provided that all disbursements would be reported to and be subject to the final approval of this Court. I have from time to time made informal accountings to the parties and to the Clerk of this Court. I shall not, however, be able to make a final accounting until after this Report has gone to press because the exact amount of the printing bill will not be available until later. Before the issuance of any decree, however, the final accounting will have been made, and the decree may contain an appropriate entry with respect thereto, and also with respect to such allocation of the burden of the expenses (including the compensation of the Special Master) as this Court may deem appropriate.[67]

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[66] III, 998.

[67] Since the Court's order of appointment of the Special Master (p. 833 infra) indicated that the Court did not expect a recommendation from him regarding the allocation of the expenses, I have not considered the question whether, if the Court should dismiss the suit, the costs might not be apportioned in some manner in the light of the entire record.

If this Court should determine that the amended complaint ought not to be dismissed, I make no recommendations with regard to the form of the decree, believing that such an undertaking would be premature, for the reasons set forth in some detail in Part IV and summarized in Paragraphs 17 and 20 of Part V above.

It goes without saying that I am at this Court's service if the Court should desire me to enlarge upon or clarify any portions of the Report or to assist in the framing of any decree, now or later on.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDANTS

REPORT OF THE SPECIAL MASTER

(Submitted in Three Volumes)

VOLUME TWO

(Pages 209 to 618)

ANALYSIS OF THE EVIDENCE

IN SUPPORT OF THE FINDINGS IN VOLUME ONE

Containing:

PART ONE. THE ALLEGED ACQUISITION OF COERCIVE POWER TO PREVENT THE LOWERING OF FREIGHT RATES.

PART TWO. THE NATURE AND ALLEGED COERCIVENESS OF THE POWER ACQUIRED BY THE DEFENDANTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDANTS

REPORT OF THE SPECIAL MASTER

VOLUME TWO

PART ONE

THE ALLEGED ACQUISITION OF COERCIVE POWER TO PREVENT THE LOWERING OF FREIGHT RATES

I. *Preliminary Note as to the Nature and Interrelationships of Railroad Rates and the Necessity of Organized Rate Conferences to Consider Rate Proposals*

The defendants at the outset of their case devoted a considerable amount of time to an exposition of the nature of railroad rates, the development of rate structures, par-

ticularly in Southern and Official Territories,[1] and the necessity of organized rate conferences to consider rate proposals before their submission to the I.C.C.

In view of Georgia's concession that some form of organized rate conferences within the different territories are necessary, much of this exposition need not here be reviewed. I set forth below only so much of it as seems to me necessary for an understanding of the actual task confronting the defendants' associations and of the reasons which led to their formation.

A. *The Nature and Interrelationships of Rates*

1. *In General*

Railroad rates, unlike ordinary prices, are, according to the defendants, knitted together into a "structure" or "fabric"; they are "part of an integral whole."[2] This is basically because (1) they are tied to *places*, which have a fixed geographical relationship to one another; and (2) they are tied to *commodities*, which at any given time have a commercial relationship to one another.

The serious repercussions on localities and competing producers caused by rapid changes in rates contributed to the passage of the Interstate Commerce Act. Thus the Interstate Commerce Commission, in its first annual

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[1] There are five major rate territories, namely, Official Territory, Southern Territory, Western Trunk Line Territory (which is located approximately between Official Territory and the Rocky Mountains), Southwestern Territory (which lies south of Western Trunk Line Territory and west of the Mississippi and includes Arkansas, Texas, Oklahoma and part of Louisiana), and Mountain-Pacific Territory (which includes Montana and New Mexico and all territory west of the Rockies).

[2] *Summer & Co.* v. *Erie R. R. Co.* (1945), 262 I.C.C. 43, 49. Cf. Professor Ripley in his text-book "Railroads, Rates and Regulation," at pp. 113, 114: "Railway rates, as has been said, are not a set of independent threads; they form a fabric. They are so interwoven everywhere that if one thread be shortened, it will cause a kink in the fabric that may run almost anywhere."

report, commenting on the causes which produced the Act, said:

> "Permanence of rates was also seen to be of very high importance to every man engaging in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of the money charges exacted for transportation * * * was of inferior importance in comparison with the obtaining of rates that should be open, equal, relatively just as between places, and as steady as in the nature of things was practicable" (Interstate Commerce Commission First Annual Report, p. 6).

The defendants drew attention to many decisions, as well as reports, of the Commission stressing the interdependency of rates. For example, in one of its very earliest cases the Commission said:[3]

> "It is said that the rate from St. Cloud is reasonable in and of itself. A rate can seldom be considered 'in and of itself.' It must be taken almost invariably in relation to and in connection with other rates. The freight rates of this country, both upon different commodities and between different localities, are largely interdependent, and it is the fact that they do not bear a proper relation to one another, rather than the fact that they are absolutely either too low or too high, which most often gives occasion for complaint, and which is the ground of complaint here."

Many similar pronouncements by the Commission were cited by the defendants but need not here be set forth.

The dual needs of stability and equitable relationships were stressed by the defendants in their testimony; Oliver of the Southern Railway, for example, testified that "next to stability in rates, shippers are usually more concerned with the relationship of their rates than they are in the actual measure of them. Stability, as stated in the tariffs,

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[3] *Tileston Milling Co.* v. *No. Pac. Ry. Co.*, (1899) 8 I.C.C. 346, 361.

permits the shipper to know what his competitor has to pay and the rate relationship puts him on a competitive equality."[4]

The defendants introduced much detailed evidence designed to illustrate the ramifications which may result from a proposal by one line to change a rate on a commodity between two points. A representative sample of this evidence is here given.

2. *The Sugar Rate Structure.*

The statements of fact which follow in this section have been summarized, except where otherwise indicated, from the testimony of Sheppard of the Illinois Central in VIII, 2240-2263 and of Tilford of the Louisville & Nashville in VI, 1720-1730.

New Orleans is one of the major sugar refining points. The Illinois Central is the only single-line railroad from New Orleans to Chicago. Chicago is said to be the largest sugar consuming point in the country.

The Illinois Central has joined with other carriers in establishing rates via approximately 1200 different routes from New Orleans to Chicago. The rates over all of these are the same.[5]

It might seem surprising that the Illinois Central, being the only direct single line between New Orleans and Chicago, should go out of its way to establish so many alternative routes in which other carriers may participate. There are, however, several reasons why this has happened. The first is the law. Section 1(4) of the Interstate Commerce Act makes it the duty of every carrier "to establish reasonable through routes with other such carriers. . . ." And Section 15(3) empowers the Commission on complaint, or on its own initiative, to establish through routes whenever it deems such action to be "necessary or desirable in the public interest."

[4] IX, 2580.

[5] SD-33 in Vol. O shows a representative group of these routes.

In addition to the requirements of the law, Sheppard of the Illinois Central testified that the multiplicity of routes had come about partly because of the Illinois Central's "policy of maintaining open routes, that is, routes with other carriers, and because the shippers, we have found, want a choice of routes. It has been my observation and experience that the public interest requires a choice of routes. Not all receivers at Chicago are located on the Illinois Central, and some of them think they can get a better service when the shipments come in over the line of railroad on which their place of business is located. There are many other reasons why shippers desire more than one route."[6]

Other witnesses pointed out that a choice of routes enables shippers (who have the right under Section 15 of the Interstate Commerce Act to dictate which of the available routes shall be followed) to divide the traffic among competing lines, thus promoting an even flow of traffic among all the carriers.[7]

Sheppard testified that the Illinois Central was further moved by *competitive considerations* to establish many of the routes in question between New Orleans and Chicago. For example, the Louisville & Nashville, a competitor of the Illinois Central, extends from New Orleans to Evansville, Indiana. There it connects with the Chicago & Eastern Illinois, which runs to Chicago. Consequently a sugar shipper in New Orleans could, if he wished, ignore the Illinois Central's direct route and send his sugar through Evansville to Chicago via the Louisville & Nashville and the Chicago & Eastern Illinois railways. However, the Illinois Central also directly reaches Evansville, although the latter point is not on the Illinois Central's main line from New Orleans to Chicago. Since the Illinois Central does reach Evansville, it was obviously to the interest of the Illinois Central to join with the Chicago

[6] VIII, 2249.
[7] Kerr, IV, 1155-7; Etheridge, X, 2932-4.

& Eastern Illinois in establishing a route via Evansville so that a shipper who wanted for some reason to route through Evansville or, for the sake of the receiver, to have the sugar enter Chicago on the line of the Chicago & Eastern Illinois, would not be confined to using the Louisville & Nashville out of New Orleans but could in the alternative use the Illinois Central.

Similarly, the Gulf, Mobile & Ohio Railroad runs from New Orleans to Memphis, Tennessee, and sugar may go from there to Chicago via the Frisco to East St. Louis and the Alton from there to Chicago. The Illinois Central lines also reach Memphis from New Orleans, and therefore it has been to the Illinois Central's interest to establish a route to Chicago via that junction and thence to Chicago via the Frisco and the Alton.

New Orleans is served not only by the Louisville & Nashville and the Gulf, Mobile & Ohio Railroads but also by the Missouri Pacific, the Louisiana & Arkansas, the Texas & Pacific, and the New Orleans & Northeastern. None of these lines extends all the way to Chicago but each, by participation with other carriers at various Northern junction points, has established routes to Chicago. For competitive reasons of the sort already discussed, the Illinois Central, where it connects with these other carriers at particular Northern junctions, has joined with them in establishing routes to Chicago.

It is in these ways that approximately 1200 different routes have been established from New Orleans to Chicago. In spite of the fact that many of these routes are very considerably longer and more circuitous than the direct single line of the Illinois Central, the rate on sugar over each one of these routes is the same.

It is obvious that the existence of this multiplicity of available routes, each carrying the same rate from New Orleans to Chicago regardless of the actual distance of the route, means that the rate on any one route could not be changed without affecting all the others. Unless the

changes were made simultaneously they would violate Section 3(1) of the Interstate Commerce Act (which forbids undue or unreasonable preferences to particular shippers or localities) and Section 3(4) (which forbids carriers to "discriminate in their rates, fares, and charges between connecting lines . . .").

The complications of the sugar rate structure, from the point of view of the Illinois Central, are by no means confined to shipments from New Orleans to Chicago. The Illinois Central, for example, does not reach Detroit. Detroit is reached from Chicago by four lines: the Wabash, the Pere Marquette, the Grand Trunk, and the Michigan Central.[8] The Illinois Central has joined with these four railroads in establishing through routes and joint rates on sugar from New Orleans to Detroit. The rates are, of course, the same via all routes. If, therefore, the Illinois Central and the Wabash were to reduce the rate from New Orleans to Detroit, they could be charged under Section 3 of the Act with discrimination against the other three carriers. They would also be chargeable with unduly preferring receivers located on the Wabash and receivers located on the other three railroads.[9] Similarly, the Illinois Central could not reduce the rate via its own line from New Orleans to Chicago without considering the effect of that reduction upon Detroit receivers and upon the relationship between the reduced rate to Chicago and the joint rates to Detroit.

The Illinois Central, moreover, has not only established through routes to Detroit via Chicago. It has also joined

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[8] SD-35, Vol. O.

[9] A carrier may be chargeable with prejudice against persons and places located off its own lines. *Southern Pacific Company's Ownership of Oil Steamers*, 34 I.C.C. 77, 80; *Memphis Freight Bureau* v. *A.G.S. Ry. Co.*, 126 I.C.C. 87, 91; *Lake Dock Coal Cases*, 89 I.C.C. 170, 184; *United States* v. *I.C.R.R. Co.*, 263 U.S. 515, 520; *St. Louis-Southwestern Ry. Co.* v. *United States*, 245 U.S. 136. In the last case the Court said (p. 144): "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them."

in establishing routes to Detroit via Indianapolis with the New York Central and the Nickel Plate, and via Louisville with the B. & O., the Pennsylvania and the New York Central.[10] The Illinois Central could not therefore change the rate via one junction point, such as Indianapolis, without at the same time changing the rates via other junction points, such as Chicago and Louisville. What is true of the Illinois Central with regard to rate changes is true also of all of its connecting carriers.

Sugar moves to Chicago not only from New Orleans but from Baltimore, New York, Philadelphia, Boston, Port Wentworth, Georgia, and from California and the beet sugar producing territory in the Western states. The Illinois Central participates with other carriers in through routes from many of these sugar refining points to Chicago. Thus it has its own line from Omaha to Chicago and participates in routes from California and other Western points to Chicago. The Illinois Central could not therefore reduce its rate from New Orleans to Chicago without considering the changes which would have to be made in the related rates from these Western producing points.

The interrelationship of rates is further illustrated by the fact that the rate from Port Wentworh, Georgia to Cincinnati is 40¢, the same as from New Orleans to Cincinnati. There are some 85 routes from Port Wentworth to Cincinnati, a number of which are in connection with the Louisville & Nashville, which also goes directly from New Orleans to Cincinnati. Therefore the Louisville & Nashville could not reduce its single-line rate from New Orleans to Cincinnati without considering a like change from Port Wentworth to Cincinnati. Moreover, a change could not be made in the rate to Cincinnati without considering all the rates to intermediate destinations in order to make sure that there would be no violations of Section 4 of the Act, which prohibits charging less for longer than for shorter

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[10] SD-35, Vol. O.

distances without the express approval of the Commission after due investigation.

A number of other examples of the complexity and interdependency of the sugar rate structure were given in the testimony, which I shall not attempt to review. Nor does it seem necessary to analyze the various decisions of the Interstate Commerce Commission dealing with the sugar rate structure.[11]

3. *The Lumber Rate Structure*

Tilford of the Louisville & Nashville testified as to the interrelationship of rates on lumber from various lumber producing sections in the South to various destinations in the North.[12] Oliver of the Southern Railway testified that the rates on lumber from mill points in Georgia to the North have a direct relationship to the rates from competing points in the Carolinas, the Southeast, the Mississippi Valley territory, and points in Arkansas, Louisiana and Texas.[13] He also testified that wall board is produced in practically every Southern state as well as in the Southwest, and that the rates on wall board from these producing sections to the principal markets are all made with relationship to each other.[14] He cited a number of Interstate Commerce Commission decisions to show the extent of that relationship.[15]

In general, the picture given of the lumber rate structure

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[11] These cases are: *Sugar Cases of 1922*, 81 I.C.C. 448; *Transcontinental Eastbound Sugar, 1931*, 186 I.C.C. 523; *Sugar Cases of 1933*, 195 I.C.C. 127, order upheld by this Court in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282; and *Sugar From Gulf Coast Port Groups To Northern Points* (1937) 220 I.C.C. 623.

[12] VI, 1669, 1670, 1734-6.

[13] IX, 2591, 2592.

[14] IX, 2592.

[15] *Rates on Lumber from Southern Points*, 34 I.C.C. 652, 36 I.C.C. 137; *Southeastern Lumber*, 42 I.C.C. 548; *Adams-Bank Lumber Co.* v. *A. & R. R.R. Co.*, 157 I.C.C. 280; *West Coast Lumbermen's Association* v. *A.C. & Y. Ry. Co.* and *Southern Pine Association* v. *A. & W. Ry. Co.*, 183 I.C.C. 191.

was similar to that of the sugar rate structure, although less complicated and less extensive in its geographical ramifications.

4. *Through Routes and Rates Between Atlanta, Georgia and Buffalo, New York.*

Franklin of the Pennsylvania introduced two exhibits which showed that between Atlanta and Buffalo there were 23,251 different rail routes available to shippers and 1,730 rail-water-rail routes, making a grand total of 24,981 routes.[16] Sixty-one railroads are involved in these routes and seven steamship lines.[17] The distances range from 820 miles on the shortest route up to nearly 1530 miles, the maximum circuity permitted for this particular group of routes by the Interstate Commerce Commission.[18]

These routes include some which run through the Southwest via Memphis and St. Louis, others which go through Michigan and Southeastern Canada, while others proceed by New York City and Albany. Franklin said that "practically all railroads within the rough territorial outline just described participate in one or more joint routes between Atlanta and Buffalo, so that it is pertinent to say that joint rates between Atlanta and Buffalo involve all Official territory to its very borders. . . ." No single carrier serves both cities directly.[19] On many of the routes four or five railroads are involved;[20] and occasionally six or seven.[21]

Some carriers participating in the joint rates between Atlanta and Buffalo reach neither Buffalo nor Atlanta nor

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[16] ND-6 and ND-7, Vol. F, introduced at X, 3185. At X, 3197 Franklin introduced a further exhibit, ND-8, showing that the Pennsylvania Railroad participated in 3557 routes between Atlanta and Buffalo with 46 other railroads and 7 steamship lines.

[17] X, 3187.

[18] X, 3187 to 3189.

[19] X, 3190.

[20] X, 3193.

[21] Franklin, X, 3198, 3199, commenting upon Exhibit ND-8, Vol. F, introduced by Franklin at X, 3197.

any of the "gateways" (the junction points on the boundaries between Official Territory and Southern Territory). Some reach one of the cities but none of the gateways. Some reach the gateways but neither of the cities.

Some which reach one or the other of the cities directly may also act as intermediate lines. For example, one route would be from Atlanta to Cincinnati via the Southern Railway and from Cincinnati to Buffalo via the Pennsylvania. Another route, in which the Pennsylvania would be an intermediate or "bridge" carrier, would be from Atlanta to the Potomac Yards (just outside of Washington) via the Southern Railway, thence by the Pennsylvania to Marion or some other junction point in New Jersey or to Wilkes-Barre or Scranton, and thence via the Delaware, Lackawanna & Western to Buffalo.[22]

Commenting generally on this complex structure of alternative routes, each carrying joint through rates which would be the same for any given class or commodity, Franklin said:[23]

> "As will be obvious, the existence of all these routes gives the shipper a wide choice, and the end result is intense competition among the railroads, each striving to obtain the traffic over the route that produces the highest earnings to it.
>
> "Inasmuch as the Interstate Commerce Act gives the shipper the right to route traffic, a right which he zealously guards, and a right which is zealously guarded, it is apparent that shippers have considerable advantage in their bargaining with railroads. For this reason, shippers are interested in and insist that all available routes be kept open on an equality."

Franklin illustrated the interrelationship of rates on the various routes between Atlanta and Buffalo by supposing that the Delaware, Lackawanna & Western wished to alter the iron and steel rate from Buffalo to Atlanta.[24] First of

[22] X. 3190, 3191.
[23] X. 3193.
[24] X. 3194, 3195.

all, it would have to consult with its connections in Official and Southern Territory. If it approached the Pennsylvania, the Pennsylvania, in order to avoid creating discriminations or preferences forbidden by Section 3 of the Interstate Commerce Act, would have to consider the effect of the proposed change on its own shippers in Buffalo and also at other iron and steel producing points which the Pennsylvania serves. In addition, the Pennsylvania would have to consider whether the proposed change should also be made via the numerous other routes in which the Pennsylvania participates. The carriers participating with the Pennsylvania in these other routes would in turn have to approach the question in the same way as the Pennsylvania. Even the bridge or intermediate lines would have to consider the effect of the proposed change on any steel producing points which might be located on their lines.

"So it follows," said Mr. Franklin, "if the ordinary standards are to be observed, that all lines participating in joint rates must necessarily confer either in groups or collectively before a change in a rate can be progressed. Convenience and expedition to the carriers and shippers has long since proven that this can only be done by committee procedure where all shippers appear on an equal footing and all interested carriers have their say." [25]

A little further in his testimony Franklin was asked whether, if the Pennsylvania proposed to reduce a joint rate between Buffalo and Atlanta in which the Southern Railway participated, it would be sufficient for the Pennsylvania to publish its joint rate with the Southern, announcing at the same time that it would be willing to offer the same rate via its other connections if they chose to come in. Such a procedure, if feasible, would avoid all the business of group consultation. Franklin replied: [26]

"If that were done the Southern would almost certainly get an advantage over the other connections, be-

[25] X. 3195.
[26] X. 3202.

cause there would be a time lag between the time that the rate via the Southern went into effect, as compared with the date at which the rate via other connections went into effect.

"By this method the railroad might prefer the connection with which it first arranged the rate.

"Also, such a preference might well have the effect of preferring a shipper located on the line of the Southern.

"I might add, furthermore, that to put in rates piecemeal in this way would also destroy the very great advantage which the conference method gives of enabling a railroad to know in advance the various repercussions that a rate adjustment is going to have.

"In order to accomplish this result, the entire situation must be reviewed at one and the same time and not piecemeal. . . .

"This is especially true from the standpoint of the shippers. If, for example, our railroad put into effect a rate with the Southern Railway as our connection, we might very well find that a prejudicial effect would be produced on shippers located on another connection, say, the Louisville & Nashville or the Seaboard, or on one of the Northern lines, and we would want to know whether this would be the case before we decided whether or not to go ahead and put the new rate in."

5. *Other Evidence Relating to the Interrelationships of Rates.*

Several witnesses for the defendants gave illustrations to show that local rate changes on a single line may require changes on other lines.

(a) Oliver of the Southern Railway Company testified that the Southern and the Seaboard both have lines between Atlanta and Birmingham. The distances via both routes are practically the same. When the Southern proposes a new rate, or an altered rate, from Atlanta to Birmingham, or from an intermediate point on its line to Birmingham, the proposal would directly concern Atlanta shippers who might desire to use the Seaboard; the Seaboard itself; and shippers located at intermediate points on the Seaboard.[27]

[27] IX. 2587-2589.

Moreover, Atlanta and Birmingham are base points so that, according to Kerr of the Southern Freight Association:[28]

> ". . . . when you speak of rates from Birmingham to Atlanta, with rare exceptions, you are talking about local rates and joint line rates from some 90 odd stations in the Birmingham group to some 60 odd stations in the Atlanta group."

(b) Etheridge of the Seaboard and Doss of the Atlantic Coast Line discussed rates on citrus fruits from Florida. In the course of their testimony the following facts were developed:[29]

Lockhart, Florida, is a local station on the Seaboard. It is near Orlando, Florida. Both the Seaboard and the Atlantic Coast Line serve Orlando. The distances between Lockhart and Orlando to consuming points in Southern, Official and Western territories are approximately the same. Therefore the establishment of any new rates from Lockhart would directly concern the Atlantic Coast Line and the shippers in Orlando.

Another example: suppose the Seaboard wished to effect

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[28] IV, 1138. The term "base points" or "basing points" is derived from the so-called basing point system of rates characteristic of Southern territory. Under this system rates for points surrounding or tributary to important trading centers where railroad-steamboat or railroad-railroad competition prevailed were based on the rates in effect at these centers. The centers were the base or basing points. The basing points in Southern territory are shown on SD-1 in Vol. N and are explained at II, 753-756 in Mr. Dickinson's survey of Interstate Commerce Commission decisions and reports relating to the development of the basing point system, and in testimony by Kerr of the Southern Freight Association, who introduced the exhibit in question, at IV, 1137-1139.

[29] Etheridge's testimony is in X, 2922-2933, and Doss's in XV, 4906-4915. Doss's testimony further dealt with the interdependency of the rates on citrus fruits, not only from Florida but from the Southwest and California, all three sets of producers being competitors, particularly in the great consuming markets in Official Territory. This portion of Doss's testimony is found in XV, 4886-4910 and 4912-4924, in the course of which he discussed Georgia's exhibits S-73 and S-93 to 101 in Vol. A.

a new rate on citrus fruits from Lockhart to Hamlet, North Carolina, which, like Lockhart, is a local station on its own line. Lockhart is grouped as a base point with 24 other stations, 8 of which are local to the Seaboard and 12 to the Atlantic Coast Line, the remainder being common points. Hamlet is grouped with 23 other points, 1 of which is common to the Seaboard and the Atlantic Coast Line, 7 of which are local to the Atlantic Coast Line, and 16 of which are local to the Seaboard. Thus, any consideration of the rates from Lockhart to Hamlet would require considering the rates from 25 origins to 24 destinations—600 rates in all.

(c) Etheridge of the Seaboard gave an example of how a proposal of the Seaboard to reduce its local rates on sand and gravel affected the local rates on the Norfolk & Southern and the Atlantic Coast Line in the same vicinity.[30]

(d) Tilford of the Louisville & Nashville, in discussing the rates on iron and steel, pointed out "how an apparently simple rate adjustment for a single line haul of the Louisville & Nashville Railroad Company from Birmingham to Mobile and New Orleans affects and disturbs a large rate adjustment extending over nearly the eastern half of the United States. . . ."[31]

At various points throughout the record other illustrations were given of the interdependence of rates.[32]

6. *Appraisal of the Foregoing Evidence, With a Comment on the Difference Between Class Rates and Commodity Rates*

The foregoing evidence was not controverted and I accept it as correct, with one necessary qualification.

By no means all rate adjustments, as Georgia pointed out, are of the peculiarly sensitive nature of those which

[30] X, 2935-6.

[31] VI, 1808. This is further discussed in detail in the *Iron and Steel Case, infra*, p. 752.

[32] For example: Tilford, VI, 1733-4; Franklin, XI, 3378-3396; Burgess, XIII, 4155-4160, 4319-4326, 4328; Hull, XIV, 4736-4748; Witt, XIV, 4812-4814; Dervin, XV, 5174-5210.

the defendants selected for discussion. On the contrary, as will appear later, the majority of all rate proposals that are filed with the defendants' rate associations are approved by mail without objections by interested carriers which, if made, would necessitate the holding of rate conferences and committee action under the procedures in effect.

In this connection it is necessary to make a distinction between *class rates* and *commodity rates*. As will appear in more detail in the analysis of rate levels at pp. 791-812 *infra*, class rates are the oldest forms of rates. Under the class rate system, all commodities of every description are contained in a classification book, which assigns them to particular classes, according to their weight, quality, ease of handling, etc. Attached to each class are mileage rates which bear a percentage relationship to the mileage rates attached to first class; and within each given class the various commodities assigned to it carry the same mileage rates for any given distance. There are separate class rate structures in each of the major rate territories and between them. In their present form these structures were prescribed by the Interstate Commerce Commission in a series of investigations following World War I; at the same time interterritorial class rates were similarly prescribed. It is fair to say of class rates that they constitute within each territory and interterritorially, an interrelated and closely articulated structure, a "fabric" in the true sense, no part of which can be modified without affecting the other parts.

Commodity rates, by contrast, are individualized rates separately bargained and established on a case-by-case basis, covering the carriage of some particular commodity between two specific points, whether within a territory or interterritorially. Their historical function has been to effectuate reductions below the otherwise applicable class rates, when reductions were needed for some particular purpose, thereby avoiding the necessity of revamping a portion of the class rate structure.

Relatively little freight actually moves today on class rates. Most of it is carried on commodity rates. In general the relationships between commodity rates are not, like the class rates, mathematical, following a prescribed pattern; they are heterogeneous, resulting from a vast multitude of separate case-by-case negotiations.

In these negotiations, however, the particular adjustments cannot be made in a vacuum, for each one affects in greater or less degree other shippers and other carriers. In some of these adjustments most or all of the carriers in a particular territory, or in two or more territories, may be involved; in other adjustments very few roads may be involved. The adjustments vary in the degree of their complexity and the extent of their repercussions according to the nature of the particular article to be carried, the location of the points between which it is to be carried, the amount of the change in rate, and so forth.

The greater the extent to which freight rates enter into the price of a commodity, and the more widely the commodity is produced and distributed, the greater will be the number of carriers and shippers concerned with any change in a commodity rate between any two points. In the case of many commodities it may be proper to speak of the existing network of commodity rates as a "fabric".

At the lower end of the scale of complexity such a characterization seems out of place; as the record shows, many rate changes involving relatively few roads can be made with relative ease. Even in such cases, however, railroad rates differ from ordinary prices in that the effect of the changes on other shippers and carriers cannot lawfully be ignored and are indeed forbidden if they grant undue or unreasonable preferences or advantages.

B. *The Necessity of Some Form of Organized Rate Conferences.*

Theoretically it would be possible for the carriers to abandon their rate association procedures; to file each rate pro-

posal directly with the Commission, without prior notice to or consultation with shippers and carriers; and to let any shippers or carriers who might be adversely affected have their day in court before the Commission. For Section 6(3) of the Interstate Commerce Act provides that a rate proposal when filed may not, without special permission of the Commission, take effect for 30 days, and within that time any shipper or carrier may protest the proposal. In case of such protest, or upon its own initiative, the Commission may suspend the proposal pending an investigation and a hearing concerning its lawfulness (Section 15(7)). Why, then, the need of private rate conferences?

1. *Reasons Assigned by the Defendants for the Maintenance of Their Territorial Associations*

(a) *Avoidance of Delays Before the Commission*

The defendants asserted that it would be quite impractical to thrust the whole burden on the Commission.

Franklin of the Pennsylvania, for example, testified that "it would take time, delay and hold up rate adjustments to take all such matters to the Commission in the first instance, and it would so increase the business of the Commission that in all probability its dockets would be clogged."[33] The Interstate Commerce Commission has been conscious of its own administrative problems in the handling of rate adjustments. Thus the Commission said in its annual report for 1939:

> "Our procedure is in some respects slower and more cumbersome than we would like. In the exercise of the administrative process we are bound by the law of the land. We have learned by experience, as a result of many court reviews of our decisions, that we must exercise great care in the making of records and in the drafting of our reports. Those who seek reductions in railroad rates, however, have suffered much more severely from delays than have the railroads when seek-

[33] X, 3204.

ing increases. The latter proceedings have been expedited at the expense of other work, and have been heard and decided as rapidly as their complexity and importance would permit."

(b) *Avoidance of Expense to Shippers*

Tilford of the Louisville & Nashville stressed the difficulties which shippers would face if rate conferences were done away with, saying:[34]

"If each railroad acted individually and the first notice a shipper would have of a contemplated change would be the filing of a rate schedule, the shipper would be at a great disadvantage. The natural thing for him to do would be to protest and investigate after the suspension. This would undoubtedly result in a large increase in suspension cases, with considerable increase in expense to the shippers, the railroads, and the Government, and more important, perhaps, would delay adjustments in rates needed to meet the changing conditions of trade and commerce.

"The shipper would have to prepare his case very carefully and, perhaps, would have to employ counsel, prepare exhibits, briefs, and so forth. Under the present procedure the shipper can present his views and arguments informally to the railroad representatives, either by letter or in conference, and in most cases the alleged maladjustment is corrected to the satisfaction of all concerned.

"In 1941, the Louisville & Nashville Railroad Company participated in thirty-five cases of all kinds, complaints, investigations and suspension dockets, and so forth, before the Interstate Commerce Commission, and, in twenty-two cases before the several State Commissions.

"Considering the size of the Louisville & Nashville Railroad, and its importance from the standpoint of

[34] VI, 1749-1750. To the same general effect, the Interstate Commerce Commission said in its Fifteenth Annual Report (for the year 1901) at p. 16: "* * * In justice to all parties we ought probably to add that it is difficult to see how our interstate railways could be operated, with due regard to the interests of the shipper and the railway, without concerted action of the kind afforded through these associations."

the traffic it handles I think those figures show that rate litigation has been reduced to a minimum and that the rate conference procedure is reasonably satisfactory."

As described at pp. 248-252 *infra*, in 1920 the railroads and the National Industrial Traffic League, the largest and most representative organization of shippers, entered into an agreement designed to give shippers full information about rate proposals and a chance to be heard thereon before the proposals are filed with the Commission. This agreement is built around, and is dependent upon, the existence of the defendants' territorial rate associations.

(c) *Facilitation of Clearance with Connecting Carriers*

Oliver of the Southern Railway drew attention to the value of the rate conferences in expediting the task of clearing proposed joint through rates with all connections of the proponent line—a task which in any event would have to be performed in advance of filing with the Commission. He said:[35]

> "Were it not for this machinery we would be compelled to have individual conferences with each and every one of our connections, thus making the proposal of authorizing a new freight rate or effectuating a change in an existing freight rate so cumbersome and long drawn-out as to be unworkable.
>
> "I can visualize dozens of conferences that would be necessary. That would consume interminable time and expense and, after all, after all that procedure the interested shipping interests would not be advised and they should certainly have the opportunity of expressing their views to all of the interested lines with which it would be necessary for us to confer."

(d) *Facilitation of Discharge of Railroads' Duty to Establish Just and Reasonable Rates*

The defendants contended that their rate associations were necessary to enable them to discharge their obliga-

[35] IX. 2585.

tions under various Sections of the Interstate Commerce Act, such as 1, 3 and 4.[36]

Section 1(4) provides that "it shall be the duty" of each carrier to establish "reasonable through routes . . . and just and reasonable rates" applicable thereto. Section 1(5) provides that all charges made for any service "shall be just and reasonable." Section 1(6) says that "it is hereby made the duty" of the carriers to establish and observe "just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed . . . "

Section 3, the basic anti-discrimination section, in paragraph (1) prohibits the giving of "any undue or unreasonable preference or advantage" or the causing of "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" to any person, locality, region, etc.; and in paragraph (4) forbids carriers to "discriminate in their rates, fares and charges between connecting lines."

Section 4, the long-and-short-haul clause, forbids any carrier, without special permission from the I.C.C., "to charge or receive any greater compensation . . . for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance . . ."

Finally, the defendants argued that the railroads' duty to establish non-discriminatory and otherwise lawful rates

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[36] With regard to the railroads' duties in rate-making, the defendants cited numerous decisions of the Commission which need not here be analyzed, at VII, 2032-2047. These decisions are from 1922 on. It may be worth noting, in addition, the following statement from the Commission's Twelfth Annual Report (for the year 1898) at p. 15: "It is extremely difficult to see how carriers can intelligently adjust their rates so as to fulfill the general requirements of the act without the right to organize in some form for the purpose of obtaining necessary information and applying that information as occasion requires. To one familiar with actual conditions it seems practically out of the question to establish rates that are relatively just without conference and agreement."

applied even when the rates fell within the so-called "zone of reasonableness." This is a zone between maxima and minima within which ordinarily any rate fixed by a carrier may not be disturbed as unreasonable. Thus in the instant case this Court said (324 U. S. 439, at 460):

> "* * * Thus a 'zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.' *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone."

In reliance upon this passage Georgia seems at times to have suggested that within the zone of reasonableness there could be no legitimate occasion for organized consultation about proposed rate adjustments. To rebut this suggestion the defendants cited authorities to show that the freedom of carriers to initiate adjustments within the zone of reasonableness is always limited by the requirement that the adjustments shall not be discriminatory or otherwise unlawful under the Interstate Commerce Act. Thus the Court in its recent decision in *New York* v. *United States*, 331 U. S. 284, 344, 345, said:

> "The Commission may remove a discrimination effected by rates even when they are within the zone of reasonableness, if the discrimination is forbidden by § 3(1). As Mr. Justice Brandeis stated in *United States* v. *Illinois Central R. Co.*, supra, p. 524, the mere fact that one rate is 'inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.' The Com-

mission has the power to adjust the rates, upwards and downwards, within that zone, in order to eradicate the discrimination."

And in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, at p. 685, the Court said:

"But this does not constitute a finding that the rates were lawful; they 'may lie within the zone of reasonableness and yet result in undue prejudice' or otherwise violate the Act." [37]

The Interstate Commerce Commission has held that even though a reduced rate is compensatory to a proponent carrier, and therefore not below a reasonable minimum as to it, the rate may be unreasonably low because it has the effect of disturbing or disrupting an existing rate structure.[38] The Court upheld this principle in *Youngstown Sheet and Tube Co.* v. *United States*, 295 U. S. 476.

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[37] Similarly, in *Limerock from Sugar Factory, Utah to Idaho*, 231 I.C.C. 278 (1938) the Commission said at p. 281: "Carriers have a right to initiate rates within the zone of reasonableness that will enable them to obtain or retain desired traffic over their own lines, *Texas & P. Ry. Co.* v. *United States*, 289 U.S. 627, 636, subject, of course, to the condition that no other provision of the law is violated."

Commissioner Aitchison of the Interstate Commerce Commission made the following statements in *Hearings Before the Committee on Interstate Commerce, United States Senate, Seventy-ninth Congress, Second Session, on H. R. 2536, pp. 1190-1192:*

"Every major amendment to the act, and there have been at least 40 of them, and the innumerable cumulating orders of the Commission, as expressed in approximately 300 volumes of its reports, have progressively narrowed the so-called zone of assumed freedom of the carriers in the making of their rates."

* * * * * * *

"As to many important rate adjustments there is no such zone at all, and if for competitive reasons the carrier depresses a rate so that it causes undue preference or otherwise violates any provision of the Interstate Commerce Act, that action is unlawful, may be vitiated by the Commission, and may subject the carrier to damages."

[38] In *Sugar from New Orleans to Arkansas*, 243 I.C.C. 703 (1941) the Commission found a proposed rate unlawful because "below a

With reference to both the free play of competitive forces and the zone of reasonableness, Franklin of the Pennsylvania testified as follows:[39]

> "If the only requirements of the Interstate Commerce Act were that the rates should not be in excess of reasonable maximums fixed by the Commission, and if all the rates below that level were lawful, irrespective of their relationship, then, conceivably, the free play of competition between carriers and shippers might result in lawful rates.
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> "The Act, however, requires much more than that.
>
> "The Act does not merely require that rates shall be at or below the level fixed by the Commission and the reasonable maximum, but also requires that rates which are below that level shall conform to relationships or patterns established or approved by the Commission to avoid various kinds of discrimination.
>
> "Unrestricted competition between carriers and shippers for business could never possibly result in establishing rates which would conform to such patterns. That relationship has to be established by conscious, deliberate efforts to comply with the Commission's principles and policies to the satisfaction of all concerned as worked out through the conference method, or else it calls for a litigated controversy before the Commission."

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minimum reasonably related to the present rates from the same origins to other destinations in the same general territory" (p. 708). A similar result was reached with respect to proposed coal rates in *Coal from Indiana to Illinois*, 200 I.C.C. 609 (1934). In *Salt Cases of 1923*, 92 I.C.C. 388, 411 (1924) the Commission brought out the interplay between particular rates and the rate structure, saying: "The low rates from Louisiana have been far reaching in their consequences. Retaliatory reductions have been established from other fields, and the truce in the salt rate war which now exists is due almost entirely to the fact that these proceedings are pending. The rates from all of the fields to certain highly competitive points, such as Chicago and St. Louis, have reached so low a level that many shippers are asking that the rate level be raised in order that the revenue may be sufficient to make the tonnage attractive to the carriers, and in order that the service may be improved. This needed readjustment can not be made effective by the carriers serving the Kansas, Michigan, or New York fields unless the rates from Louisiana are increased."

[39] X, 3206-7.

(e) *Avoidance of Liability for Damages*

The defendants argued that if in a given case they established rates which did not meet the standards laid down by the Act, they would subject themselves to the possibility of damages for rates which the Commission might find, after the rates had been effectuated, to be unreasonable or unjustly or unduly discriminatory or preferential. Thus Section 8 of the Interstate Commerce Act provides that a carrier which either does or fails to do anything forbidden or required by the Act "shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation", together with attorneys' fees. A carrier may therefore be liable for changing a rate in such a way that the new rate violates the provisions of the Act. *Baer Bros.* v. *Denver & R. G. R.R.*, 233 U. S. 479; *L. & N. R.R.* v. *Sloss-Sheffield Company*, 269 U. S. 217.

Moreover, Section 13 of the Act authorizes any person "complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Part, in contravention of the provisions thereof" to petition the Commission for relief; and Section 16(1) authorizes the Commission in such a proceeding to award damages. In *El Paso & S.W.R. Co.* v. *Arizona Corporation Commission*, 51 F. (2d) 573, 576, the Court said:

> "The Commission may, upon complaint of a shipper or upon its own motion, review the rate fixed by the carrier. If it finds the rate to be excessive, unjust, or unreasonable, it may then fix a just and reasonable rate to be charged in the future and order the carrier to pay the shipper as damages all moneys collected by the shipper under the unreasonable rate in excess of the rate the Commission finds would have been a reasonable rate during that period. This is a penalty on the carrier for disregarding its duty under the law and initiating an unreasonable rate."

The defendants also cited the statement by this Court in *Arizona Grocery Company* v. *A. T. & S. F. Ry. Co.*, 284

U. S. 370, 383, 384, that although the Interstate Commerce Act required carriers to file and publish rates, which thereby became the "legal rates, that is, those which must be charged to all shippers alike," the Act "did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." [49] In this same case, however, the Court held that where the I.C.C. exercises its statutory power to prescribe a specific rate or a maximum limit, a carrier cannot be accused of charging an unreasonably high rate if its published tariff conforms to the specific rate or does not exceed the prescribed maximum.

2. *Appraisal of the Foregoing Evidence*

The defendants' evidence was not controverted and it demonstrates the varied reasons why some form of organized rate conference in each major rate territory is a practical necessity.

II. *The History and Functions of the Defendants' Territorial Rate Associations*

A review of the evidence under this heading is essential to an understanding of the role played by the Association of American Railroads when it came to be organized in 1934. It is essential also to an understanding of Georgia's charges of coercion and discrimination, insofar as these

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[49] The I.C.C. on occasion avoids the effect of the *Arizona Grocery* decision by including the following statement in its findings:
"Rates and charges increased as herein permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370." E.g.: *Ex Parte No. 166*, 269 I.C.C. 33, 55 (1947).

charges are based upon the procedures and activities of the associations.

A. The History, in General, Down to World War I

Almost from the inception of the railroad industry attempts were made to stabilize rates by agreement in order to avoid rate wars and discriminations against competing shippers. When the Interstate Commerce Act was passed in 1887, there were in existence some eleven traffic associations covering substantially the whole competitive railway traffic of the United States.[41]

The first of these associations which succeeded in establishing itself on a large scale was the Southern Railway and Steamship Association, and it served as a model for the development of similar organizations in other parts of the country. The members of these associations agreed to observe the rates fixed by the associations, upon condition that each received a given proportion of traffic or a given proportion of all the members' earnings, regardless of the traffic actually carried or the amount actually earned by each particular road. These pooling arrangements constituted the heart of each association and the sanction for its rate decisions.[42]

Because of the tendency of the railroads, however, to take independent action in rate matters, rates were not successfully stabilized; rate wars were frequent; and discriminations between shippers continued to flourish. These conditions led to the passage of the Interstate Commerce Act in 1887.[43]

The Act did not, however, lessen the need which the railroads felt for some common understanding as to competitive charges, and consequently the associations continued in existence. Since the Act prohibited pooling provisions the associations adopted other forms of sanctions, chiefly

[41] 12th Annual Report of I.C.C., pp. 11, 12.
[42] Ibid at 12.
[43] Ibid at 12.

money penalties, for the enforcement of their agreements. The agreements were held illegal after the passage of the Sherman Act, in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 and in *United States* v. *Joint Traffic Association*, 171 U. S. 505. In the former case the Court, in spite of holding such agreements illegal, took note of their general ineffectiveness, observing at pp. 338, 339 that:

> "It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. Rate wars go on notwithstanding any agreement to the contrary, and the struggle for business among competing roads keeps on, and in the nature of things will keep on, any alleged agreement to the contrary notwithstanding, and it is only by the exercise of good sense and by the presence of a common interest that railroads, without entering into any affirmative agreement in regard thereto, will keep within the limit of exacting a fair and reasonable return for services rendered. These agreements have never been found really effectual for any extended period."

Similarly the Interstate Commerce Commission said of the *Joint Traffic Association* agreement:[44]

> "Manifestly, if the purposes of this association could have been carried out, its effect must have been to eliminate the factor of railway competition between its members in the matter of the rate as to all the traffic subject to its control. * * * As a matter of fact, the orders of this association in reference to rates, called recommendations in the agreement, were seldom enforced; for while the association was in all cases able to secure the publication of tariffs named by it, it was unable to secure the maintenance of those tariffs. Freight was habitually carried at less than the published tariff, and in making these cut rates each com-

[44] Ibid at 13.

pany acted independently and was therefore an independent competitor."

Following the above decisions the rate associations throughout the country removed from their agreements all penalties and compulsory provisions. A series of amendments to the Interstate Commerce Act, beginning with the Elkins Act in 1903, introduced more effective controls over secret rebates and open rate wars, and thus made easier the efforts of the associations to stabilize rates.[45]

In both Southern and Official Territory the basic structure and procedures of the associations, minus the compulsory features and penalties, remained as they had been virtually from the beginning, and they continued without major changes down to the period of Federal control in the first World War.

I shall now summarize in more detail the evidence relating to the development of the territorial associations, beginning first with those in Official Territory, and including the changes that took place during World War I, and afterwards.

B. *Official Territory Associations Down to the Period of Federal Control in World War I*

1. *The Development in Official Territory of Three Sub-Territorial Rate Associations (New England, Trunk Line and Central Freight)*

Historically, Official Territory grew up in the form of three more or less distinct sub-territories—New England, with its center in Boston; Trunk Line, with its center in New York City; and Central Freight Association, with its center in Chicago.[46] Railroad construction developed

[45] 17th Annual Report of I.C.C., p. 8.

[46] ". . . the territories composing official territory are: New England, lying east of the eastern State-line of New York, but including points in New York State served directly by New England railroads and certain others, which takes in practically all points east of the Hudson River; trunk-line territory, extending west-

separately in these sub-territories because of differences in resources, industrial growth, geographical characteristics and other factors.[47]

As the roads within each of the sub-territories reached their respective boundaries, junction was made through consolidation or otherwise with the other roads, and in this way certain east-west systems were formed between the Atlantic Seaboard and the Ohio and Mississippi Rivers. Those rivers served as natural barriers beyond which the Official Territory carriers did not build. Within each of the sub-territories there are still railroads which do not extend beyond its particular borders—for example, The Boston & Maine in New England, the Delaware & Hudson in Trunk Line Territory, and the Nickel Plate in Central Freight Association Territory.[48]

Separate rate associations grew up and presently exist in each of these sub-territories. They are voluntary, unincorporated organizations with a hierarchical structure of committees consisting of railroad officials in ascending

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wardly from New England and the Atlantic Ocean to a line drawn through Buffalo and Salamanca, New York, Warren, Oil City, Pittsburgh, and Washington, Pa., Wheeling, Parkersburg, Charleston and Gauley, W. Va.; and central-Illinois territories, which are west of that line." *Class Rate Investigation, 1939*, 262 I.C.C. 447, 516, note 19. Although the State of Illinois is within the boundaries of Central Freight Association Territory, historically it and certain adjacent areas have been regarded for some purposes as a separate rate territory known as "Illinois Territory." "Illinois Territory" includes the State of Illinois, the southern part of Wisconsin, Milwaukee, the southwest bank cities on the Mississippi in Iowa and Missouri, and the Chicago switching District in Indiana. The special characteristics of Illinois as a rate territory result from the facts that within Illinois a number of railroads whose lines extend north, south, east and west have terminals and exchange traffic, and that prior to the Interstate Commerce Act intrastate rates in Illinois were regulated by state authority. Raasch, Chairman of Illinois Freight Association, XVI, 5382-5394.

[47] Burgess, of the B. & O., former Chairman of the Trunk Line Association, XIII, 4029.

[48] Ibid, 4030-4032.

order of rank. The members are railroads operating in the particular sub-territory.

The record in this case contains no history of the New England Freight Association (whose present set-up is substantially like that of the others),[49] presumably because its operations were not immediately involved in any of the cases discussed by the plaintiff.[50] The associations in Trunk Line and Central Territories developed along parallel and similar lines.[51] For the foregoing reasons, and because Trunk Line Territory comprises the most powerful railroads and the most important markets in Official Territory, I shall concentrate almost entirely on the history and operations of the Trunk Line Association.

2. *The Trunk Line Association Prior to the Trans-Missouri and Joint Traffic Association Cases*

The first Trunk Line organization was created in 1885 by a contract between the New York Central, the Pennsylvania, the Baltimore & Ohio and four other railroads.[52]

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[49] Burgess testified: "In each sub-territory the organization of rate committees under each of the sub-territorial associations I have mentioned is substantially the same, any differences being due only to the volume of proposals to be handled." XIII, 4032.

[50] Mr. McGovern stated for Georgia (XIII, 4100) that "we have no particular interest in New England Freight Association. . . ."

[51] As appears from a comparison of the successive documents comprising ND-31 in Vol. L.

[52] The contract appears in Vol. L, ND-31, pp. 1 to 10. Earlier agreements dating from as far back as 1877, described by Burgess in XIII, 4061 to 4063, are not given textually in the record; they appear to have been simpler and more rudimentary in form and are not discussed here. There existed at one time, side by side with the Trunk Line Association, an organization known as the Middle States Freight Association. The *Trunk Line Association*, as originally set up, dealt with rate adjustments between (a) seaboard or interior points in Trunk Line Territory and the western termini of the Trunk Line railroads, and (b) points in Trunk Line Territory and points in other territories. The *Middle States Freight Association* dealt with rate adjustments within Trunk Line Territory east of the western termini of the Trunk Line roads (but not including New England Territory). Its history and functions were explained by Burgess in XIII, 4070 to 4072, 4080,

The Central Freight Association was established in 1887 and, as already stated, it followed the same pattern as that of the Trunk Line Association. The Trunk Line Association in turn derived many of its features from the Southern Railway and Steamship Association, which had been organized in 1875. The pooling of experience between South and North was facilitated by the fact that the first Commissioner under the Southern Railway and Steamship Association was also the first Commissioner under the Trunk Line Association agreement.[53]

It is true of all of the associations North and South that the set-ups were frequently revised either by amendments to existing agreements or by new agreements. Generally speaking, however, the basic features remained the same and no attempt will be made to trace all of the changes which were made from time to time.

In the case of the Trunk Line Association I shall begin with the Articles of Association of February 20, 1889 because they bring out most clearly the nature of the organization as it was after pooling had been eliminated by the passage of the Interstate Commerce Act and before all the obligatory features were eliminated as a result of the *Trans-Missouri* and *Joint Traffic Association* cases.[54]

The purposes of this Association were stated to be as follows:

> "Whereas, Past experience has fully established the fact that the joint action of railroad companies is necessary to establish and maintain reasonable and just transportation tariffs on freight and passenger traffic; and
>
> "Whereas, Such joint action is also necessary to

4081; the documents are in Vol. L, ND-31, pp. 40 to 65. Since it did not survive the period of Federal control in the first World War, no account of it is given in this report.

[53] Kerr, IV, 1170; Vol N, SD-2, Part II (copy of a circular letter written by Fink in 1876, describing the purposes of the Southern Railway and Steamship Association); Vol. L, ND-31, p. 10.

[54] What follows is taken from Vol. L, ND-31, pp. 21 to 35, containing the full text of the agreement.

avoid unjust discrimination in transportation charges, in conformity with the requirements of the Interstate Commerce law . . ."

Two main features characterized the agreement:

1. A series of hierarchical committees to deal with rate proposals; and

2. Compulsive powers at the top.

As has already been indicated, after the *Trans-Missouri* and *Joint Traffic Association* cases, the second of these features was eliminated while the first was retained.

The committees consisted, in ascending rank, of General Freight Agents, Traffic Managers, Traffic Executives (Vice Presidents) and Chief Executives (Presidents). Regarding the rationale of these committees, whose evolution in the South followed the same lines as in the North, Kerr testified:[55]

"In a general way, the organization . . . follows that of any large railroad. With the average large railroad we generally find a vice president in charge of traffic. He is the policy-making man, so far as the traffic department is concerned. He usually has jurisdiction over passenger matters and freight matters of various kinds.

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"Under the vice president in charge of traffic, we usually find a group of officers known as freight traffic managers, or assistant freight traffic managers, and, under them, general freight agents or assistant general freight agents.

* * * * * * *

"Generally speaking, a proposal to change rates on any kind of commodity originates with the general

[55] Kerr, chairman of the Southern Freight Association, began his career with the Louisville & Nashville Railroad in 1903 (IV, 1130, 1131). The testimony quoted is from IV, 1192 to 1194.

freight agent or assistant general freight agent, or sometimes further down the line. If he is in doubt as to what to do, he would ordinarily confer with a superior officer, and in this case it might be the freight traffic manager or the assistant freight traffic manager, or, if one of those should be in doubt, they would confer with the vice president in charge of traffic.

"Stated a slightly different way, the freight traffic manager or the assistant freight traffic manager would usually have authority on an individual railroad to review and overrule, if necessary, the actions of the general freight agent or the assistant general freight agent and, in like manner, a vice president in charge of traffic, could review and possibly overturn the actions of the freight traffic managers or of the assistant freight traffic managers."

The organization of the rate associations North and South settled into this form of structure, paralleling the officialdom of the individual railroads; and the committees consisted of representatives of each member railroad of the rank appropriate to the committee. Normally rate proposals would start at the bottom, and if not finally disposed of there, they would go to the next highest committee by a process of appeal, and so on; the proposals requiring action by the higher committees becoming progressively fewer as they neared the top.

In the Trunk Line Association Articles of 1889, which we are here describing, control functions were vested in a *Commissioner* appointed by the railroad Presidents and in a Board of Arbitration. The Commissioner acted as Chairman of the Executive Committee, which was a committee of the Vice-Presidents of each of the member roads; like each of the other committees each road was represented on it, and it was called "Executive" only because it consisted of the chief executive officers in charge of rate matters—a terminology peculiar to the railroad world.[56] If the Execu-

[56] See Kerr, IV, 1195.

tive Committee could not unanimously agree upon a particular proposal the Commissioner was authorized to decide the matter; but any member could appeal from that decision to the Board of Presidents, the Commissioner's decision meanwhile being effective. If the Board of Presidents could not agree, the case would go to arbitration. The Commissioner was to be the arbitrator unless any member demanded a board of three arbitrators, in which case the two others would be appointed by the Presidents, or if they could not agree, by the Commissioner himself. The decision of the Commissioner, or of a majority in the case of three arbitrators, was to be final and binding upon all the members.

No sanctions in the way of money penalties were contained in these Articles and, as has been noted, the deprivation of pooling privileges could no longer be invoked as a sanction because of the prohibition of pooling by the Interstate Commerce Act. Chief reliance for enforcement seems to have been placed on the terms of the agreement itself, with its provisions for final decisions by the respective committees or by the Commissioner, or by the arbitrator or arbitrators, as the case might be. There were also provisions that in the case of a violation the Commissioner would take the matter up directly with the company concerned, and if necessary, with its president, and with the Chairman of the Board of Presidents, and the latter could then be convened to take appropriate action. What that action might be was not spelled out but there was a provision that the complaining company and other interested carriers would have the right, upon a very short notice served on the Commissioner and without awaiting the results of his investigation, to reduce rates in order "to meet the reductions made by competing companies either openly or by secret devices." Finally there were provisions binding each company not to take independent action and not to permit any connecting road to act in any way contrary to the agreement.

Because of the division of Official Territory into three sub-territories, of which the Trunk Line Association was one, it was necessary to provide some machinery for the adjustment of rates and other matters with companies "whose roads connect with the Trunk Lines at their eastern and western termini, and with other transportation lines with which they have traffic arrangements . . ." To this end the Articles established a Joint Committee consisting of the members of the Trunk Line Association and the members of the Central Freight Association, under the chairmanship of the Trunk Line Commissioner. It was made the duty of this Joint Committee "to establish joint freight and passenger tariffs and to agree upon the classification and other regulations governing said tariffs; to determine divisions of through rates and fares in order that they may be uniform, and to make such other rules and regulations as are necessary to secure the objects herein set forth." This Joint Committee was the forerunner of the somewhat more elaborate machinery for adjusting differences between the subdivisions of Official Territory which now prevails and which will be described later.

Other provisions of the Articles of Association of 1889, which need only be mentioned because they did not have to do with rates, were provisions for the filing of statistics and the establishment of inspection bureaus "to weigh freight, correct underbilling, and to inspect and correct rates and classification."

3. *The Effect of the Trans-Missouri and Joint Traffic Association Decisions on the Trunk Line Association*

Following these decisions, the Articles of the Trunk Line Association were completely revised as of January 1, 1899. The revision took the form of the wholesale elimination of all provisions in the 1889 Articles, summarized above, which had anything to do with compulsion or obligation.[57]

[57] The text of the Articles of 1899 are contained in Vol. L, ND-31, pp. 37 to 39.

The Board of Presidents was no longer referred to as a Board but simply as a meeting of the Presidents, and no functions were assigned to them except to exchange views "upon subjects which may be of mutual interest", and to appoint a Commissioner and an Executive Committee of Vice-Presidents. No functions were assigned to the Commissioner except to act as executive officer of the Association and to "perform such other duties as may be assigned to him." The Executive Committee was given no specific functions except to appoint subordinate Freight and Passenger committees, and the functions of these committees were in turn not spelled out. There were the same provisions as before relating to statistics and inspection bureaus and the filing of published tariffs.[58]

As indicated above, these revised Articles, stripped of all compulsory and obligatory features, gave on their face no inkling of the structure and procedure of the committees, nor was there even a hint that these committees should deal in a recommendatory way with rate proposals. Mr. Burgess, however, a Vice-President of the Baltimore & Ohio Rail-

[58] The Articles of the Central Freight Association, revised as of November 15, 1898, in addition to removing all compulsory features, contained an explicit clause that "nothing herein contained shall be so construed as to confer on the majority or any number of members of the Association the power to make rates for any member, but as regards the fixing, maintenance and changing of rates and the relations of the members as common carriers to the public, each member reserves to itself the right at all times to take separate and independent action." The text of the Articles is in Vol. L, ND-31, pp. 82 to 89. The quoted portion is at p. 83. The Articles were considerably more detailed than those in Trunk Line Territory, providing among other things for the establishment of a weighing and inspection bureau, a classification committee, a standing audit committee, etc. Comparable provisions were contained in the Trunk Line Articles but in barest skeleton form. The stated purposes of the two were the same, namely, to interchange information regarding tariffs, classifications, rules and regulations, to compile statistics, to maintain inspection agencies and to aid in securing compliance with Federal and State laws.

road Company and a former Chairman of the Trunk Line Association, testified in the instant case that:[59]

> "The whole purpose of the '99 Articles was not to change the organization.
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> * * * * * * *
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> "It was merely to delete what the United States Supreme Court had found objectionable in the former Articles, leaving the machinery, the committee set-up, as it was beforehand, and that is the intendment, in my judgment, of Article III where it recites that these committees, the Freight Committee and the Passenger Committee, shall meet and consider matters."

He noted that the declared purposes of the Association included "interchanging opinions and information in regard to the tariffs, classification and rules . . ."[60] And while the revised Articles were silent on the question of submitting proposed rate changes for consideration by the committees and placed no restraints on the individual roads, the earlier practices continued. Burgess testified:[61]

> "Now, the committees continued to function. That is, there were committees and conferences under that general rule which I just—under the authority or contemplation of that general rule of Article III; those committees functioned all through that period just as they do today, but they did so without any restraint or restriction in the Articles. That was significantly left out."

As to the basis of his knowledge Burgess stated:[62]

> "My personal recollection does not go back to 1899, but it does go back a little and goes back to a point a little prior to World War I, and I have talked to many Traffic Officers who were participants under this pro-

[59] XIII, 4239.
[60] XIII, 4211.
[61] XIII, 4213.
[62] XIII, 4242, 4243.

cedure, that is, the committee procedure, and the committee organization did obtain, and that is the manner in which proposals were handled."

The revised Articles and the practices of the member roads thereunder continued unchanged up to the period of Federal control in the first World War.[63]

C. *The Period of Federal Control During the First World War.*

During the first World War all the rate associations throughout the country were supplanted by territorial passenger and freight committees established by the United States Railroad Administration. Later the Administration set up in place of these committees a national organization of carrier and shipper representatives.[64]

The period of Federal control ended on March 1, 1920. For several months prior thereto traffic executives of the Eastern, Western and Southern railroads were active in shaping plans for territorial rate associations to be set up as soon as the Federal control was over. In the end it was concluded that the roads in each rate territory would establish their own organization in their own way.[65] As one of the Northern railroad executives explained in his testimony, the system established during the war "was very different from anything that had previously existed and was different from what would be appropriate to continue during peacetimes, so it was very necessary, after Federal control had ended, for the railroads to revise the special committee machinery in effect during Federal control . . . they just could not automatically go ahead from Federal control into peacetimes with what they had under Federal control. . . ."[66]

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[63] XIII, 4205.
[64] Vol. L, ND-31, pp. 98 to 114; and Burgess, XIII, 4077, 4078.
[65] Burgess, XIII, 4079, 4080; Vol. L, ND-31, pp. 114 to 120.
[66] Burgess, XIII, 4244.

In the upshot territorial associations were formed during 1920 which were substantially like those that had existed prior to Federal control, though more elaborate in structure.

D. *The Agreement Between the Railroads and the N. I. T. League, and the Consequent Participation of Shippers in the Consideration of Rate Proposals*

As noted above, representatives of shippers were included on the Federal committees during the war. The effect of this innovation on the rate association set-up after the war was thus described by Burgess:[67]

> "Prior to government control it was not customary that there be public hearings in connection with railroad rate matters. The inclusion of shipper representatives on the rate committees during the period of federal control had demonstrated that closer cooperation between carriers and shipping public was desirable. The question arose, therefore, as to just how this desirable feature might be continued. The shippers were not prepared to have representatives paid by them participate in continuous session with the railroads, and after long and careful consideration, it was decided that the most advantageous results could be obtained through cooperation with the National Industrial Traffic League."

The National Industrial Traffic League is, as described by Kerr. "an organization of industrial traffic managers representing Chambers of Commerce, Boards of Trade, and numerous industries throughout the United States. It is strictly a shippers' organization."[68] The League made an agreement in the Fall of 1920 with the traffic executives of the railroads in Official, Southern and Western Territories "for the purpose of overcoming difficulties then experienced by shippers because of lack of knowledge

[67] XIII, 4084.
[68] IV, 1224.

as to proposed changes in rates, classification ratings, etc., until published in the tariffs or the classification." [69]

The agreement in its present form provides that with some minor exceptions of a local nature which need not here be noted "proposals for all changes in rates, rules or regulations will be placed on the Public Docket . . ."; that "changes requested by shippers will be promptly docketed with the proper rate committee by the carrier and effort will be made by the railroad rate committees to expedite action thereon . . ."; that "the carriers upon specific request will undertake to furnish shippers with reasons for refusal to accede to proposals for rate changes proposed by them" (the shippers); that as to changes proposed by carriers "the railroad representatives serving on the railroad rate committees will, upon specific request of shippers, state the ground upon which changes are justified"; and that publication of changes objected to by shippers will upon request, after notice to the chairman of the particular rate committee that a conference is desired, be delayed until the shippers' representatives have had an opportunity to confer with the appropriate railroad executives.

By this agreement the nationally organized shipping interests indicated their acceptance of the railroad rate associations as useful institutions by means of which the shippers could be kept informed of proposed rate changes and could be given an opportunity to express their views in connection with proposed changes. In 1939 the Executive Secretary of the League wrote to the members that:[69a]

> "The agreement on the whole has worked out successfully. There have been comparatively few complaints of violations . . . and most cases presented

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[69] The quoted passage is from a letter to the members of the League by its executive secretary, dated November 3, 1939, enclosing a copy of a revised agreement between the League and the railroads, dated November 1, 1939. These documents are in Vol. N, SD-4.

[69a] Vol. N, SD-4, supra, note 69.

were either the result of a misunderstanding of the terms of the agreement, or else its provisions were entirely overlooked. . . ."

In Official Territory Burgess testified[70] that under the agreement a so-called "Docket Bulletin" is sent out by the Trunk Line Association periodically "to a long list of Chambers of Commerce, trade organizations, and commercial bodies representing shippers throughout the territory. In addition, a copy of every Docket Bulletin is mailed to the 'Traffic World' for publication, at railroad expense, in columns provided for that purpose in its weekly issues. . . . The Traffic World is a publication, or a magazine, published by a private or non-railroad publishing company in Chicago, Illinois. As its name implies, it is a publication devoted to the interests of all kinds of transportation and of the traffic handled by the various transportation agencies. It has a wide circulation among all transportation agencies, a very wide circulation, and with industrial and commercial organizations and shippers."

To the same general effect Kerr testified that the Southern Freight Association sends to the Traffic World each week the proposals requiring public docketing under the agreement and, in addition, the Association prepares its own weekly docket and status report in mimeographed form, which it distributes upon request to various organizations and traffic associations throughout the country.[71] He stated that shippers through their traffic managers and organizations keep "in very active touch with the public dockets that we issue and advertise. . . . Most of them very frequently appear before our Standing Rate Committee to present their views for or against any proposal. . . . When these shipper-appearances are made before our Standing Rate Committee, stenographic notes are made, and transcripts of those notes are immediately distributed

[70] XIII, 4093, 4094.
[71] IV, 1233.

to member lines in order that they may be fully informed of the views of shippers. . . ." [72]

Kerr further testified that the Southern Freight Association would "frequently receive a request from a single shipper or a small group of shippers for a conference, say, with the members of our Executive Committee" [73] (Kerr was here referring to the Southern Freight Association Executive Committee, the body next above the General Freight Committee in the hierarchy of the Southern rate associations). In such instances, where the request was from only a single shipper or a small group, Kerr testified that:[74]

> "We make it an effort, if the conference is arranged as it usually is, we make it an effort to invite every shipper of record that we think is interested in that particular rate proposal; we invite him to attend and participate in discussion."
>
> • • • • •
>
> "We very frequently find groups of shippers that are bitterly opposed to the views of each other, and we make it an effort, and I think other organizations throughout the country do the same thing, to get them all there and state their views in the presence of each other, and not have a one-sided presentation.
>
> "I might add there, too, Mr. Swiggart, that a part of my task as Chairman at these, what we call, public conferences between shippers and railroads, is to assist in developing all of the views, both pro and con, particularly respecting those shippers who may not be well versed in freight rate construction.
>
> "The whole purpose of the conference is to develop all the views that anyone may have to the end that the individual members may have all the facts before them and reach an intelligent or fair conclusion, so far as they are concerned as individuals."

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[72] IV, 1229, 1230.
[73] IV, 1209.
[74] IV, 1210, 1211.

As will be shown later, instances occur in which railroads, in emergency cases, proceed directly with rate proposals without filing them with the appropriate rate association. Such instances appear to be technically, at least, a violation of the N.I.T. League Agreement [75] although counsel for the defendants argued that the agreement carries an implied recognition of the right of independent action when deemed necessary by the carrier.[76] In any event, the utility of the agreement in keeping the shippers generally informed about rate proposals and giving them a chance to be heard is beyond question.

E. *Comparison of Rate Associations After the Period of Federal Control With Those Existing Before That Period.*

After the war the rules of procedure which were adopted in the subdivisions of Official Territory, and which for the purposes of this case I consider to have been from the beginning agreements,[77] described the committee set-up in

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[75] Oliver, a Vice-President of the Southern Railway Company, so regarded it (IX, 2688).

[76] See Final Brief of Northern Defendants, Vol. I, p. 287. Oliver thought that the "rule of reason" warranted the disregard of the strict letter of the agreement in emergency cases (IX, 2689).

[77] These rules of procedure are in ND-31, Vol. L, pp. 139-160. The rules of the Traffic Executive Association-Eastern Territory are captioned "Organization and Procedure of the Traffic Executive Association-Eastern Territory" (ND-31, Vol. L, p. 142). The basic documents in Trunk Line Association are captioned "Organization of Freight Committees" (ND-31, Vol. L, p. 150), and "Announcement of Procedure Respecting Proposals for Changes in Rates, Charges, Rules, Regulations or other Tariff Provisions" (ND-31, Vol. L, p. 156). In filing these documents with the Interstate Commerce Commission in 1943, under the regulations relating to Certificate No. 44 of the Chairman of the War Production Board, the respective Chairmen of the Association above mentioned stated as to each document (in reply to a request for a "copy of any agreement or other document which in any way provides for, governs, or affects such procedure"): "There is no agreement which provides for, governs or affects such procedure. *It was adopted by its members and has been revised by them as occasion has required.*" (ND-31, Vol. L, pp. 140, 145, em-

much more detail than had been true before the war. There was at least one new feature—the establishment of the *Traffic Executive Association-Eastern Territory*. This was an over-all appellate body composed of Vice-Presidents of the member roads, to which action upon rate proposals affecting the interests of carriers in two or more of the sub-territories could be appealed from the sub-territorial associations by carriers. A still later development was the establishment of the so-called "Buffalo Conference" of Official Territory lines. To this Conference disagreements between the sub-territorial associations about rate proposals could be referred by the associations.

In Southern Territory after the termination of Federal control a detailed three-level rate association structure was established in place of a rather loosely defined two-level structure. In 1938 a five-level structure was established.

All of these developments will be described later.

Georgia proposed a finding that after the *Trans-Missouri* and *Joint Traffic Association* cases and up to the period of Federal control the rate associations "enjoyed no authority affecting rates on freight traffic, except that in Southern Territory each member line of the Southern Association, if it deemed proper to do so, might suggest changes in its rates, rules and regulations to the Association for consideration and discussion prior to the effective date thereof."[78] In the case of Official Territory this finding rests on a statement by Burgess, former chairman of the Trunk Line Association, that the Articles of the Trunk Line Association prior to Federal control "did not provide for the rules of procedure of the designated committees."[79] I have

phasis added). I conclude from this, and on the basis of all the testimony about the rate associations, that the rules represent an agreed-upon method of procedure. This conclusion is not vitiated by the fact that the carriers frequently act independently. The agreed-upon rules themselves contain provisions for independent action, all of which is considered hereinafter.

[78] Proposed Finding of Fact No. 12, Final Brief, p. 214.

[79] Burgess, XIII, 4068.

set forth above at pp. 246, 247 Burgess's testimony to the effect that although there were no written rules of procedure covering the committees of the Trunk Line Association, these committees continued to function in rate matters as they had done from the beginning, prior to the *Trans-Missouri* and *Joint Traffic Association* cases, and "just as they do today . . ." [80] This testimony being uncontroverted, I find that the committees exercise the same general functions in rate matters as they did before the period of Federal control.

With regard to the alleged change in Southern Territory, Georgia relies upon a comparison of a provision about the filing of rates, contained in the Articles of the Southern Freight Association from 1906 to 1918, with a similar provision in the Articles adopted after the end of Federal control. The earlier provision stated that "whenever any member of this Association shall consider a change in its rates, rules or regulations, *it may, if it deems proper to do so,* suggest the same to said Conference Committee for consideration and discussion . . .", after which followed a clause to the effect that each member retained full liberty of independent action with regard to rates, *whether or not they were submitted to the committee.*[81] The later provision stated that "all proposals for changes in rates, rules and regulations made by member or other lines *shall be* addressed to the chairman, and copies in sufficient number furnished for distribution to member lines," after which there were provisions for the processing of the proposals in the appropriate committees.[82] This provision omitted the earlier phrase "may, if it deems proper to do so," but the

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[80] XIII, 4243.

[81] IV, 1182. (Emphasis added) Georgia also cited two other sections at pp. 1180 and 1181, emphasizing the right of independent action.

[82] Article VII (a) of the 1922 Articles, SD-2, Vol. N, Part X. (Emphasis added)

Articles contained as before a broad provision permitting independence of action, reading as follows:[83]

> "Each member line through its Chief Traffic Officer reserves the right to take separate and independent action with respect to any rate, rule or regulation that has been considered by the General Committee or that has been submitted by the Chairman in a mail proposal; or if any member line shall itself determine that any rate, rule or regulation it may believe necessary to establish *is of such emergency character as to demand immediate disposition it may give notice* through the Chairman to other member lines of its intention to establish such rate, rule or regulation, provided not less than ten (10) days notice shall be given before publication." (Emphasis added)

As will appear hereinafter the defendants' evidence shows that in actual practice the Southern railroads sometimes have not even waited the ten days but have proceeded to establish desired rate changes without filing them with the Association at all, and that the right thus to by-pass the Association procedure is well understood and accepted by all the railroads. I find that there was less textual emphasis on independence of action in the 1922 Articles than in the 1906 Articles but that the actual functions of the committees and the practices of the railroads with regard to them were substantially the same during the two periods in question.

The rate associations which emerged after the period of Federal control continued in both Official and Southern Territory down to the time of these proceedings substantially unchanged,[84] except for certain developments in 1938 which Georgia alleged, and the defendants denied, were brought about by pressure from the A.A.R. as a part of

[83] Ibid, Article VIII (a).

[84] As can be seen by a comparison of the documents in ND-31, Vol. L, for the Official Territory Associations, and SD-2, Vol. N, for the Southern Associations.

the conspiracy to control freight rates in the interests of the North. This controversy is reviewed hereinafter at pp. 341-387.

It would now seem appropriate to consider, against the background of the history previously sketched, the detailed structure and functioning of the territorial associations under the agreements in effect at the time of the hearings before me in this case.

F. *The Structure and Procedure of Rate Associations in Official Territory Under the Agreements in Effect at the Time of the Hearings Before the Special Master in this Case*

As already indicated, the distinguishing feature of Official Territory, as compared with Southern Territory, is that it consists of three sub-territorial associations and of over-all machinery for dealing with unsettled matters affecting two or more of the sub-territories. I shall therefore begin with the sub-territorial set-up and then consider the over-all machinery. In analyzing the sub-territorial set-up I shall, as heretofore, concentrate upon the Trunk Line Association as the most important of the three sub-territorial associations and as typical of the others.

Throughout this analysis all references will be to the structure and procedure of the associations under the agreements *in effect at the time of the hearings before me. I shall not be dealing with the new agreements which the defendants and other railroads recently submitted to the I.C.C. under Section 5(a) of the Interstate Commerce Act.* For convenience I shall describe the set-up in the present tense throughout this Section F; but it will be understood nevertheless that the description does not relate to the new agreements.

One preliminary general observation should be made. In Trunk Line Association procedure, as in all territorial rate association procedure North and South, the rules permit (in most instances expressly, in some by long-estab-

lished practice) any railroad to act independently in rate matters. The extent of independent action, its significance, and its bearing on the plaintiff's charges of coercion and discrimination, will be discussed after the procedural steps in both Official and Southern Territory have been described.

1. *The Trunk Line Association.*
   (a) *Initial Disposition of the Majority of Rate Proposals Through Technical Staff, Analysis and Approval by Correspondence.*

Except where a railroad publishes a rate independently without invoking any of the rate association procedures, all rate proposals are referred in the first instance to a so-called *Auxiliary Committee*. This Committee, according to Burgess,[85] "is not a committee of railroad representatives, but solely of association employees; . . . its sole and only function is to develop and study the facts of a proposal and give a report of its own recommendations to the lines represented on the committee. The report has no effect other than as information to the roads, and may be accepted, rejected or in any respect modified by the representatives of the lines which consider it either by mail or in meeting." The Committee's study is of a technical nature; it "makes a study and analysis of the tariff and other relevant facts, including decisions of the Interstate Commerce Commission which have a bearing upon the reasonableness and propriety of the proposed change, under the standards of the Interstate Commerce Act."[86]

When the report is ready a brief synopsis of the proposal (if it is of the sort which the N.I.T. League Agreement requires to be docketed) is listed in the "Docket Bulletin", copies of which are then distributed to shippers' organizations and to the "Traffic World" for publication, as already described.[87]

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[85] XIII, 4119, 4120.
[86] XIII, 4092.
[87] XIII, 4093.

Shippers and carriers are in general given twelve days within which to send their views to the Trunk Line Association office.[88] If at the end of the twelve days no written objection has been received from any shipper or from any member line, the Chairman of the Auxiliary Committee issues a notice that the proposal is satisfactory and will be published in tariff form. This is done without any committee action and solely as a result of correspondence.[89] Burgess testified that "on the whole, it is our experience in Official Territory that more than one-half of the proposals received are disposed of by mail without action at a meeting of any committee."[90]

Franklin, a Vice-President of the Pennsylvania Railroad Company, testified that during a three-months period in 1942, eighty per cent of the Pennsylvania's proposals were thus disposed of by correspondence without formal committee action, and that eighty-two per cent were thus disposed of during the same three-months period in 1945.[91]

(b) *Disposition of Remaining Proposals by Formal Committee Action.*

(i) *The General Freight Committee*

In the Trunk Line Association the minority of proposals which are not cleared by correspondence in the manner described above normally go first to the *General Freight Committee,* consisting of member lines' general traffic officers of the lowest grade, namely, general freight agents. On the same level with the General Freight Committee are three specialized committees of the same rank, dealing respectively with proposals affecting only the New York Harbor Lines, proposals coming from the Southern and Southwestern Territories, and proposals relating to coal

[88] XIII, 4094, 4095.
[89] XIII, 4095, 4096.
[90] XIII, 4097. At p. 4096 Burgess submitted some supporting statistics.
[91] XI, 3282, 3283.

and coke.[92] Since the great bulk of the proposals go to the General Freight Committee, and since the three specialized committees just mentioned operate in the same way and function on the same level as the General Freight Committee, only the latter committee will here be considered.

The General Freight Committee meets each month on regular days.[93] As in the case of the remaining committees, each member line is represented. The procedure is simple; "on the day of the meeting," said Burgess,[94] "any shipper asking to be heard is heard and the matter is fully discussed and considered, after which the views of the members are determined by their individual votes. Each line votes only for itself through its own representative attending the meeting, and whenever desired by anyone present, the vote is by ballot" (i.e., a secret ballot) "thereby enabling each member freely and without restraint to express his views."

(ii) *Appeals to the Freight Traffic Managers Committee; and the Appellate Procedure Generally*

The Freight Traffic Managers Committee, as the name implies, is a committee of member lines' general traffic officers of intermediate grade, called freight traffic managers.

Any member road may appeal to this Committee from the recommendations of the General Freight Committee.[95]

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[92] These committees are designated respectively the General Freight Conference-New York Harbor Lines; The Southern and Southwestern Freight Committee; and the Coal and Coke Committee. Burgess, XIII, 4120, 4121, 4265, 4266.

[93] XIII, 4145.

[94] XIII, 4098.

[95] One provision peculiar to the Trunk Line Association procedure and not found in the other subdivisions of Official Territory should here be noted. In addition to appeals from action by the General Freight Committee, the Auxiliary Committee itself has authority under the rules of procedure of the Trunk Line Association, where it regards action by the General Freight Committee as "detrimental to the carriers' interests as a whole" to ask the General Freight Com-

The Chairman of the General Freight Committee (a paid official without vote) may also appeal if he regards the action as "inimical to the best interests of the carriers as a whole." The Chairman of each Committee above the General Freight Committee has similar authority to appeal from action of his own Committee, and is similarly a paid official without vote. Wherever it is said hereinafter that an appeal may be taken from any committee, it is to be understood that the appeal may be taken either by a member road or by the Chairman. The appellate authority of the several Chairmen, which the testimony indicates is rarely exercised, is sharply criticized by Georgia and will be discussed more fully hereinafter (at pp. 548-555).

Of the proposals which are not approved by the Auxiliary Committee at the initial stage, all but a very small percentage are disposed of either in the General Freight Committee or the Freight Traffic Managers Committee. As already noted, Franklin of the Pennsylvania testified that during a three-months period in 1942, eighty per cent of the Pennsylvania's proposals in Trunk Line Territory were disposed of by correspondence at the Auxiliary Committee stage; he further testified that during the same period fifteen per cent were disposed of in the General Freight Committee and five per cent in the Freight Traffic Managers Committee. The corresponding figures for the same three-months period in 1945 were eigthy-two per cent, fourteen

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mittee to reconsider its action. The rule further provides that if after such reconsideration the General Freight Committee unanimously reaffirms its prior action, that action stands. If, however, the reconsideration results in divided views, the proposal automatically goes to the Freight Traffic Managers Committee for review (the Auxiliary Committee may similarly "up" a proposal from the New York Harbor Lines Committee or the Southern and Southwestern Committee which, as already noted, have functions parallel to those of the General Freight Committee). For the procedure see Burgess, XIII, 4121, 4122. Burgess testified that the provision was academic since it existed only in Trunk Line Territory and since the authority given to the Auxiliary Committee had never in practice been exercised so far as investigation could disclose. XIII, 4123, and on cross-examination, 4270.

per cent and four per cent respectively.[96] Thus, during these two periods no proposals had to go higher than the Freight Traffic Managers Committee.

(iii) *The Trunk Line Association Traffic Executive Committee.*

An appeal may go from the Freight Traffic Managers Committee to the Trunk Line Association Traffic Executive Committee, provided that the proposal is one which is of concern only to Trunk Line Association members.[97] If the proposal involves a "general basis"—that is to say, if it would directly or collaterally affect rates in one or another subdivision of Official Territory (New England or Central Freight Association)—the appeal would go not to the Trunk Line Association Traffic Executive Committee but to the *Traffic Executive Association-Eastern Territory.*

The only difference between these two committees is that the former consists of the vice-presidents of the member lines whose headquarters are in Trunk Line Territory, while the latter consists of the vice-presidents of all the member lines in all three subdivisions of Official Territory (the term "Eastern Territory" being synonymous in this instance with Official Territory).[98]

The more limited of these two committees rarely functions because almost all rate proposals involve a "general basis". Burgess explained the matter in this way:[99]

> "There are rates, there are commodities which are unique and separate and move only from or to one point in our territory. Offhand, I cannot think of them, but you asked me if I could conceive such a case, and I am answering that way; where there is a particular, special commodity that has no origin or destination in Central Territory but one exclusively

[96] XI, 3282, 3283.
[97] For the text see XIII, 4276.
[98] See generally Burgess, XIII, 4176, 4177, 4278, 4279.
[99] XIII, 4333, 4334, 4335.

in Trunk Line Territory. It may well be that a change in Trunk Line rates on that unique Trunk Line traffic would have no effect on or interest in other lines."

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"It could have more than one consuming point in Official Territory, but it would be a case where it had no consuming point or origin points in other territories or a case where there was no comparable commodity moving in other territories."

For practical purposes, therefore, the third stage of formal appellate procedure is in the Traffic Executive Association-Eastern Territory rather than in the Trunk Line Association Traffic Executive Committee.[1] This brings me to a consideration of those organizations, beginning with the Traffic Executive Association-Eastern Territory, which are made up of representatives of all the member lines in Official Territory and which operate over and above the sub-territorial organizations.

2. *Analysis of the Functions of the Over-All Rate Organizations in Official Territory.*

(a) *Traffic Executive Association-Eastern Territory.*

As indicated above, the Traffic Executive Association-Eastern Territory is made up of vice-presidents in charge of traffic. The membership is open to all of the members of the Trunk Line, New England and Central Freight Associations.

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[1] In the rare case of action by the Trunk Line Association Traffic Executive Committee, an appeal would lie to the Presidents Traffic Conference, Trunk Line Association. Burgess testified that this Presidents Traffic Conference for Trunk Line Territory only, "never had occasion to be called upon to consider anything during the four years I was in office" (XIII, 4279). All that has been said above regarding the Trunk Line Association Traffic Executive Committee is equally applicable to the Executive Committees of the New England and Central Freight Associations; they, too, for practical purposes can be disregarded as appellate bodies since within those subdivisions, as within Trunk Line Territory, there are few proposals which do not involve a general basis.

Appeals lie to the Traffic Executive Association-Eastern Territory from the Freight Traffic Managers Committees of these Associations.[2] However, cases may also originate directly in the Traffic Executive Association-Eastern Territory in instances where, according to Burgess, "special circumstances in the judgment of a proponent make it desirable to bring his proposal in the first instance directly to the executives' docket. . . . A check of our records since January, 1942, shows that during that period there have been over 250 instances in which proponents initially docketed their proposals on the Traffic Executive Association docket without prior consideration by any subordinate committee."[3] (Testimony given on July 26, 1946.)

Testifying more generally with regard to the practice of docketing special cases directly with one of the higher committees, Burgess said:[4]

> "The point I wish to make is that committee procedure is not rigid or arbitrary.
>
> "Committee procedure is designed and practiced in such manner as experience shows will best expedite and facilitate the prompt determination of the views of the interested lines on each proposal as it arises. The existence of the committee procedure, and the existence of the different committees is simply in the interest of orderly and expeditious procedure. Their number is designed to divide work by arranging for the consideration of the proposals among the various grades of committees of Traffic Officers according to their grade of responsibility within the individual Traffic Departments.
>
> "However, where the lines have obtained sufficient information about a proposal, either from the Auxiliary Committee of the Association or through their own investigation and studies, to enable them to determine their views regarding it, there is no hesitancy on the part of a higher committee to receive and deal with the proposal initially and without prior action

[2] XIII, 4279 to 4281.
[3] XIII, 4132 to 4133.
[4] XIII, 4133 to 4134.

by the subordinate committee that, in the normal course, would regularly have first considered it.

"Theoretically, it might be thought desirable and time-saving to have all proposals initially considered and disposed of by the Traffic Executives, thereby finally determining them at one meeting. As a practical matter, this, of course, is impossible. Such a practice would require more than the entire time of the Traffic Executives, leaving them no opportunity to attend to other matters.

"There must be action by subordinate committees under the committee plan, just as there must be action on many traffic matters within a railroad's Traffic Department by subordinate Traffic Officers in that Department."

(b) *The Presidents' Traffic Conference.*

Appeals from the Traffic Executive Association-Eastern Territory may go to the Presidents' Traffic Conference, but according to Burgess:[5]

"Appeals of that character are very, very infrequent. * * * The reason for this is that when proposals have been considered by the Traffic Executive Association, it means that they have had the consideration of the highest traffic officer, generally the Traffic Vice President, of each of the interested railroads. By that time the position of each road is sufficiently formulated to make it unlikely that further review by the Presidents would change the result. It is, therefore, only proposals of unusual nature, involving far-reaching effects and policies, that are appealed to the Presidents for further consideration."

On cross-examination Burgess testified that the Presidents' Traffic Conference has been a "very, very inactive organization."[6] It met only once during the four years in which he was Chairman of the Traffic Executive Association-Eastern Territory, and "its meeting then was futile because the line whose action was up for review

[5] XIII, 4171, 4172.
[6] XIII, 4400.

went ahead and did as it had announced it was going to do."[7]

(c) *The Buffalo Conference of Freight Traffic Managers*

Up to this point we have seen that action on rate proposals may be appealed from the sub-territorial organizations of Freight Traffic Managers to the Traffic Executive Association-Eastern Territory (the Vice-Presidents) and that in very rare instances appeals may go to the Presidents' Traffic Conference. The procedure up to this point, therefore, is a simple progression (where appeals are taken) according to the rank of the respective officials, with the cases diminishing at each level and occasionally starting at a higher level for reasons of convenience.

We have now to consider the special functions assigned to a special conference of the Freight Traffic Managers of the lines in Official Territory, who meet periodically in Buffalo.[8] The official title of this conference is "The Joint Conference of Official Territory Lines", but it is often referred to as the "Buffalo Conference", and I shall so refer to it hereafter.

This Conference, according to Burgess, "is one of the later developments in our procedure brought about by the necessity for some means of ironing out disagreements that occurred and that do occur when matters are separately considered in the sub-territories."[9]

The normal jurisdiction of the Conference, apart from emergency proposals, is restricted to differences between the sub-territorial committees over rate proposals which

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[7] XIII, 4400. "Ordinarily, majority action is accepted as the action of the Presidents' Traffic Conference but the President of any line reserves the right of individual action following joint discussion of the question at issue." From letter dated November 30, 1937 written to Cleveland by the Chairman of the Traffic Executive Association-Eastern Territory describing the rate procedure in that Territory. S-489, XI, 3434.

[8] Burgess, XIII, 4161, 4303, 4304.

[9] XIII, 4313.

have a "general basis".[10] As previously stated, a proposal is called a "general basis proposal" if it would directly or collaterally affect rates in more than one of the territorial subdivisions of Official Territory; and all but a small fraction of proposals are of this sort.

Under paragraph 5 of the Rules of Procedure of the Buffalo Conference "no general basis shall be established" in any one of the sub-territories "unless concurred in" by the appropriate organizations of all three sub-territories. In case of a disagreement between the three, the proposal may be referred to the Buffalo Conference for disposition.[11] Reference to the Conference, however, may be made *only* by one of the sub-territorial committees after they have failed to agree; no proposal may be referred by an individual carrier.[12]

There is a somewhat complicated system of voting at the Buffalo Conference, which will be discussed later in connection with the handling of interterritorial rate proposals emanating from the South. Appeals may be taken from the Buffalo Conference to the Traffic Executive Association-Eastern Territory.[13]

The difference in function between the Buffalo Conference and the Traffic Executive Association-Eastern Territory now becomes apparent. The Buffalo Conference is a sort of *appellate court for the sub-territorial committees,* acting *only at the instance of one of the committees* on proposals affecting more than one sub-territory with regard to which the sub-territorial committees are not in agreement. The Traffic Executive Association-Eastern Territory, by contrast, acts on appeals brought by *individual roads* (or by committee chairmen) from action taken within some one of the sub-territorial organizations.

Thus the Buffalo Conference and the Traffic Executive

[10] Burgess XIII, 4299, citing the text of the provisions.
[11] The text of these provisions appears in XIII, 4299.
[12] Paragraph 4 of the Rules of Procedure, XIII, 4299.
[13] Burgess, XIII, 4305.

Association-Eastern Territory constitute separate but parallel appellate organizations, functioning in their respective fields immediately above the sub-territorial associations. They are, however, not completely parallel in the rate association hierarchy since, as already stated, appeals may be taken from the Buffalo Conference (consisting, as it does, of freight traffic managers) to the Traffic Executive Association-Eastern Territory (consisting, as it does, of vice-presidents).

It should perhaps be added for accuracy that while the two organizations in question are appellate organizations, they may also act upon proposals in the first instance. The practice of bringing proposals directly to the Traffic Executive Association-Eastern Territory where circumstances warrant has already been noted. With regard to the Buffalo Conference, Burgess (who refers to it in the passage below as the "Joint Conference") testified as follows:[14]

> "When sub-territorial disagreement occurs, then it is necessary to take the matter to Joint Conference, but as I said, under the last sentence of that subdivision 4,[15] the practice is that where there is any emergency or where the matter can be conveniently put on the Joint Conference docket initially, without being handled separately in the subdivision(s), it is put on the Joint Conference docket, or on the docket of the Joint Conference, and that is the tendency."

This completes the description of the present-day rate associations in Official Territory, and the nature of their operations. I shall introduce at this point two charts which may serve as a summary of the description given above.

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[14] XIII, 4303, 4304.

[15] Burgess is here referring to paragraph 4 of the Rules of Procedure of the Joint Conference, reading as follows: "All subjects referred to the Joint Conference shall come to it only from one of the territorial committees and not from individuals and then only after proposals have been considered by the interested territorial committees and they have failed to agree. This is not to be construed as precluding reference to the Joint Conference by any of the territorial committees of subjects which in their opinion require emergency consideration."

(Here Follow Charts 1 and 2)

CHART NO. 1

CHART OF OFFICIAL TERRITORY

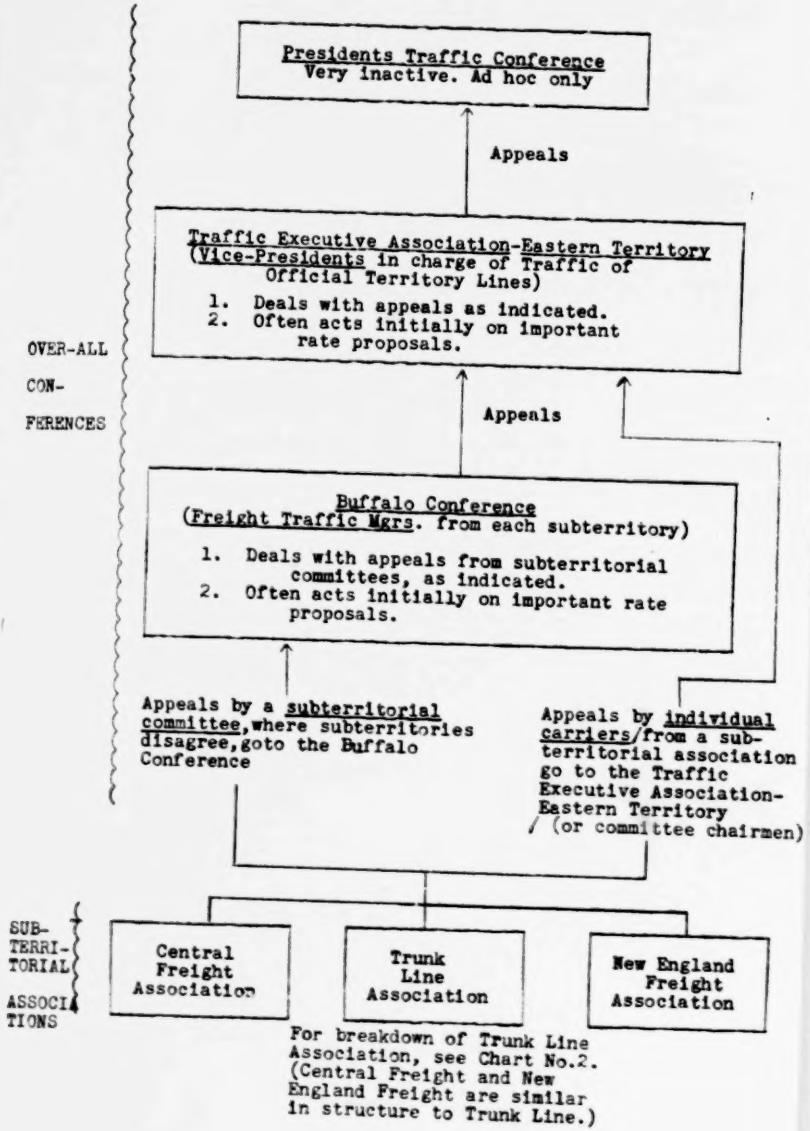
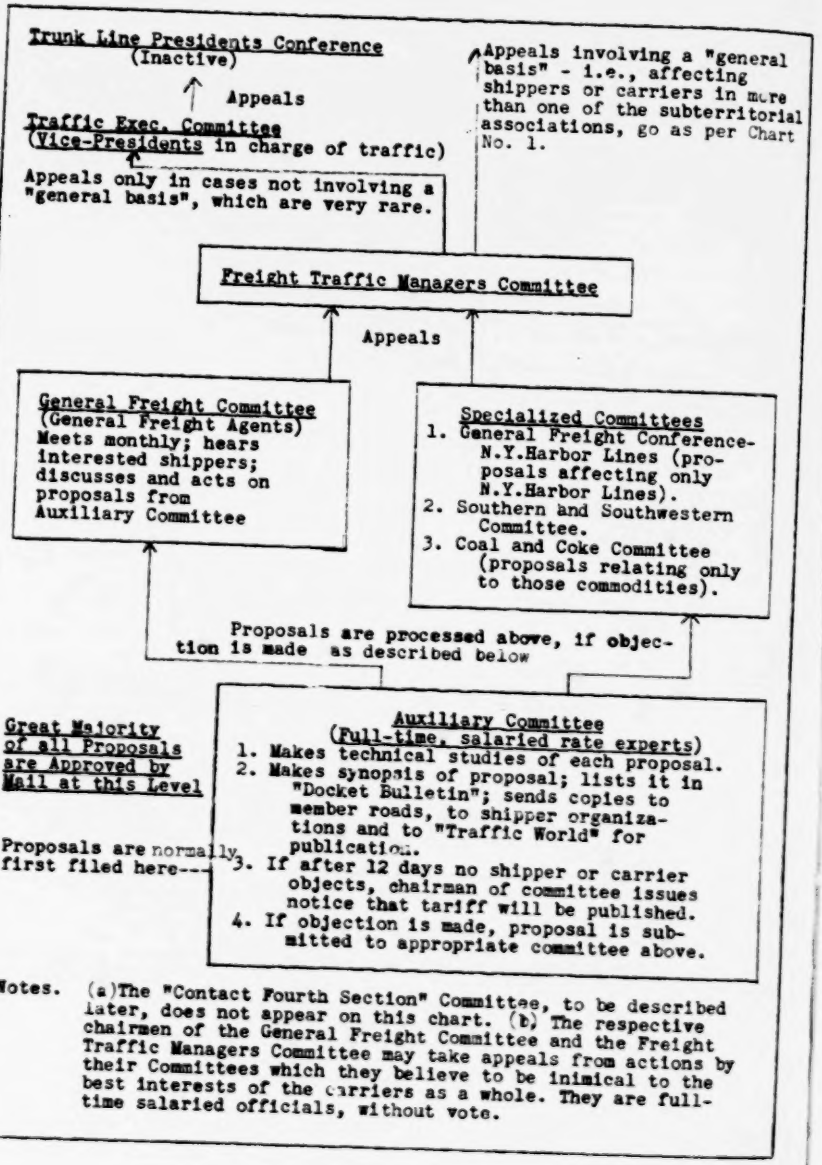


CHART NO. 2

TRUNK LINE ASSOCIATION



Notes. (a)The "Contact Fourth Section" Committee, to be described later, does not appear on this chart. (b) The respective chairmen of the General Freight Committee and the Freight Traffic Managers Committee may take appeals from actions by their Committees which they believe to be inimical to the best interests of the carriers as a whole. They are full-time salaried officials, without vote.

G. *Development of the Southern Territory Associations Down to the Period of Federal Control in World War I*

1. *The Development Prior to the Trans-Missouri and Joint Traffic Association Cases.*

The history of the rate associations in Southern Territory has been simpler than in Official Territory because the South grew up as a single territory whereas Official Territory has always comprised three sub-territories, each with its own history and separate bureaus, as already described.

Kerr, the present Chairman of the Southern Freight Association, described at length the historical development in the South, and what follows will be taken chiefly from his testimony. The first rate organization in the South was the Southern Railway & Steamship Association, established in 1875.[16]

As in the North, the establishment of rate associations grew out of the necessity of dealing with rate wars between railroads and discriminations against shippers. Kerr testified that his study of the history of the associations in the South showed that "the chaotic conditions in the Southern Railway industry in 1875, such as rate wars, cut-throat and secret rate making, rebates, discrimination, ruinous competition of all kinds, existed, and so much so that practically all railroads were either bankrupt or practically so."[17]

As in the North, the first associations contained pooling provisions, for which money penalties were substituted after the passage of the Interstate Commerce Act in 1887.[18] In addition to these sanctions, there were provisions for compulsory arbitration, and broad powers were vested in a full-time salaried Commissioner. The details, which it seems unnecessary here to trace, may be found in Kerr's

[16] IV, 1160; the text of the agreement is in Vol. N, SD-2, Part I.
[17] IV, 1187.
[18] IV, 1169, 1173, 1174.

testimony[19] and in the successive Articles of Association contained in Exhibit SD-2, Vol. N.

2. *The Effect of the Trans-Missouri and Joint Traffic Association Decisions.*

Within approximately one month after the Court's decision in the *Trans-Missouri* case in 1897 the Southern carriers called a meeting to review the legality of their existing plan of organization. The minutes of the meeting[20] show that after discussion by various lawyers and officials it was decided to form a new association and meanwhile to cancel all those provisions of the existing agreement "which bind the members of the Association to accept and maintain rates fixed by the Association, and which provide for penalties or for apportionment and distribution of traffic."

At an adjourned session on the same day new articles of association were agreed upon and approved as legal by the various counsel present. The articles provided[21] that the Association should be governed by an executive board "which shall have no power to bind the members of the Association to observe any regulations in restraint of trade." The executive board, which could act only by unanimous vote, was given no express authority except to discourage violations of the Interstate Commerce Act, such as the secret reduction of published rates by rebates, drawbacks, payment of commissions or underbilling of weights. The chairman of the board was given various statistical and reporting functions.

The only part of the agreement having to do with the processing of rate proposals was an article which established a Conference Committee, consisting of traffic officers of each company, subordinate to an Executive Board of top officials. The article provided that each company, "reserv-

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[19] See particularly IV, 1168 through 1178.
[20] Vol. N, SD-2, Part VI.
[21] Vol. N, SD-2, Part VI, pp. 4 to 6.

ing always to itself the right to take independent action on any subject, agrees that any change in rates, rules, or regulations" proposed by it should be submitted to the Committee "for consideration and exchange of views, at least three days before the same shall take effect." There were no provisions for any decisions or even recommendations, and each member could withdraw from the Association at will.

Thus the Southern carriers, like the Northern carriers, stripped from their agreements all compulsory features in order to conform, as they believed, to the decisions of the Supreme Court. The Southern Association, in addition, contained in its Articles express disclaimers of authority, and express reservations of the right of independent action by the members. As has been noted, affirmative provisions of this sort did not appear in the Trunk Line Association Articles until after the period of Federal control in World War I.

In 1902 the Southern carriers adopted a new agreement substantially like the 1897 one.[22] It made explicit the power of the Executive Board "to reconsider any subject that may have been considered by the Conference Committee. . . .", thus making it clear that the Executive Board had appellate functions in the processing of rate proposals. The only other change that need be noted consisted of an amplification of the provisions relating to the right of independent action. An additional article was added, that nothing in the agreement should be so construed as to confer upon any number of members of the Association, or upon the executive board or the Conference Committee or any of the officers, the power or authority to make rates upon the line of any member, "it being distinctly understood that each member of this Association expressly reserves to itself the exclusive power to make rates and tariffs on its own line . . . free from the dictation or control of any other member or members."

[22] Vol. N, SD-2, Part VII.

In 1906 a further amendment was made removing any obligation to file proposed rates with the Conference Committee.[23]

The articles of association as thus amended remained in effect without substantial change until the period of Federal control.[24]

H. *Development of the Southern Territory Associations From World War I to 1932.*

I have previously described how, during the period of Federal control, the rate associations throughout the country were supplanted by governmentally established organizations of carrier and shipper representatives; how after the termination of Federal control the carriers in their respective territories took steps to re-establish their rate associations in substantially their previous form, though with more elaboration of procedure and committee set-up; and how the experience of shipper participation in rate conferences led to the National Industrial Traffic League agreement between the principal shipping interests and the carriers, which established the right of shippers to be notified of all pending rate proposals and to be heard by the rate associations upon request.

In Southern Territory a detailed three-level rate association structure took the place of the previous two-level structure. The agreement of 1920, and more particularly the agreement of 1922 which took its place,[25] spelled out the functions of the committees in some detail and established below the two previous committees (a General Committee and an Executive Committee)[26] a new committee

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[23] Kerr, IV, 1182. As stated at p. 515 infra, a similar provision is not contained in the present Articles of Southern Freight Association, but in practice the Southern railroads sometimes do not file proposals with the Association and they regard such action as permissible.

[24] Kerr, IV, 1181, 1182.

[25] Parts IX and X respectively of SD-2, Vol. N.

[26] Their original titles were Conference Committee and Executive Board. Part VI, SD-2, Vol. N.

of technical rate experts called in the 1922 agreement the "Standing Rate Committee." This was a preliminary sifting committee, similar to the Auxiliary Committee in the Trunk Line Association and to similar committees in the other sub-territorial associations in Official Territory, its function being to examine all proposals in the light of Interstate Commerce Commission requirements, etc., and to send them out by mail with recommendations to the member lines. It may be that the functions of this new Committee had been performed informally under the pre-war agreements by the chairman of the Association, who was required to list for discussion subjects coming before the Conference Committee and to conduct correspondence and communicate information.[27]

I. *Enlargements of the Southern Set-Up in 1938.*

In November, 1932, a Southeastern Presidents' Conference was organized "for the purpose of considering and acting upon matters of common interest" to the Southern railroads.[28] It had an unpaid Chairman and Secretary, and its rules of procedure called for an annual meeting and for special meetings as occasion might arise. It had no direct connection with the Southern Freight Association and there is nothing to indicate that it had anything to do with rate proposals until 1938, when a new organization known as the Traffic Executive Association-Southern Territory was established. Provision was then made whereby appeals from committee actions on rate proposals in the Southern Freight Association could be taken to the new organization and from it to the Southeastern Presidents' Conference. Thus by 1938 there existed in Southern Territory a five-level structure comparable to that in Official Territory.

The establishment of the Traffic Executive Association-

[27] See Article VI of the 1902 agreement, Vol. N, SD-2, Part VII.
[28] S-148, I, 258, which contains the rules of procedure of the Conference.

Southern Territory in 1938 and the changes which accompanied it with regard to appeals and certain other matters are subjects of controversy in this case. Georgia connects them with the establishment and purposes of the Association of American Railroads and points to them as evidence of the conspirators' design to establish effective control over all freight rates in the interests of Northern industry. The defendants put quite a different interpretation upon these 1938 events.

I shall therefore postpone consideration of the origin and functions of the Traffic Executive Association-Southern Territory and of the changes which accompanied its establishment until after I have summarized the history of the formation of the Association of American Railroads in 1934. In the meantime, however, I shall describe in somewhat more detail the functions and nature of the Southern Freight Association, omitting until the later stage mentioned above any discussion of the particular provisions which were changed in 1938.

J. Structure and Procedure of the Southern Freight Association as of the Time of the Hearings Before the Special Master.

As in the case of the description of the set-up in Official Territory, all that is set forth below has to do with the Southern set-up as it was at the time of the hearings before me. The description, though in the present tense for convenience, does *not* relate to the set-up provided for in the revised agreements recently submitted to the I.C.C. under Section 5(a) of the Interstate Commerce Act.

1. *Membership and Jurisdiction.*

Unlike the associations in Official Territory, the Southern Freight Association includes in its membership not only railroads but coastwise steamship lines.[29] These steam-

[29] The text of the current Articles of Association appears in Vol. N, SD-2, Part XI.

ship lines have been members of the Southern Freight Association and its predecessors from the earliest times; "they are," said Kerr,[30] "the historic connections of the Southern rail carriers." However, the Southern Freight Association does not have to do with rate proposals covering the port-to-port traffic of the steamship lines; it has to do only with rate proposals covering movements south of the North Atlantic ports by coastwise steamer and thence by rail inland into Southern Territory.[31] In other words, the Southern Freight Association, so far as the steamship lines are concerned, concerns itself only with joint ocean-rail rates between North Atlantic ports and interior Southern points.[32]

There are some sixty-five so-called "short lines" within Southern Territory which are not members of the Southern Freight Association.[33] Ten other short lines (being the longer of the short lines) are members of the Southern Freight Association. All seventy-five are members of the American Short Line Railroad Association, with which we are not concerned in this proceeding.[34]

Kerr explained that the short line roads which are not members of the Southern Freight Association have all the substantial benefits of membership. The facilities of the tariff publishing agencies of the Association are extended to them.[35] They have a joint traffic manager in Atlanta who "gets all of the proposals and other material that we submit to our members" and on behalf of the non-members he "files proposals with Southern Freight Association, files objections, suggestions to broaden the proposals, files

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[30] IV, 1191.
[31] Kerr, IV, 1190.
[32] Including also rail-water-rail rates between the interior east and the interior south. In the case of such rates, however, only that part of the movement south of the North Atlantic ports comes under the jurisdiction of the Southern Freight Association. Kerr, IV, 1190.
[33] Kerr, IV, 1198.
[34] Kerr, IV, 1198.
[35] IV, 1199.

independent announcements—just the same as our members do. * * * A considerable amount of the traffic originating or terminating in the South originates or terminates on short lines, and when they get a proposal they are in a position to suggest a broadening of proposals covering freight rates, so as to cover points on their lines, and it enables them to protect their interests just the same as the larger lines are in a position to protect their interests by knowing what is going on."[36]

2. *Initial Disposition of the Majority of Rate Proposals Through Technical Analysis and Approval by Correspondence.*

At the bottom level in the Southern Freight Association is the *Standing Rate Committee*, composed of four full-time officers elected by the members of the Executive Committee.[37] As already stated, the Standing Rate Committee corresponds in function to the Auxiliary Committee in the Trunk Line Association. It is the receiving station for rate proposals; it analyzes them in the light of legal requirements; and it sends its analyses, with recommendations, to the member lines.

As in Official Territory, so in Southern Territory the great majority of rate proposals are approved at the lowest level by correspondence, without formal committee action. Thus Exhibit SD-5, submitted by the Southern defendants,[38] showed that during a three-months period in 1940, 1220 proposals were filed by member lines, of which 995, or approximately 82%, were approved by correspondence after having been analyzed and distributed by the Standing Rate Committee. Kerr testified that "based on my experience, the results for this period of three months are not substantially different than for any other representative period in

[36] IV, 1198, 1199.
[37] Kerr, IV, 1204.
[38] Vol. N.

any normal times in any normal year."[39] It may be noted in passing that of the 1220 proposals filed during the three-months period in question, 1134, or approximately 93%, were proposals for reductions in rates.[40]

In the Southern Freight Association procedure there are special provisions for the expeditious handling of so-called *emergency proposals.* If a member line determines "that a change in any rate, rule or regulation is of such emergency character that the regular procedure cannot be followed, emergency proposal may be submitted."[41] The procedure, as prescribed by the Executive Committee, calls for the sending of an emergency proposal by the Chief Traffic Officer of the proponent line direct to the membership, without going through the Standing Rate Committee. If no objection is received within ten days, the proposal is deemed to be approved. If one objection is received, the proposal is deemed to be disapproved, and, according to Kerr:[42]

> "It is then up to the Chief Traffic Officer of the proponent line either to announce the rate or to ask that it be given further consideration by the interested lines through the members of the Executive Committee."

In other words, if an emergency proposal is objected to and is not independently announced, it is submitted to the topmost committee in the Southern Freight Association, namely, the Executive Committee, and skips the General Freight Committee, which represents the second stage in the procedure. With this exception proposals which are not approved by correspondence normally go to the General Freight Committee, whose functions will now be considered.

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[39] IV, 1236.

[40] Kerr, IV, 1235.

[41] Article X(a) of the present Articles of Association of the Southern Freight Association, Vol. N, SD-2, Part XI.

[42] V, 1553.

3. *Disposition of Remaining Proposals By Formal Committee Action.*

(a) *The General Freight Committee.*[43]

The General Freight Committee consists of traffic officers of the rank of Assistant General Freight Agent or higher.[44] As already indicated, if a proposal is objected to by correspondence and is not independently announced, it normally is referred to the General Freight Committee for action. Kerr testified that the word "action" merely means "recommendation" (by the majority) and that the term "objection" merely means the view of a member that "the particular proposal as filed should not be made effective, or, at least, should not be made effective without modification in certain respects, such as the inclusion of other points of origin and other points of destination."[45]

(b) *The Executive Committee.*

Appeals from action by the General Freight Committee may be taken to the Executive Committee, consisting of Chief Traffic Officers of member lines.[46] As is true in Official Territory, the number of proposals reaching the traffic executives is small in comparison with the number disposed of by correspondence at the first stage and by the General Freight Committee at the second stage. For example, of 1220 proposals of all sorts filed in a three-months period in 1940 (which Kerr testified was typical), 995 were approved by mail, as already stated above in the discussion of the Standing Rate Committee; 143 were approved as filed or as amended and 23 were disapproved, by the General Freight

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[43] I am omitting from this analysis any discussion of certain specialized committees of the Southern Freight Association, namely, the Coal and Coke Committee, the Textile Committee, and the Contact-Fourth Section Committee, whose functions are set forth in SD-2, Vol. N. Counsel for Georgia stated that no question was raised about these committees (McGovern, IV, 1316).

[44] Article IV(a), SD-2, Part XI, Vol. N.

[45] IV, 1205, 1206.

[46] Article III(a) of SD-2, Part XI, Vol. N.

Committee; and only 49 were referred to the Executive Committee. Kerr testified that 46 of these were recommended by the Committee "as filed or amended and disapproval was recommended as to 3."[47] Finally, 10 of the 1220 proposals reached the Traffic Executive Association-Southern Territory (which approved 6 and disapproved 4); none reached the Southeastern Presidents' Conference.

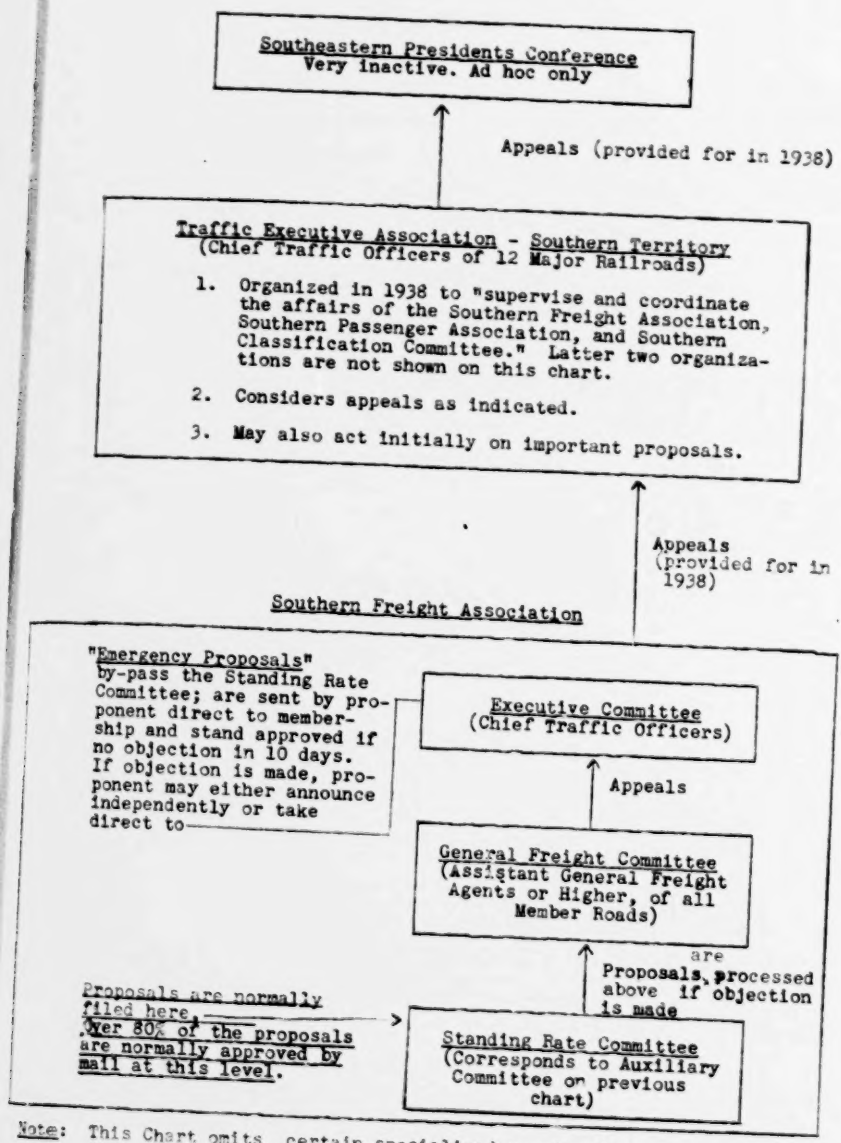
Attached is a chart of the set-up in Southern Territory. It includes the Traffic Executive Association-Southern Territory and the Southeastern Presidents' Conference, each of which for reasons previously explained will be discussed at a later stage in this report.

[47] IV, 1236.

(Here Follows Chart 3)

CHART NO. 3

CHART OF SOUTHERN TERRITORY



Note: This Chart omits certain specialized committees, namely, the Coal and Coke Committee, the Textile Committee, and the Contact-Fourth Section Committee, per foot-note

K. *Methods of Handling Interterritorial Rate Proposals, In General*

In the analysis of the structure and procedure of the territorial rate associations, North and South, I have not attempted to differentiate between rate proposals covering purely intraterritorial movements and interterritorial rate proposals involving through shipments between Southern and Official Territory. In general, within the respective territorial rate associations interterritorial proposals are put through the same procedure as intraterritorial proposals. That is to say, poposals relating to joint through rates between Southern and Official Territory are normally filed with the rate associations in the two territories and normally go through the same procedure in each territory as any other kind of rate proposal.

There are, however, certain special features connected with the handling of interterritorial rate proposals which will be noted at a later stage.

III. *The Establishment and General Nature of the Association of American Railroads.*

A. *The Earlier National Railway Associations Out of Which the A.A.R. Was Formed.*

Prior to the formation of the Association of American Railroads in 1934, there existed a number of independent and uncorrelated national railway associations which had been built up over the course of many years and which performed a variety of functions. The Association of American Railroads absorbed all of these earlier bodies and took over their functions. The more important of the earlier organizations were as follows:

The American Railway Association. This Association was organized in 1891.[48] It had to do chiefly with the use and handling of equipment—demurrage, standardiza-

[48] Pelley, XVI, 5559, 5560.

tion, interchange of cars, and so forth.[49] Nearly all the railroads in the United States, Canada and Mexico were members of it.[50] It was formed by a merger of a number of organizations of technical men which had grown up through the years. The earliest of these was the Master Car Builders, established in 1867 for the purpose of bringing about uniformity and standardization of cars.

The system of interchanging freight cars was perhaps the most important achievement of this Association and its predecessors. There was a time when freight cars did not go off the lines of the railroads which owned them, with the result that freight had to be transferred from car to car at every junction point. "Beginning in the 1869's," said Pelley, the first President of the Association of American Railroads, "there gradually evolved a system of interchange traffic which has become the very foundation of the nation-wide, and in fact, continent-wide[51] commerce of North America. This interchange of traffic on the scale on which we know it would have been totally impossible factually without cooperation in developing uniform standards of many kinds, and without closely coordinated working arrangements of many sorts on all railroads."[52]

The Association of Railway Executives. This Association was established in 1914 to deal with matters of exe-

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[49] S-3, Vol. I, 76, 77. Originally the Association had jurisdiction over rates and charges but after the decision in the *Trans-Missouri* case in 1897 its by-laws were amended to exclude such jurisdiction.

[50] S-4, Vol. I, 77, 78.

[51] The interchange of freight cars takes place in Canada and Mexico as well as in the United States, and the Canadian and Mexican railroads are members of the A.A.R., as they were of the American Railway Association. Pelley, XVI, 5558, 5559.

[52] XVI, 5558. See also the statement by Burgess, former Chairman of the Trunk Line Association and the Traffic Executive Association-Eastern Territory, in XIII, 4059-4061, regarding the origins of the so-called Fast Freight lines in the late '50s and early '60s, which were the first organizations of connecting carriers to make possible the through service of goods without breaking bulk at the junctions of connecting lines.

cutive policy, such as Federal legislation.[53] In the summer and fall of 1934 the Advisory Committee of this Association, as will appear later, took the lead in formulating a plan for the consolidation of this Association and the American Railway Association, described above, into one organization.

That organization in turn absorbed the *Bureau of Railway Economics*, the *Railway Accounting Officers Association*, and the *Treasurers Association*, whose functions were sufficiently described by their titles.[54]

The organization thus created was known as the Association of American Railroads. Its formation, said Pelley, summarizing the process of absorption described above, was "a direct continuation of the process of organizing or dealing with matters of common concern which started back in 1867: it combined the several organizations existing in 1934, each of which covered only part of the field, into one organization under one directing head, governed by one board of directors—obviously a step toward coordination and efficiency, and the elimination of duplication and overlapping." [55]

What was the precipitating cause of this step? The parties agree that it was the depression. They approach the history, however, from differing points of view which will now be summarized.

B. *The Events Leading up to the Formation of the A.A.R.*

1. *Statements by the Interstate Commerce Commission in 1931 About Competitive Wastes*

The defendants' account begins earlier than Georgia's, so I shall start with theirs.

In 1931 the railroads applied to the Interstate Commerce Commission for a 15 per cent increase in freight rates to

[53] S-4, Vol. I, 78; Pelley, XVI, 5559, 5560.

[54] Pelley, XVI, 5550, 5570, 5571. Detailed descriptions of these associations are given in S-4, Vol. I, 78.

[55] XVI, 5560.

help meet their financial difficulties. On October 16, 1931, the Commission denied the application, holding that the level of rates had already reached the point where competing forms of transportation were making serious inroads upon the railroads' revenues and that further rate increases would only tend to make matters worse.[56] In spite of this conclusion the Commission granted certain temporary emergency increases because it found that "distrust of railroad securities is rapidly gaining such elements of panic" that a slight charge on industry would be justified "for the purpose of increasing confidence and averting developments which might further disturb an already tremendously shaken financial situation, and to avoid impairment of an adequate system of transportation."[57]

In commenting upon the future the Commission stated among other things that the intensified and constantly growing competition from trucks, busses, pipelines and waterways made it necessary for the railroads "to cooperate more efficiently with each other and reduce the waste, both in service and in rates, which has marked their own competition."[58]

In spite of the reference to rates in the statement just quoted, the major emphasis in the opinion, as in the later pronouncements of the President and the Federal Coordinator set forth below, was on competitive waste in *service*—in duplication of facilities, for example. And the remedy which was stressed more often than any other in these pronouncements was a greater degree of cooperative effort on

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[56] *Fifteen Per Cent Case, Ex Parte No. 103,* 178 I.C.C. 539, at 571 to 577.

[57] Ibid at 578.

[58] Ibid at 585. The defendants also pointed out that as early as 1922 in the case known as *Reduced Rates, 1922,* 68 I.C.C. 676, the Commission said, at page 689: "One of the matters for consideration in this proceeding is the extent to which net income can be increased by enhanced economy and efficiency in operation. The record indicates that the railroads individually, and collectively through their associations, have been and are devoting their attention to this matter."

the part of the railroad. Thus, in the 1931 case noted above, the Commission went on to say, in a passage relied on by the defendants:[59]

> "That this waste [in service] is of very large proportions is clear. Many specific instances have been brought to our attention. That it can be minimized we also have no doubt, but that this will require a greater degree of cooperation than the railroad executives have yet been willing to put into practice is plain. Such cooperation, which we believe the times make essential, would also be of great advantage in carrying on adequate research and experimentation.
>
> "The record shows that in the past decade the railroads have made great strides in improving their service and at the same time operating with greater efficiency and economy. But what they have done in this direction has largely followed lines which developed under conditions different from those which now prevail, and it has been characterized by a continual intensifying of their own competition. At a time when as an industry they have new enemies to face, their warfare with each other has grown more bitter, so that economies in operation have been offset in part by the growth of competitive waste.
>
> "All this is contrary to the spirit of the Transportation Act, 1920. Congress then looked beyond the individual railroad to the concept of a national transportation system. It pointed the way in the consolidation provisions to the reduction of competitive wastes. It went to the extreme of removing the barriers of restrictive Federal and State anti-trust legislation which might otherwise stand in the way. Short of consolidations, it opened wide the door to agreements for the pooling of service and of revenue, whenever it could be shown to our satisfaction that such agreements were in the public interest. Much has been accomplished in the way of unification, but much remains to be done, and the pooling provisions of the law stand almost unused. Further progress along the lines pointed out by Congress will aid in bringing about the cooperation which is essential to railroad salvation.

[59] Ibid at 585, 586.

But the problem can not wholly be solved in this way, nor is there need that cooperation should be subordinated to the consolidation program." (Emphasis supplied)

Six weeks later, on December 1, 1931, the Commission in its Forty-fifth Annual Report said:[60]

"The waste in revenues and expenses resulting from undue and unwise competition of the railroads with each other we believe to be of very large proportions. In the investigation in Ex Parte No. 104, elsewhere described in this report, we shall endeavor to examine into specific instances of such waste. *But this is a matter which the railroads should follow up on their own initiative and without this outside aid.* If they do not, it may be that a comprehensive investigation adequately financed and under the direction of Congress may at length prove desirable. Experience has shown that the traffic pressure which large shippers strategically located are in a position to exert upon the railroads is so great that the reduction of competitive wastes by the carriers upon their own initiative is surrounded by great practical difficulties." (Emphasis supplied)

2. *The Financial Difficulties of the Railroads in 1932.*

During the year 1932 the financial situation of the railroads grew steadily worse and reached critical proportions.[61] Pelley cited statistics to show that in that year the Class I railroads suffered a net operating deficit of $139,203,821, and that their revenue ton miles aggregated only 235 billion as against 450 billion in 1929.[62] "Cut-throat"

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[60] At page 119.

[61] The defendants introduced evidence to show that their financial plight was not due to a lack of operating efficiency. They cited, for example, the increase in the average capacity of freight cars from 42½ tons in 1921 to 47 tons in 1932; in freight train speed from 11½ miles per hour in 1921 to 15½ miles in 1932; in gross ton miles per ton of fuel from 12,367 in 1921 to 16,245 in 1932; and so on. AD-1, Vol. D, p. 5; Parmelee, XVI, 5541-5545. Some of Mr. Eastman's strictures, quoted hereinafter, would indicate that further progress was still possible.

[62] XVI, 5554.

competition between trucks and railroads was intense.[63] In Southern territory, every railroad except the Cincinnati, New Orleans & Texas Pacific, was in the red; leading railroads in the North, such as the B. & O., the New York Central, and the New York, New Haven & Hartford, were in similar difficulties.[64] Fourteen railroads, representing 8.5% of the mileage of Class I railroads, were in receivership, and others were on the way (by the end of the next year 25 roads, representing 32.2% of the mileage, were in receivership).[65]

3. *Statements by Mr. Roosevelt and the Interstate Commerce Commission in 1932 about Competitive Wastes.*

On September 17, 1932, Franklin D. Roosevelt, then a candidate for the Presidency, stated in an address at Salt Lake City:[66]

> "Second, while thus forcing the railroads to meet unfair competition we have not only permitted but frequently required them to compete unreasonably with each other. In regulating the railroads, we have preserved the policy that at all times, between principal points, there must be competing railroad systems.
> "There is a great deal to be said for this policy, so long as there is traffic enough to support the competing

[63] Pelley, XVI, 5555. He pointed out that truck traffic in interstate commerce was then unregulated, and "it was possible, therefore, for a great many persons to purchase trucks on credit, make very small down payments, and to engage in transportation of goods for hire without being required to observe any published schedules as to service or rates." The result, he said, "was an intensity and degree of cut-throat competition, not only as between trucks and railroads, but also as among the trucks, which resulted in great losses to all concerned. Almost without exception everybody was losing money in trying to furnish transportation at less than cost."

[64] Pages 2A and 2B of AD-1, Vol. D, entitled "Revenues, Expenses, Net Earnings and Traffic, and other Railroad Statistics published by the Interstate Commerce Commission", introduced at XVI, 5532 by Dr. Parmelee, Director of the Bureau of Railway Economics of the A.A.R.

[65] Page 4 of AD-1, supra, note 64.

[66] The address is set forth in AD-4, Vol. D, p. 24.

lines. As long as you have that traffic, the competition helps to insure efficiency.

"But as the railroads have been allowed to increase their capacity far beyond traffic needs, the wastes of competition have become more and more insupportable. Now we face the issue: Shall we permit them—in fact, force them—to bankrupt each other? Or shall we permit them to consolidate and so to economize through reducing unprofitable services? In other words, shall we permit them to divide traffic and so eliminate some of the present wastes?"

In the following month the Interstate Commerce Commission issued a report which strongly urged on the railroads a policy of not constructing individual terminals.[67] In this report, the Commission said that it had decided to bring the subject "to the attention of the American Railway Association," (one of the predecessors of the AAR, as previously noted) "in the hope that if it were considered by the railroads jointly, they might be able to take effective steps to avoid such competitive wastes." In the Commission's letter to the American Railway Association, as reproduced in the report, the Commission said:

> "This matter has been considered • • • with the thought that the situation might properly be given attention by the American Railway Association with a view to reconciling the conflicting competitive interests of different carriers which are resulting in unnecessary duplication and waste of transportation facilities, and with a view to discouraging activities by the carriers which in the end will operate to their own disadvantage as well as impose a burden of waste upon the shipping public."

Shortly thereafter, on December 1, 1932, the Commission reported that a committee of "eminent men" were studying the railroads' plight at the request of certain fiduciary institutions, and that "associations of shippers

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[67] The report appears in the case of *Duplication of Produce Terminals*, 188 I.C.C. 323.

and other business organizations are at work on the problem, and so is railroad labor." [68]

4. *Consideration by the Railroads Themselves in 1932-33 of the Problems of Competitive Wastes.*

The Commission in the report just referred to also indicated hopefully that the railroads themselves were beginning to realize "that they must avoid the waste in revenues and expense which has resulted from undue and unwise competition with one another . . . and act in comparative unison for the improvement of the conditions which surround their industry. . . ."

Pelley testified that in this period the members of the Advisory Committee of the Association of Railway Executives held frequent conferences, and discussed the railroads' problems "at considerable length and on numerous occasions with representatives of the government, including officers of the Interstate Commerce Commission, officers of the Reconstruction Finance Corporation, and the President of the United States." [69]

Shortly after the inauguration of President Roosevelt, the Advisory Committee of the Association of Railway Executives appointed Pelley, then President of the New York, New Haven & Hartford, Gray, President of the Union Pacific, and Williamson, President of the New York Central, as an unofficial committee to see the President and discuss the situation with him.[70] Among the topics discussed, ac-

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[68] 46th Annual Report, I.C.C. 1932, p. 2. The Commission said in part: "Finally, the railroads are clearly approaching an effective realization of the fact that they must avoid the waste in revenues and expense which has resulted from undue and unwise competition with one another * * * and act in comparative unison for the improvement of the conditions which surround their industry, not only conditions for which they may believe the Government to be responsible, but also of the conditions which are immediately related to their own initiative, enterprise, and ability to cooperate for mutual advantage."

[69] XVI, 5556.

[70] Pelley, XVI, 5556.

cording to Pelley, was "the creation of a Federal Coordinator of Transportation with authority to assist the railroads, or, if necessary, to require them to bring about economies in operation through coordinated action with government sanction. The President . . . expressed his approval of such an idea and we agreed with him. Subsequently, there was an act of Congress creating the office of Federal Coordinator of Transportation,[71] to which the President appointed Mr. Joseph B. Eastman. Mr. Eastman assumed the duties of Federal Coordinator of Transportation in June, 1933." [72]

5. *Statements about Competitive Wastes by the Federal Coordinator in 1933.*

Commenting on the purposes of the Coordinator Act, Eastman stated in an address on September 28, 1933: [73]

> "* * * Tens and even hundreds of millions of dollars were being squandered in the tactics and strategy of inter-railroad warfare. With plenty of extraneous competition available, the wastes of this internal competition were more readily seen."

A month later, in another address, Eastman said: [74]

> "* * * A predominant idea behind the creation of this office was that our national railroad system suffers from much waste motion and unapplied or misapplied effort, due to its ownership by many separate companies and the consequent fact that it is operated by a small army of independent feudal chieftains who

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[71] Act of June 16, 1933, 48 Stat. 211, Section 14.

[72] XVI, 5556, 5557. The Committee which went to see the President was selected by the Advisory Committee of the Association of Railway Executives (5557).

[73] Address before the Springfield, Massachusetts Traffic Club and Shippers' Advisory Board, Vol. D, p. 352.

[74] Address at Harrisburg, Pennsylvania, October 20, 1933 before the Interstate Bus and Truck Conference, Vol. D, p. 357.

fight a good deal among themselves and band together for the common good with considerable difficulty."

Taking note of the new attention being given by the railroads to the whole question of effecting a greater degree of cooperation, Eastman, in an address on November 9, 1933 before the Railway Business Association at Chicago, said:[75]

"* * * The hope of good results lies in the fact that the carriers are approaching these inquiries from a point of view somewhat different from that which has prevailed in the past. It is, I believe, a less individualistic point of view. They begin to see that what is good for the railroads as a whole may also be good for them individually, and that it is possible to trade in advantages and disadvantages. I am not prophesying success for these undertakings. All that I can say is that they are under way and that the auspices and auguries appear favorable."

Five days later, on November 14, 1933, there took place at the Metropolitan Club in New York City a meeting of eighty-one railroad directors and heads of insurance companies and savings banks, to discuss what further steps should be taken to save the industry.

6. *The Metropolitan Club Meeting of Railroad Directors and Investors.*

Georgia attaches primary importance to the Metropolitan Club meeting, and presented it as the first major act in the drama of the conspiracy. As evidence of what took place at the meeting, Georgia offered an account prepared by the "Security Owners Association." This Association, as noted later, took the leading part in organizing the meeting. The defendants objected to the admissibility in evidence of the account of the meeting, and of other documents indicating the steps taken prior and pursuant there-

[75] Vol. D, p. 361.

to.[76] The defendants' basic objection was that no connection with the subsequent organization of the A.A.R. had been established. For reasons to be stated presently, I agree that that connection has not been established, and I conclude therefore that the documents in question are not admissible for the purpose for which they were offered—i.e., to show that the Metropolitan Club meeting and the steps taken pursuant to it were part of the conspiracy charged by Georgia. I have, however, concluded that they are admissible for background purposes, as part of the historical setting in which the A.A.R. was organized. In this respect they are like the various governmental pronouncements introduced in evidence by the defendants, no one of which had a direct causal relation with either the fact or the form of the A.A.R.'s organization but all of which were part of the climate of opinion in which the railroad executives established the organization.

If, as I assume, the account of the meeting contained in the record may be taken as substantially accurate for historical purposes, supported as it is by contemporary newspaper reports introduced by the defendants,[77] the nature of the meeting may be summarized as follows.

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[76] The account, including purported transcripts of the addresses made at the meeting, was contained in a document prepared by the Security Owners Association, Inc., an association of railroad investors which was active in arranging the meeting. Extracts from this document were first offered in evidence by Georgia as S-11 (at I, 90) and were objected to by the defendants as both incompetent (I, 611-613) and irrelevant (II, 641-644). Later the entire document was offered by the defendants (AD-5, Vol. D, p. 29), subject to their previous objections, and only in case S-11 should be held admissible (Fletcher, Cox, XVII, 5697, 5698-9). The defendants also objected to the competency of S-9 and S-10 (introduced at I, 85, 86 and objected to at II, 610-611); and to the relevancy of S-9, S-10, S-12 (introduced at I, 93), S-13 (at I, 94), S-38 (at I, 111), S-39 (at I, 112), S-45 (at I, 114), and S-46 (at I, 115); the objections to relevancy of all these exhibits being set forth at II, 641-644. These exhibits consisted chiefly of correspondence relating to the meeting and the steps taken pursuant to it.

[77] As indicated in note 76, above, the entire document containing the account of the meeting appears as AD-5 in Vol. D, at p. 29. It

Milton W. Harrison, president of the Security Owners Association, an organization of railroad investors which had been instrumental in arranging the meeting,[78] called the meeting to order. Pierre S. duPont, chairman of the duPont Company and a director of the Pennsylvania Railroad, was elected Chairman and made the opening address. It contained these major points:

(1) The drift toward government ownership ought to be halted.[79]

(2) Railroads were no longer a monopoly, in view of the rapid development of competing forms of transportation; at the same time there was a trend toward ever-stricter regulation of the railroads, which was hampering managerial initiative and efficiency.[80]

(3) Regulation ought to be extended to cover all forms of transportation in interstate commerce.[81]

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was obtained from the files of the Law Department of the A.A.R. (Fletcher, XVII, 5697) and counsel for the defendants, Mr. Cox, conceded that "so far as I know we have no reason to suppose it is not an accurate copy or that it is not the document that the Security Owners Association, Incorporated, prepared, promulgated and distributed." (XVII, 5698). The defendants, however, felt that they ought not to be "charged with the accuracy of the account of the proceeding that is there set forth" (Cox, XVII, 5699; and, in more detail, the defendants' memorandum of objections at II, 611-613). Extensive newspaper publicity was given to the action taken at the Metropolitan Club Meeting, and the accounts were photostated and introduced in evidence by the defendants as AD-6 in Vol. D, pp. 57-66, for the purpose of showing "that nothing had been done in a corner or secretly or of which these people were ashamed, but, rather, they were quite proud of what they were trying to do" (Fletcher, XVII, 5701). The substance of these accounts was the same as the substance of AD-5. Under the circumstances I conclude that it is proper to utilize AD-5 for the limited historical purposes of this portion of my Report.

[78] S-9 and S-10, at I, 85, 86; and the contemporaneous accounts in the Railway Age, New York Times and New York Herald Tribune, reproduced in AD-6, Vol. D, at pp. 58, 59 and 60.

[79] AD-5, Vol. D, p. 31.

[80] Ibid, pp. 33, 34.

[81] Ibid, p. 37.

(4) Eastman, the Coordinator, was able and sincere in trying to help the railroad industry; he was under a duty to make recommendations to Congress; and the railroads ought to formulate a constructive plan of action and give it to him in the hope that he might approve it and push it.[82]

(5) Representatives of the investors, with their broad knowledge of industry and finance and their stake in the continuation of private enterprise, and the directors of the railroads, should cooperate in formulating the necessary proposals.[83]

In each of the subsequent addresses the speakers repeated, in varying language, the last of these five points, and, generally, one or more of the other four points. The addresses were given by: James Lee Loomis, president of the Connecticut Mutual Life Insurance Company;[84] S. T. Bledsoe, president of the Sante Fe Railroad;[85] Milton W. Harrison, president of the Security Owners Association;[86] A. C. Robinson, chairman of the Peoples-Pittsburgh Trust Company;[87] S. H. Beach, president of the Rome (N.Y.) Savings Bank;[88] Myron F. Converse, president of the Worcester (Mass.) 5¢ Savings Bank;[89] H. B. Erminger, Jr., president of the Miami Corporation, Chicago;[90] Jeremiah Milbank, a director of the Southern Railway;[91] John Henry Hammond, chairman of the Bangor & Aroostock and a partner in Brown Bros. Harriman &

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[82] Ibid, p. 43.
[83] Ibid, p. 32.
[84] Ibid, pp. 35, 36. He covered points 1, 2, 4 and 5.
[85] Ibid, pp. 37, 38. He covered points 3, 4 and 5.
[86] Ibid, pp. 38-43. He covered all five points.
[87] Ibid, pp. 43-45. He covered points 4 and 5.
[88] Ibid, pp. 45, 46. He covered points 1 and 5.
[89] Ibid, p. 46. He covered point 5.
[90] Ibid, p. 46. He covered points 4 and 5.
[91] Ibid, pp. 46-49. He covered points 4 and 5. (His directorship was not indicated in the account in AD-5, but appears in the New York Times account, AD-6, p. 59.)

Company;[92] Philip A. Benson, president of the Dime Savings Bank of Brooklyn, New York;[93] and W. Averell Harriman, chairman of the Union Pacific.[94]

None of the speakers added any new points of their own, except Mr. Harriman, who spoke last, and upon whose statement Georgia relies as showing that the object of the alleged conspirators was to set up an organization to control freight rates in the interest of the North. The statement in question, according to the account of the meeting by the Security Owners Association, was as follows:[95]

> "Mr. Harriman stressed the need for cooperative effort on the part of investors and directors and states that in his opinion cooperation on the part of directors could be more effectively given if the directors of all Class I carriers could be organized into an authenticated group. *He described the organization of the directors group representing the Western railroads, recommended that similar action be taken in the South and East, and urged that the conference undertake to bring about such organization.*" (Emphasis supplied; it is this last sentence on which Georgia particularly relies, as will appear presently).

Mr. Harriman, according to the account, then offered, and the meeting adopted, a set of resolutions to the effect that: (1) the Conference should be continued as a "temporary and informal organization"; (2) a "permanent and more formal organization of railroad directors should be

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[92] Ibid, p. 50. He covered point 5. (His affiliations appear in the New York Times account, supra, note 91.)

[93] Ibid, p. 52. He covered points 2, 4 and 5.

[94] Ibid, pp. 54, 55. He covered point 5, in addition to what appears above in the text. Brief remarks, which need not here be noted, were made in the course of discussion (Ibid., p. 51) by Victor Morawetz, a New York attorney; Michael J. Cleary, president of the Northwestern Mutual Life Insurance Co.; Henry S. Sturgis, vice-president of the First National Bank of New York, and Dr. Lewis Sorrell, secretary of the Railway Business Association ("which also has a plan to help the carriers," New York Times, supra, note 91).

[95] Ibid, pp. 54, 55.

created"; (3) a Steering Committee of nine should be appointed, three from the Western, three from the Southern, and three from the Northern regions; (4) the Steering Committee should "develop a plan for a permanent directors organization with power to urge in the name of this Conference its adoption by the Boards of Directors of the Class I Roads"; (5) pending step (4), the Steering Committee should cooperate with the Security Owners Association "in the preparation of a plan or plans and the carrying through of such plan or plans"; (6) the Steering Committee should be authorized to call the Conference together again if occasion necessitated.

Contemporaneous newspaper accounts of the meeting referred to the decision to appoint a Steering Committee of nine, and said that its function was "to carry out the purposes of the conference and to cooperate with the Security Owners Association in consideration of measures regarded as important to the strength and financial stability of the railroad industry."[96] Two papers[97] noted that:

> "W. A. Harriman spoke on the desirability of forming an association representative of all Class I directors to cooperate with investors, and stressed the necessity for action on the part of the appointed committee until such organization could be perfected."

The newspapers did not specifically state, as the Security Owners Association account stated, that Mr. Harriman recommended that such organization be modelled on "the organization of the directors group representing the Western railroads." Did this recommendation of Mr. Harriman's—assuming for the moment that he made it—indicate a purpose on the part of the Conference to establish an association to control freight rates in the interests of the North?

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[96] E.g.: The Traffic World, Railway Age, New York Herald Tribune, and the Associated Press dispatches; in AD-6, Vol. D, pp. 57-61 and 66.

[97] The Traffic World and the New York Herald Tribune, AD-6, Vol. D, pp. 57 and 60.

Georgia answers this question in the affirmative, stating in her Final Brief at page 17:

> "Harriman subsequently pointed out that the purpose of the Committee of Directors created by the Western Agreement was to subject Western railway management decisions concerning rates to review by Eastern financial interests."

In support of this allegation Georgia submitted two exhibits. The first one was an excerpt from a statement filed by Mr. Harriman with a Senate Committee ten years after the Metropolitan Club meeting. The substance of the statement was that a "Commissioner Plan" (not described) had been adopted in the West; that under it the Commissioner reported to a "Directors Committee" (not described) "all problems" (not defined) in which the recommendations of the Commissioner were not adopted; that the Directors Committee had been established to exercise "effective supervision over policies of rates and practices involving substantial sums"; but that "the Committee had no power to act. It could not and did not decide or order anything."[98]

[98] The text of the statement is contained in S-12 at I, 93. The statement consists of two paragraphs. The quoted extracts above contain the substance of these paragraphs except for the final sentence of the second paragraph, which reads as follows: "In this Committee of Directors all personality, prejudice, and suspicion of traffic officers was left behind, the necessity of management to uphold a subordinate did not exist, because no president, vice president, or trustee was eligible for membership." Georgia's Final Brief at p. 17 quotes this sentence in support of Georgia's allegation that the purpose of the Committee was to subject Western railway management decisions concerning rates to review by Eastern financial interests. I cannot find that the sentence contains any such implication. Its natural meaning is simply that the directors felt they could function more freely and effectively by omitting from the Committee top railway officials. The defendants have objected to S-12 on the grounds that there was no independent proof that Harriman was a co-conspirator, and that even if he were regarded as a co-conspirator S-12 is not competent proof of what Harriman said ten years earlier at the Metropolitan Club, II, 613-618. In view of my finding that the exhibit does not support Georgia's allegation, it is unnecessary to consider the objections to competence.

Georgia's second exhibit consisted of an extract from a letter between two railroad officials in connection with the preparation of the plan of organization of the A.A.R., in which the statement was made:

> "In Western territory for over a year we have proceeded with definite success in a plan of adjustment of controversies through a Commissioner form of organization and appellate jurisdiction in a committee of directors, without binding contract controlling in advance the liberty of action of individual roads." [99]

Nothing in either of these exhibits supports Georgia's statement, attributed to Mr. Harriman, that the purpose of the Western agreement was to subject "Western railway management decisions concerning rates to review by Eastern financial interests." Nor can it fairly be concluded from the record that the purpose of the Metropolitan Club meeting was to create a mechanism for the control of freight rates in the interests of the North, or to control freight rates at all. Indeed, there was no mention of freight rates in the account of the meeting.

7. *Appointment of the "Directors Committee" Pursuant to the Metropolitan Club Meeting.*

Shortly after the Metropolitan Club meeting, pursuant to the resolution passed thereat, a Directors Committee of nine was appointed. On this Committee the South was given equal representation with the North and West. The Committee consisted of the following:[1]

Representing the *Northern* roads:

Pierre S. duPont, Chairman (Pennsylvania),
John R. Morron (B. & O.),

[99] S-24, I, 101, 102. The letter is from Hale Holden to W. W. Atterbury, dated August 1, 1934, in which Mr. Holden, in the passage in which the quotation in the text above appears, was arguing against the inclusion in the proposed plan of organization of the A.A.R. of a provision for compulsory arbitration.

[1] S-19, I, 97-98.

Fairman Dick (Boston & Maine—also Chicago, Milwaukee & St. Paul);

Representing the *Western* roads:

W. W. Colpitts (Chicago, Milwaukee & St. Paul—also Pere Marquette),
W. A. Harriman (Union Pacific—also Illinois Central, a Southern defendant),
Arthur Curtiss James (Chicago, Burlington & Quincy—also Great Northern);

Representing the *Southern* roads:

Frederick B. Adams (Atlantic Coast Line—also Louisville & Nashville),
Jeremiah Milbank (Southern Railway),
Henry W. deForest (Illinois Central—also Southern Pacific).

Each of these nine men had industrial or financial affiliations as well as railroad affiliations,[2] and in Georgia's Final Brief reference was made to the timidity of rail management in the face of the "terrible economic power possessed by the Committee of Directors."[3] However, no showing was made as to the relative interests which the directors possessed in the different corporations in which Georgia listed them as having affiliations, and the record does not permit any inference to be drawn that in their relations to railroad management they had anything in mind except the best interests of the particular railroads of which they were directors.

Georgia sought to show a connection between the Directors Committee (and therefore inferentially the Metropolitan Club meeting) and the organization of the A.A.R., by

[2] I have taken the railroad affiliations of these directors from a statement by Mr. Daniel Willard, president of the B. & O., contained in S-19, I, 97, 98, supplemented by Georgia's proposed finding No. 33 at pp. 218 and 219 of the Final Brief, which indicates that the affiliations in the proposed findings were taken from Poor's Register. The division of the directors into three groups is my own.

[3] Georgia's Final Brief, p. 19, foot-note 7.

alleging that "as a result of pressure" from that Committee the Association of Railway Executives set in motion the machinery for drafting the A.A.R. plan.[4] Although the Directors Committee was appointed in November, 1933, there is no trace in the record of any activity on its part until the spring of 1934.[5] Therefore, I think it appropriate to resume the chronology of the events leading up to the A.A.R., reverting at the proper point to Georgia's allegations about the influence of this Committee on the establishment of the A.A.R.

8. *Pronouncements by the Federal Coordinator in 1934 about Competitive Wastes and the Railroads' Need of a "More Perfect Union."*

On January 11, 1934 some two months after the Metropolitan Club meeting, Eastman made the first of several statements urging the railroads to "form a more perfect union" for dealing collectively with their economic problems. This statement was contained in a report by him to the Interstate Commerce Commission—one of a number of

[4] Final Brief, pp. 19-20. Georgia refers to the Directors Committee as the "Directors-Investors" Committee, actually a misnomer; see note 28 infra.

[5] Georgia's only exhibit relating to this interim period is an extract from a letter, S-13 (in I, 94) by one Willis E. Wood (who, according to an identification chart submitted by Georgia which is not in evidence but in Mr. Wood's case is not questioned, II, 619, was a member of the New York bond house of Wood, Low & Co. and a director of the Denver and Rio Grande and the Western Pacific, and of the Missouri, Kansas and Texas Railroad) to Jeremiah Milbank, dated February 7, 1934. The exhibit was objected to by the defendants at II, 618, 619, on the grounds (1) that there was no independent proof that Wood was a co-conspirator; (2) that the letter is not a declaration made with respect to the subject matter of the alleged conspiracy. I conclude that both these objections are well taken. However, even if the exhibit were regarded as competent, it would add nothing to the historical background given above, since it contains only some rather vague references to the adverse reactions of Messrs. James and duPont to an unidentified report by Eastman, with a suggestion from James that Milbank should "talk the matter over with a group composed of Williamson, Holden, Budd and Gray."

such reports which were in turn transmitted to the President and the Congress.[6] In this report Eastman said in part:

> "It is not too much to hope that the railroads may be able to 'form a more perfect union' to deal with matters of common concern, such as scientific research, the establishment of standards, the adoption of new types of equipment and new forms of service, the unification of terminal operations, and readjustment of the rate structure. There is need, also, for a study of the organization and administration of individual railroads, to determine whether methods which originated years ago meet present-day demands. Such a study would have the further advantage of throwing light on the character of organization required for the administration of much larger units, if such were eventually created."

It should be noted that, as the Interstate Commerce Commission had done in the *Fifteen Per Cent* case in 1931 (page 283 above), Eastman in this statement assigned rate adjustments as among the matters calling for new cooperative action by the railroads. At the same time he drew attention not only to the need of avoiding duplication of facilities, which he had emphasized earlier, but to the need of organized efforts in research covering both mechanical operations and administrative methods.

In an address a few weeks later, Eastman said that there were several possible approaches to the railroads' difficulties. One was public ownership and operation. Another was "a grand plan of consolidation, in other words, a plan of joining these railroads in a very few systems, six or seven or some such number."[7] Another approach, already

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[6] A collection of Mr. Eastman's reports and addresses will be found in AD-19, Vol. D, beginning at p. 226, and AD-19(a), Vol. D, beginning at p. 350. An extract from the report cited in the text above is at p. 230 of Vol. D.

[7] This extract and the accompanying extracts and references are from Mr. Eastman's address on January 29, 1934 before the Democratic Women's Luncheon Club of Philadelphia, Vol. D, pp. 363, 364.

taken, was the Federal Coordinator Act. This Act, he said, had been passed because of the railroads' "inability to cooperate with each other to the full extent and to coordinate their activities, because of their intense competition with each other," the hope of Congress being "that much money could be saved if there were such coordination and if they could pool their operations to a greater extent at large terminals, pool some of their traffic and services, use their facilities jointly, and so on."

A fourth approach, and the one which Eastman particularly urged in this address, was for the railroads themselves to organize more effectively for common purposes. Reverting to his theme of a "more perfect union", Eastman compared the railroads' situation with that confronting the States prior to the adoption of the Federal Constitution. He said:

> "They formed one nation in fact but they were very loosely tied together by the Articles of Confederation, and it was necessary for them to form a more perfect union for the purpose of handling matters of common concern. Now, that is the situation with respect to the railroads at the present time. They really form a single national system, but they are separately owned, and the bonds of union between them which enable them to deal with matters of common concern are rather loose and ineffective, and the question is whether they can't form a more perfect union, as the States did through the adoption of the Constitution, by following the principle which is contained in this Coordinator bill."

In urging this course Eastman repeatedly drew attention to what he termed "the over-supply of transportation facilities of several different kinds", i.e., truck, bus, waterway, pipe lines, and air transportation in addition to the railroads. The great expansion of transportation facilities, he said in an address on April 30, 1934 before the National Rivers and Harbors Congress, "has brought in its wake the wastes and other evils of fierce and destructive

competition, not only between the different forms of transportation but within each separate group."[8] In this address and in other later addresses Eastman likened the conditions to those obtaining before the passage of the Interstate Commerce Act in 1887. "The chaotic conditions of instability, discrimination, and cut-throat or piratical competition which characterized the railroad world in those early days are finding their parallel now. * * *"[9]

While urging more effective public regulation of the new forms of transportation, Eastman kept recurring to the need of more effective cooperation among the railroads. For example, on May 16, 1934, he stated that "with the truck, bus, waterway, pipe lines and air competition which the railroads now have to meet, there is little reason why they should fight among themselves and every reason why they should abandon wasteful competition and by coordinating their efforts make the national railroad system more efficient and economical."[10]

9. *Action by the Railroads' Executives Looking Toward the Formation of a New Association.*

It was in this setting and against this background of economic distress, of the Metropolitan Club meeting, and of governmental activity and pronouncements that the railroads set to work to organize the Association of American Railroads. The story of what they did will now be traced.

According to Pelley, it was sometime in the spring of 1934 that the railroads first began "a serious discussion of creating a new organization which ultimately culminated in the forming of the Association of American Railroads."[11] There then took place, extending into the summer "numerous meetings of the Advisory Committee of the

[8] Vol. D, p. 365.
[9] Ibid. pp. 365, 366.
[10] Address before the National Association of Mutual Savings Banks in New York City, Vol. D, p. 368.
[11] XVI, 5557.

Association of Railway Executives • • • at which the matter of forming a new organization was given serious consideration." [12]

He was asked what the principal reasons were which prompted this action, and he replied:

> "The consideration which led to these discussions at this particular time were the same as those which had caused the President of the United States to recommend to Congress, and which caused the Congress to enact the law creating the Federal Coordinator of Transportation." [13]

In addition, he said, the railroads were being "urged" by the President, the I.C.C. and the Coordinator "to effect a more efficient organization, particularly with a view to reducing the competitive wastes. . . ." [14]

Concrete action was taken on June 20, 1934. The Advisory Committee of the Association of Railway Executives met and took the following action:[15]

> "General Atterbury moved that the Chairman appoint a Committee of six: three from the East, one of whom shall be from New England, two from the West and one from the South, to consider and report to the Advisory Committee at an early date recommendations looking to the reorganization and consolidation of the American Railway Association and the Association of Railway Executives. The motion was seconded by Mr. Scandrett and was unanimously adopted."

Later in the meeting the Chairman (Mr. Aishton, who was also Chairman of the Association of Railway Executives)[16] announced the appointment of the following railroad presidents to serve on the Committee: Messrs. Atter-

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[12] Ibid.
[13] XVI, 5557, 5558.
[14] XVI, 5560.
[15] S-17, at I, 96, 97; Pelley, XVI, 5563, 5564.
[16] Pelley, XVI, 5563; the other affiliations listed in the text are from the same source.

bury (of the Pennsylvania, who became Chairman of the Committee),[17] Williamson (New York Central, in lieu of Mr. Willard of the B. & O. who was first appointed but could not serve),[18] Holden (Southern Pacific), Scandrett (Chicago, Milwaukee and St. Paul), Cole (Louisville & Nashville), and Pelley (New Haven).

According to Pelley, this Committee of Six Presidents (hereinafter referred to as the Presidents' Drafting Committee) then "went to work diligently with the aid of the officers of the Association of Railway Executives, and in consultation with officers of the American Railway Association and other existing railroad organizations, in an effort to prepare a plan which would conform to the law and would provide a more efficient organization than had previously existed.

"Numerous drafts were made and all of them were subjected to the closest scrutiny and criticism.

"Ultimately, after the submission of three or four drafts, the Plan of Organization was agreed upon and submitted to a joint meeting of the Advisory Committee of the Association of Railway Executives and the Board of Directors of the American Railway Association, held in Chicago, Illinois, on September 20, 1934." [19]

At that meeting the plan was approved and recommended for adoption by the railroads who were members of the two sponsoring Associations.[20] And, on September 21, 1934, "with some slight amendments," the plan was adopted by the member roads, and the A.A.R. came into existence.[21]

I shall postpone until later an analysis of certain exhibits introduced by Georgia containing letters and drafts of proposals having to do with the work of the Presidents' Drafting Committee—exhibits which, in Georgia's view,

[17] S-17 at I, 97.
[18] Ibid.
[19] XVI, 5564, 5565.
[20] Ibid.
[21] XVI, 5566.

establish the conspiratorial nature of the Committee's work and the improper purposes of the final plan which became the constitution of the A.A.R. At this point it is appropriate to consider Georgia's allegation that the Presidents' Drafting Committee was appointed as a result of "pressure" from the Directors Committee which was appointed following the Metropolitan Club meeting.

10. *Relationship Between the Directors Committee and the Presidents' Drafting Committee.*

I shall first take up Pelley's testimony. He was asked whether he knew anything about the Metropolitan Club meeting, to which he replied: "No, sir. I did not attend the meeting held at the Metropolitan Club and have no recollection whatever as to its proceedings or what was sought to be accomplished through it." [22]

He was then asked whether the Association of American Railroads had been "formed as a result of this Metropolitan Club conference or of any other action taken by the group that attended this particular conference?" He replied: "The steps leading up to the formation of the Association of American Railroads, and the causes for its formation, were as I have already described them" [23] (referring to his testimony summarized above that the Association had been organized for the same reasons as had brought about the appointment of the Federal Coordinator and also because of governmental promptings). He went on to say: "The idea of an association and the determination of its scope and purposes were determined by the railroad executives themselves, under the circumstances and for the reasons which I have stated, and without any suggestion whatever from the group who held the meeting in the Metropolitan Club." [24]

Fletcher, Vice President and General Counsel of the

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[22] XVI, 5571.
[23] XVI, 5571.
[24] Ibid.

Association of American Railroads, in his capacity as counsel, made a statement with the consent of Georgia[25] regarding his own recollections of the events leading up to the appointment of the Presidents' Drafting Committee and the subsequent creation of the A.A.R. He said that in April, 1933 he went from the Law Department of the Illinois Central to Washington to become General Counsel of both the Association of Railway Executives and the American Railway Association.[26] He then continued:

> "I found all these various railroad associations, the Association of Railway Executives, the American Railway Association, Bureau of Railway Economics, Accounting Officers Association, Treasury Officers Association, Patent Division, and so forth, all functioning independently, reporting to different people, all pretty much in the same building.
>
> "It occurred to me that it would be the sensible thing if they were all combined in one organization under one directing head so that their efforts could be coordinated.
>
> "I began by taking the matter to my immediate superior, Mr. Aishton, who was Chairman of the Association of Railway Executives and Chairman of the Board of the American Railway Association, suggesting that all these various railroad organizations should be brought together.
>
> "I also discussed the matter with the members of the Advisory Committee of the Association of Railway Executives.
>
> "Well, gradually, as time passed, more and more people came to the conclusion that that was the sensible thing to do.
>
> "Now, I started out just simply with the idea of consolidating all these railway associations into one. That was my objective.
>
> "I know nothing in the world about the Metropolitan Club meeting. I did not attend it. I only knew what

[25] The colloquy of counsel on this point is at XVII, 5870, 5871. Mr. Fletcher appeared in the proceedings as counsel for all the defendants, the Association of American Railroads not having been joined as a party defendant.

[26] XVII, 5871.

I saw in the newspapers about it and excerpts from these publications have been introduced into this record."[27]

He then said that he had discussed "the whole situation" informally from time to time with certain members of the Directors Committee (which he characterized as "something quite apart and different", so far as he knew, "from anything done at the Metropolitan Club meeting or subsequent meetings of that particular group").[28] He specifically mentioned Messrs. deForest, Adams, Milbank, Harriman and Dick, and then went on to give the following account of what the Directors Committee sought to accomplish under the leadership of Mr. deForest, who was then Chairman of the Board of the Southern Pacific.[29]

"Now, those gentlemen under Mr. deForest's leadership were not, in the beginning at least, at all interested in the organization of a new association.

"Mr. deForest conceived the idea that the proper thing to do was to leave the existing organizations as they stood, but to detach from their regular duties about five railroad presidents of experience and standing, let them go down to Washington and take up their abode there, leaving the conduct and management of their railroads to others, and work with Mr. Eastman who had been appointed as Coordinator the previous year; also perhaps contact the President of the United States if that seemed appropriate; discuss the matters

[27] XVII, 5871, 5872.

[28] XVII, 5872. Judge Fletcher referred to the Directors Committee as the "Directors-Investors" Committee, but it is clear that he was talking about the former. There had been a mixed Committee of directors and investors which called the Metropolitan Club meeting (AD-5, Vol. D, p. 30) and some of the director members of it served on the Directors Committee which was appointed after the meeting. This latter Committee, it is clear from the context and from the names mentioned, was the one Judge Fletcher had in mind in his testimony.

[29] XVII, 5873. Mr. duPont was Chairman of the Committee but Mr. Fletcher stated that: "I don't think he functioned actively, and the Acting Chairman—maybe he was not so formally designated—but in reality the one who seemed to be most active in the matter was Mr. deForest. . . ."

with the members of the House and Senate Committees of Interstate Commerce and, generally, handle the matter with government agencies of all sorts of all railroad problems which were then important in the field of legislation and finance.

"That was the idea that Mr. deForest had, and I think he had pretty well sold that idea to the members of the Committee.

"I thought it was an awkward arrangement and one that would not be very helpful." [30]

In the meantime, he said, the Presidents' Drafting Committee had been appointed by the Association of Railway Executives to draw up a plan for a new association. Mr. Fletcher said that he met with that Committee from time to time, knew what its members were doing, and recommended to the Directors Committee "that the proper thing to do was to leave such matters as a necessary and desirable liaison with the government officers to the Board of Directors of this association which we hoped to form.

"Their objection to that was they would be there only once a month, now and then, or something of that kind, and to meet the situation, which seemed to me to require pretty constant contact, it was finally agreed that in the formation of the new association there should be an Executive Committee, and as you will note by referring to the Plan of Organization, there is a recital that the Executive Committee should be considered as being continuously in session, the theory being that the members of this Executive Committee stay in Washington just as long as they would be found to be useful there. . . .

"Well, it took a good deal of persuasion, I may say, to convince Mr. deForest at least that that was a satisfactory substitute for his plan, but ultimately, as the correspondence here I think indicates, Mr. deForest finally came to the conclusion that he would have to be satisfied with that arrangement.

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[30] XVII, 5873, 5874.

"I don't mind saying that one of the most effective arguments which I could use with Mr. deForest with respect to this proposition was to suggest that if he did create this special Committee of railroad presidents and send them to Washington his own president, Mr. Holden, would have to head the group because he was then Chairman of the Advisory Committee of Railroad Executives, and Mr. deForest did not hesitate to say that he could not be spared from the property, and that same situation would be true of nearly all the presidents of the various significant railroads in the country.

"I believe that is the whole story." [31]

Georgia introduced in evidence extracts from a statement by Mr. Willard, President of the B. & O., at a meeting of the Advisory Committee of the Association of Railway Executives on July 12, 1934.[32] In this statement Mr. Willard discussed among other things the same point of difference which Mr. Fletcher had described between the Directors Committee on the one hand and the Presidents' Drafting Committee on the other. The first extract from Mr. Willard's statement was a reference to a communication from Mr. Dick of the Directors Committee about rate reductions; this I shall refer to in more detail a little later. The second extract consisted of an enumeration of the mem-

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[31] XVII, 5873-5875.

[32] S-19, I, 97. Georgia introduced four exhibits, S-39, S-40, S-41 and S-42, Vol. A, pp. 152-157, to show that Mr. Dick of the Directors Committee became officially connected with the A.A.R. (though in what precise position does not appear); that he continued his association with the Directors Committee, with the knowledge and approval of the A.A.R.; and that the Directors Committee extended to the A.A.R. a general offer of support and assistance when called upon in cases which might arise "where divergent interests might make difficult of accomplishment, measures for the benefit of the industry as a whole" (S-39, Vol. A, 152). Except as showing that at the time of the organization of the A.A.R. the relations between the Directors Committee and those in charge of the A.A.R. were close and cordial, I do not believe that this evidence can be regarded as of any particular significance, there being nothing further in the record about either Mr. Dick or the Directors Committee.

bers of the Directors Committee. The succeeding extracts, in their entirety as given by Georgia, were as follows:

"We had quite a long discussion" (there is no identification of the "we"; the reference may have been to Mr. Dick) "and it seemed to me when we had finished that the way we ought to proceed is something like this: (and I would like to say this for the particular consideration of the Committee which has been selected to report on the reorganization of the two Associations)"—Mr. Willard is evidently referring here to the Committee of six presidents—"I think we can and should bring the two Associations together in such a fashion as to strengthen our organization in Washington, and to have such a Committee as Mr. Dick and his associates think we should have. We could undoubtedly bring about a more effective arrangement than we have had previous to this time.

"I talked with Mr. Myron Taylor somewhat yesterday about the organization of the American Iron and Steel Institute, to ascertain how they carried on their work, how they maintained discipline, what percent of the industry they represented, and so on, and I learned something from him.

* * * * * * *

"I think there should be an Executive Committee of five railroad presidents, not detached from their properties, and that Committee, I believe, could deal with the situation that these gentlemen have in mind. We would keep the organization that we had been building up through many years. We would not be duplicating its efforts. I believe if that sort of a program could be worked out it would probably satisfy what the duPont Committee has in mind, and I think it is desirable that they should be satisfied, because they are men of real importance and strength in the whole situation.

* * * * * * *

"I saw him, Mr. Dick, again two or three days later and he said—'You can say to your colleagues, if you want to, that you have the assurance of this committee that they will stand behind you and they will support

the committee of five to the extent of their ability; that they are in favor of private ownership and that there is no substantial sentiment among security holders for government ownership, but they do want this committee to be in position to represent the industry and they will give it all the support that they can.'

* * * * * * *

"Now, in substance—and this is all I am going to say—we were urged to get a committee. Mr. Gray told us about it;" (Mr. Gray's capacity does not appear; he was not a member of either the Directors Committee or the Presidents Drafting Committee) "Mr. Holden also told us about it" (Mr. Holden, as already indicated, was a member of the Presidents' Drafting Committee). "I think both endorsed it, and you voted to have a Committee of five appointed." (That is to say, an Executive Committee of five, to be appointed by the new national association which the railroads were planning to establish.) "Having in mind what these gentlemen of the duPont Committee think we ought to do, it is clear to me that instead of building up something entirely separate from what we already have, we ought to bring what we already have into symmetrical and logical shape so it can best do what is required of it. This committee of five, if desired, could use the agencies we already have for the doing of the things that they are designated to do. If we were all earning dividends, or even earning our interest, with substantial margins, we might perhaps be a little indifferent to suggestions from the Directors Committee, although even so, such a policy, in my opinion, would be most unwise. Under existing circumstances I think we should treat what they say with great consideration."

These extracts from Mr. Willard's remarks show that he had been in touch upon at least two occasions with Mr. Dick, one of the members of the Directors Committee. There is nothing, however, in his report of the discussions with Mr. Dick to indicate that the Directors Committee had, as Georgia alleges, brought pressure to bear on the Association of Railway Executives to appoint the Presi-

dents' Drafting Committee. The Presidents' Drafting Committee had been appointed over three weeks before Mr. Willard's remarks were made, and the functions of that Committee were solely to draft the articles of the new Association. There is nothing to indicate that Mr. Willard's discussions with Mr. Dick had preceded the appointment of the Presidents' Drafting Committee or had had anything to do with the appointment of such Committee.[33]

For the rest, Mr. Willard's remarks showed that, as Judge Fletcher had testified in the passage quoted above, the Directors Committee originally was not interested in a new association but wanted to have in Washington a full-time committee of five railway presidents detached from their properties. Mr. Willard, like Judge Fletcher, was opposed to this and, like Judge Fletcher, thought that an Executive Committee of five railroad presidents, not divorced from their properties, to be established in the projected merger of the associations, should satisfy the Directors Committee, "instead of building something entirely separate from what we already have".

Although Mr. Willard's remarks are not clear at all points, they suggest that Mr. Dick indicated approval by

[33] In further support of its allegation that the Committee of six had been appointed as a result of pressure by the Directors Committee, Georgia cited at p. 19 of her Final Brief proposed finding 39 on p. 220 of her Final Brief. Proposed finding 39 states that "from time to time" the Committee "consulted with George Whitney, Arthur Anderson and Thomas Lamont of J. P. Morgan & Company, concerning the inadequacy of the methods pursued by rail management in meeting the railroad situation." This proposed finding does not seem to have anything to do with the text on p. 19. However, proposed finding 39 is not elsewhere mentioned in the Final Brief, nor is any mention made of the two exhibits (S-15 and 16) which Georgia cites as supporting the proposition of finding 39. S-15 is a letter from George Whitney to Mr. deForest, a member of the Directors Committee, dated May 11, 1934, and S-16 is a letter from Mr. Lamont to Mr. deForest, dated June 20, 1934. These letters indicate that members of the Morgan firm had long been concerned about the railroad situation and had had some conversations at one time or another, as to what should be done, with Mr. deForest, Judge Fletcher, and General Atterbury.

the Directors Committee of this alternative suggestion, and that Mr. Willard was recommending this alternative to the meeting.

I referred above to the opening extract from Mr. Willard's statement, in reference to a communication from Mr. Dick about rate reductions. The extract was as follows:

> "* * * I received another communication from Mr. Dick, also rather critical of what we were doing in the matter of reduction of rates and in which he made the assertion that the traffic managers seemed to be vying with each other in the making of such reductions and suggesting that the presidents were practically doing nothing to prevent it."[34]

In Georgia's Final Brief, at p. 19, this extract is coupled together, without any transition, with the last two sentences of the final extract from Mr. Willard's statement quoted above, in which Mr. Willard said that the railroad executives should treat the views of the Directors Committee "with great consideration". In those last two sentences Mr. Willard was simply assigning an additional reason (namely, the views of the Directors Committee) for approving the proposal of the railway executives to provide for an Executive Committee of five railroad presidents in the new association, upon which the executives were working.

By taking Mr. Willard's remarks about the views of the Directors Committee out of their context and tacking them on to the earlier extract about reduction in rates, Georgia seeks to give the impression that the railway executives were being pushed unwillingly by the Directors Committee into setting up a conspiratorial mechanism for the control of freight rates. Such an inference cannot justifiably be drawn from the evidence. All that Georgia's exhibit on this point really shows is that one member of the Directors Committee expressed to Mr. Willard his con-

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[34] S-19, Vol. I, 97.

cern about the extensiveness of rate reductions made by traffic managers and the lack of action by the presidents in checking this practice; and that Mr. Willard reported Mr. Dick's concern to a meeting of railway executives some three weeks after the executives had established a committee to draft plans for a new association.

It seems clear from Mr. Willard's remarks and also from letters by Mr. Holden to Mr. deForest, and by Mr. deForest to Mr. Milbank, pertinent extracts from which are set forth below, that the Directors Committee was kept generally informed of the progress of the work. It also appears from these extracts that the Directors approved the results of that work. All this, however, falls short of evidence of pressure or direction on the part of that Committee. The extracts are as follows:

(1) From Mr. Holden's letter to Mr. deForest, written on the eve of the adoption of the Articles of the A.A.R.:[35]

> "I have endeavored to keep Mr. Dick generally informed as to the progress that we have made and I think he approves it and doubtless he has acquainted other members of your committee with the information; in fact Mr. Averell Harriman spent the better part of a day and evening with us over one of the drafts of the plan and seems to be in accord with it."

(2) From Mr. deForest's letter to Mr. Milbank, written just after the establishment of the A.A.R.:[36]

> "A few days after my return I had a long talk with Dick and a very full report from Mr. Holden of what had transpired in railroad affairs during my absence. Taking it all in all, I am more than satisfied with what has been accomplished. As I think you know, my objection to waiting for the reorganization of the Association of Railway Executives was due to my doubt whether it could be accomplished quickly and whether if accomplished, it would be done in the right way.

[35] S-30, Vol. A, 133, 136.
[36] S-38, Vol. A, 149.

Both of these objections have been met and I see no essential difference between the present setup and the independent committee we proposed. It also has the definite merit of having been accomplished with the unanimous approval of all of the railroads and the best that we could have hoped for if our plan had been adopted was a majority vote with a somewhat dissatisfied and certainly unenthusiastic minority.

"While of course it is not possible to say what might have happened if our committee had not intervened, I think we may properly feel that we are entitled to the credit of at least starting the first constructive move ever made by our railroads acting as a whole."

This letter shows that in Mr. deForest's mind the important objective had been to establish a small committee of railroad presidents who could speak for the industry as a whole; that he had been opposed to awaiting the establishment of a new national organization, fearing that it might not be set up expeditiously enough or in the right way; but that his objective had been achieved under the A.A.R. plan.

Mr. deForest's statement to Mr. Milbank that the Directors Committee was "entitled to the credit of at least starting the first constructive move ever made by our railroads acting as a whole" presumably had reference to the committee's success in inducing the Presidents' Drafting Committee to provide for a small executive committee of the A.A.R. Board, as has been previously described. Possibly Mr. deForest intended to claim credit for actually bringing about the establishment of the A.A.R. as a reaction to the Directors' pressure for an independent committee of Presidents, but there is no support in the record for such a claim, and the defendants' testimony is to the opposite effect.

I now turn to a summary of the evidence relating to the formulation of the A.A.R. plan by the Presidents' Drafting Committee—evidence which seems to me relevant as illuminating the general purposes of the defendants in establishing the A.A.R.

11. *The Work of the Drafting Committee of Six Railroad Presidents.*

The Presidents' Drafting Committee, after its appointment on June 20, 1934, set about the task of drafting a plan for a new association. Georgia introduced a series of exhibits regarding the work of the Committee, from which the following account has been summarized.

On June 22, Mr. Aishton, Chairman of the Advisory Committee of the Association of Railway Executives, notified the Committee of its appointment.[37]

On June 23, Mr. Aishton wrote to General Atterbury, president of the Pennsylvania, who, as has been noted, was made Chairman of the Drafting Committee. In this letter Mr. Aishton (not a member of the Committee) argued in favor of an organization with authority to "direct, rather than recommend." [38] He had earlier written General Atterbury in the same vein, about six weeks prior to the appointment of the Committee.[39]

The question of the nature and extent of the authority which should be vested in the new association was a major point of discussion throughout the many weeks of deliberation which followed. In the shaping of the plans Judge Fletcher appears to have taken a prominent part. According to his own testimony (p. 307, *supra*) he had been the original proponent of the idea of merging the existing national associations into one comprehensive organization. In a letter

[37] S-20, I, 99.

[38] S-18, I, 97.

[39] S-14, I, 94. In this earlier letter Mr. Aishton referred to "the many plans that are being discussed for establishing control over railroad affairs" and stated that in these discussions "you have always expressed yourself in favor of some measure of control by the industry within itself. Whether the time has arrived for that will be questioned. In my opinion it has. . . ." He then suggested a particular form of association and concluded by saying: "The main thing is, are the railroads willing to place the power in anybody's hands even in view of the fact that any political organization or czar that might be set up would arbitrarily use such power."

of July 18, 1934 to the members of the Committee General Atterbury said:[39a]

> "I am enclosing an outline of plan which I have drafted and which is based upon suggestions submitted by Judge Fletcher, in his letter of June 23, 1934, and subsequent views of both Messrs. Aishton and Fletcher, together with my own ideas on the subject."

The views of a number of people, however, went into the drafting of the final plan.[40] The first draft, sent out by General Atterbury as described above, was discussed at a meeting of the Drafting Committee in New York on July 20, 1934.[41] At this meeting General Atterbury explained the purpose of the plan. Most of the comments came from Mr. Cole of the Louisville & Nashville Railroad and Mr. Holden of the Southern Pacific. Doubts seem to have been expressed about the adequacy of the Board's power and about the legality of a penalty feature in the arbitration provision which was embodied in the plan.

On July 27 Mr. Pelley, president of the New Haven Railroad and a member of the Committee, wrote to General At-

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[39a] S-20, I, 99.

[40] It has already been noted that at the meeting of the Advisory Committee of the Association of Railway Executives on July 12, 1934, Mr. Willard said that he had inquired into the disciplinary and other features of the American Iron and Steel Institute (S-19, Vol. I, 98). As has been stated, Mr. Willard had been originally appointed to the Committee of six but felt himself unable to serve. He seems to have taken a somewhat active part, however, in the discussion of the Committee's plans. In Georgia's Final Brief at p. 20 it is stated that the plan of organization was drafted under the "leadership and dominance" of the Pennsylvania Railroad. The record does not justify this allegation. It is true that General Atterbury acted as Chairman of the Committee and in that sense assumed leadership, and the record also shows that ideas of his own went into the drafting. On the other hand, the exhibits set forth above indicate that Judge Fletcher as counsel to the two associations, and Mr. Holden of the Southern Pacific, played very important roles; and that many changes were made as the result of meetings about which the record tells us nothing.

[41] S-21, I, 99. This exhibit shows that Mr. Willard and Judge Fletcher were present by special invitation.

terbury commenting upon a second draft of the plan which he had received from General Atterbury. While approving the draft in general, Mr. Pelley advocated compulsory arbitration, "so that no one can ask, where are the 'teeth' ".[42] For fear that some roads might not be willing to obligate themselves in this way for an indefinite period he suggested that the agreement might be limited to five years.

In the course of his cross-examination in these proceedings Mr. Pelley was asked what he had in mind when he referred to "the teeth". He replied:[43]

> "Well, I had this in mind:
> "That is exactly what I said and that is what I meant.
> "I thought if we were going to have a new organization it ought to be one that had a fair chance of accomplishing some of the things that were greatly concerning us all at the time, and that is the question of competitive wastes, and what I had in mind was that there might be a situation where four railroads, for instance, were involved in some coordination of facilities or consolidation of facilities, and three of them had agreed to do it and the fourth would say 'no' and it could not be accomplished. Then that would end it.
> "There would be a consolidation of facilities that apparently at the time was definitely desirable from a railroad point of view, reducing competitive waste and helping the earning situation, and that is the reason that I was contending for compulsory arbitration.
> "I thought we ought to have a plan that would obligate the fourth man who didn't want to go through with it to arbitrate and settle it on an arbitration basis.
> "That was my point of view."

Then, referring to the situation at the time, he explained:[44]

> "You see, at the time, there was a great deal of discussion in the country by almost everybody for that matter, from the President of the United States down,

[42] S-22, I, 100.
[43] XVII, 5741, 5742.
[44] XVII, 5742, 5743.

as to what should be done about the railroad situation. Times were bad. Roads were going in the hands of the courts and we were meeting with some new competition, and business generally was bad, and there was quite a feeling abroad in the land that we were overbuilt and perhaps we had more railroads than could be made use of with the amount of business we had, and there was keen competition, so there was much talk of what to do about the roads.

"There were many plans made and suggested by some people outside of the railroad industry—there was the so-called Prince plan, a plan named Prince plan.

"They were going to consolidate the railroads in the country into a specific number of systems, I forget the number, maybe seven or fifteen, some small number, and they thought that was the way to save the situation for the railroads.

"I knew from my experience that some things could be done in the way of saving if we could agree upon it, and I was seeking a plan that would enable us to agree, and all that talk developed into the Coordinator. That is what brought about the Coordinator Act."

To return to the history of the development of the A.A.R. plan: in reply to Mr. Pelley's letter favoring compulsory arbitration General Atterbury's assistant, Mr. Eysmans, wrote Mr. Pelley that Judge Fletcher believed that penalty provisions, which compulsory arbitration would require, might make the plan subject to attack under the anti-trust laws, and that a provision in the draft for expulsion from the Association, in case of violation of the arbitration provisions, should be "sufficient punishment".[45]

While Mr. Pelley was seeking compulsory arbitration with "teeth", Mr. Holden of the Southern Pacific was contending for the exact opposite. On August 1 he wrote General Atterbury objecting to the expulsion provision as "unnecessarily drastic" and "too un-American".[46] As will be seen, Mr. Holden's views were destined to prevail.

[45] S-23, I, 100.
[46] S-24, I, 101.

In his letter to General Atterbury Mr. Holden also objected to a provision in the draft for consolidating into one organization all of the existing associations, including the territorial associations. "As stated at the last meeting of the Committee I feel that an appellate jurisdiction in the reorganized association is all that is necessary or practical; meaning thereby that in case of serious differences on policies or conduct such matters can be appealed to the board of directors for consideration by that body . . ." In conclusion he noted that in Western territory "for over a year we have proceeded with definite success in a plan of adjustment of controversies through a commissioner form of organization and appellate jurisdiction in a Committee of Directors, without binding contract controlling in advance the liberty of action of individual roads."[47]

Two weeks later Mr. Holden wrote Judge Fletcher regarding a third draft which was about to be issued and concerning which Mr. Holden and Mr. Eysmans had had a conference. Mr. Holden said that he continued to feel "serious anxiety over the wisdom" of the provision for expulsion from the association. He asked Judge Fletcher's views as to the effect of expulsion on the right of the dissenting road to continue to participate in the "existing agreements now under the general supervision and jurisdiction of the American Railway Association, such as car service and per diem rules and agreements, agreements relating to repairs and bills for repairs on foreign cars, etc., etc. If there have been cases of withdrawal of members from the American Railway Association, what have the consequences in these particulars been and what is the general understanding in case of such withdrawals?"[48] He noted Mr. Eysmans's opinion that in case of expulsion the dissenting road would be excluded from these agreements. He also said that he

[47] This last sentence of Mr. Holden's letter has previously been noticed in connection with Mr. Harriman's reference to the Western organization at the Metropolitan Club meeting, in the next preceding Note 95 supra.

[48] S-26, I, 102, 103.

understood "that the intention of the drafters of this Plan is that the obligatory requirement for arbitration will exclude the right of any railroad to go before the Interstate Commerce Commission as in case of disputes over divisions . . ." He inquired whether such a requirement would be lawful.

Judge Fletcher replied on August 17[49] that he had received draft No. 3; and that as to Mr. Holden's first inquiry "no member has ever withdrawn from the American Railway Association, so that the question has never arisen as to the status of the withdrawing line with respect to per diem and car exchange agreements. It is true, however, that railroads members of the American Railway Association, have some arrangements with railroads not members of the Association whereby cars are exchanged, repaired, and handled cooperatively. I would assume that if a railroad under the new plan of organization withdraws from the Association or is automatically excluded therefrom, it would have the right to apply to the I. C. C. and secure an order requiring railroads members of the Association to interchange cars with them and generally to enter into arrangements which would not interrupt the regular flow of traffic."

Judge Fletcher then said he shared Mr. Holden's view about the inadvisability of expulsion in case of refusal to arbitrate. He did not believe that such a penalty would be necessary; "we should proceed upon the theory that the railroads, if they agree to a plan, will carry it out in good faith."

With regard to Mr. Holden's second inquiry, Judge Fletcher said that it was "perfectly obvious that railroads cannot get together and shorten the arm of the Interstate Commerce Commission or deprive the Commission of the jurisdiction conferred upon it . . ." However, he added, "I would suppose that the railroads might agree and be bound at least by a gentlemen's agreement that when they

[49] S-27, I, 103.

disagree about divisions they will submit the matter to arbitration and not go to the Commission with the controversy." While a railroad could not be kept from going to the Commission, if it did so it "would simply be outside the pale and be guilty of breaking its agreements." He concluded by saying that he was studying the anti-trust laws in connection with the various questions presented and would report to the Committee thereon.

12. *Final Changes in the Plan, and Its Effectuation on September 21, 1934*

On August 23, 1934 the plan in its then form, apparently minus the controversial feature of expulsion from membership,[50] was submitted to a meeting of the Advisory Committee of the Association of Railway Executives. The meeting unanimously approved the plan as submitted, except for one change, namely, the addition of one more representative of the Western roads on the projected board of directors.[51]

Since, as will appear later, Georgia criticizes the distribution of voting power in the A. A. R. as discriminatory against the South, it is worth noting here how the distribution was worked out at this stage of the deliberations.

The minutes of the meeting indicate that on the question of representation Mr. Baldwin, an officer of one of the Western railroads, expressed the view that "the West—by reason of its great expanse of territory and divergence of conditions in the various localities—ought to have seven directors on the Board." The minutes went on to state that: "On a motion presented to adopt the report (on the basis of the Special Committee's recommendation), all

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[50] As indicated by the draft bearing that date, the full text of which is in Vol. A, 116-122. Mr. Holden, in a letter to Mr. deForest of September 18, 1934 (S-30, I, 108, also Vol. A, 133-136) spoke of the provision as if it were still in the draft, and expressed "some doubt" about its legality. Whether or not the provision was eliminated at the August 23 meeting, it was eliminated before the adoption of the final plan.

[51] S-28, I, 104.

voted affirmative except Mr. Baldwin. The subject was thereupon reconsidered and while the Southern and Eastern roads felt that the . . . distribution as proposed by the Committee was entirely equitable, they agreed in the interest of harmony, and to strengthen the presentation to the Member Roads by a unanimous report, to give the West an additional director."

The result was that the West was given five representatives on the Board, the North five, and the South three. A majority vote of the Board was required for a decision,[52] but any member of the Board could declare a question controversial, in which case a two-thirds vote was necessary. The arithmetical result was that only the South could not block action in any case declared to be controversial. The Southern carriers' representatives, however, appear to have accepted this arrangement as satisfactory.

So much progress had been made toward the completion of the plan that on the day after Labor Day Mr. Pelley went to see President Roosevelt at Hyde Park and, according to his testimony, discussed the principal features of the plan with him. "After the President had thoroughly familiarized himself with the proposed plan, he told me that he would endorse it publicly, which he afterwards did, and that he would support the work of the Association to be formed under the plan proposed, which he also did."[53]

Events then moved rapidly to a conclusion.

On September 20, at a joint meeting of the Advisory Committee of the Association of Railway Executives and the Board of Directors of the American Railway Association, the plan was recommended to the respective members after

[52] As shown by the draft, supra note 50.

[53] XVI, 5572. Mr. Holden, in his letter to Mr. deForest, note 50 supra, said: "The President has seen and has expressed himself with considerable enthusiasm about the plan and, as now indicated, will issue a statement of approval. He seems to feel that this is helpful to his administration as an evidence of courage by one of the large industries of the country to undertake to readapt its methods to current conditions and to govern itself. Mr. Eastman has seen the plan and has expressed complete approval of it and will likewise also issue a statement to that effect."

minor amendments in the draft had been made.[54] The plan was described as "a plan for the consolidation into one national organization of the American Railway Association, the Association of Railway Executives and other national organizations."

The next day the member roads, after making some further "slight amendments", unanimously approved the plan, to become effective as soon as three-fourths of the members of each association had formally subscribed to it.[55]

The amendments of September 20 and 21, as shown by a comparison of the drafts before and after adoption,[56] did not go to substance, except for the voting arrangements. The Western roads were given a sixth place on the Board, and the requirement for voting upon questions declared to be controversial was changed from two-thirds to three-fourths.[57] Thus the plan as finally adopted provided for a Board of 15, 6 from the West, 5 from the North and 3 from the South, with the A.A.R. President ex-officio. So far as the record discloses the arrangement appears to have been acceptable to the South.

When the adoption of the plan was announced at a press conference at Hyde Park, President Roosevelt informally expressed his commendation of the action taken.[58] Mr. Eastman, in an official statement, did likewise, saying among

[54] Pelley, XVI, 5565.

[55] Pelley, XVI, 5566. In S-31, I, 109, Judge Fletcher is reported in a memorandum by Mr. Eysmans to have assured the meeting that "on the subject of any possible violation of the anti-trust laws . . . great care had been exercised to prevent any criticism on this point" and that "if we were challenged it would not be because of the plan itself but on account of subsequent actions of the Association."

[56] The last draft before adoption is in Vol. A, 116-122; the draft as adopted is in Vol. A, 124-130.

[57] S-29, I, 105; also Vol. A, 125.

[58] As reported by the United Press, and by special dispatches in the New York Times and the Washington Post for September 23; Pelley, XVI, 5569, 5570. The Times dispatch added: "It was believed that the President was informed of the new organization in fullest detail some ten days ago when J. J. Pelley, President of the New York, New Haven & Hartford Railroad, who is resigning to head the new organization, called here." The Washington Post dispatch also referred to Mr. Pelley's visit.

other things that the action was "gratifying", and "a step in the right direction, which offers promise of substantial benefit to the railroads and also to the country."[59]

On October 12, 1934, three-fourths of the members of the constituent organizations having formally subscribed to the plan, the first meeting of the Board of Directors of the new Association was held. At that meeting Mr. Pelley was elected President.[60]

C. *The Structure and General Nature of the A. A. R.*

1. *Summary of the Articles of Association.*

The Plan of Organization of the A. A. R. as adopted (herein referred to as the "Articles of Association") began with a preamble, to be analyzed later, expressing the purposes of the new organization.[61]

Article 1 provided that, within the scope of the preamble, the Association was created "to deal expeditiously and effectively with all matters of general interest to the industry."

Article 1 further provided that the Eastern Presidents' Conference and the Southeastern Presidents' Conference, and the Western Association of Railway Executives, and "their related or subordinate associations and organizations will preserve their identities and activities, cooperating with the Association." Thus the structure and functions of the territorial associations were left untouched by the new Association. However, Article 19, which will be referred to again later and which provided for arbitration under certain circumstances, also provided that "where there exists means for the settlement of disputes in organizations to be brought under the

[59] The full statement, as reported by the Associated Press on September 22, was given in Mr. Pelley's testimony, XVI, 5568.

[60] Pelley, XVI, 5570.

[61] Pertinent extracts from the Articles of Association as originally adopted are contained in S-29, I, 105-108, and the quotations and summaries which follow are taken from that exhibit. The full text is in Vol. A, pp. 124-130.

Association, such rules and regulations may be continued, *unless otherwise ordered by the Board of Directors or the Executive Committee.*" (Emphasis added)

Article 2 provided that "in addition to carrying out the purposes stated in the preamble hereof, the object is to coordinate the activities of the several associations dealing, directly or indirectly, with subjects connected with the American railroads." The evidence does not indicate to which associations this article had reference. As has been noted previously, the A. A. R. came into being as a consolidation of the two principal national railway associations which had been in existence for a great many years, namely, the Association of Railway Executives and the American Railway Association. At the time of the creation of the A.A.R., certain other pre-existing railroad organizations, such as the Railway Accounting Officers Association, the Presidents Conference Committee on Federal Valuation of Railroads, the Railway Treasurer Officers Association, and the Bureau of Railway Economics, were still in existence and were subsequently merged into the A. A. R.[62] Article 2 may or may not have had reference to these associations or to the territorial associations or to all of them in general. The language is broad enough to cover all of them, and I shall so construe it.

Article 4 provided that the Board of Directors, consisting of 15 railroad presidents as previously described, "shall determine the policies and control the activities of the Association." There were further provisions for arbitration in certain cases, and the members agreed to comply with Board decisions voted by a three-fourths vote, and with arbitration awards; but no penalties or sanctions were provided. These portions of the Articles will be analyzed in Part Two, together with the preamble, under the heading of the "The Nature and Alleged Coerciveness of the Power Acquired by the Defendants."

[62] Pelley, XVI, 5550. The record does not disclose when the mergers took place except that they were subsequent to the adoption of the Articles of the A.A.R. on September 21, 1934.

Article 7 established an Executive Committee of five members of the Board. It provided that this Committee "shall be considered as being continuously in session" and that the presidents who composed it "shall give to the affairs of the Association such time as may be necessary." They were not, however, divorced from their properties.

These provisions, as previously indicated, were a substitute for the proposal by the Directors Committee (appointed as a result of the Metropolitan Club meeting) for an independent committee of five presidents, divorced from their properties, who should reside continuously in Washington and deal with government officials and agencies and Committees of Congress.

However, it was expected that the new Executive Committee would, for the time being at least, be very active. Thus Mr. Holden of the Southern Pacific wrote to Mr. deForest of the Directors Committee, a few days before the formal adoption of the A. A. R. Articles:[63]

> "I shall be on the Board of Directors but have declined to be on the Executive Committee because that Committee, certainly during the coming winter, will have to maintain almost continuous sessions; in fact the plan as drafted states that the Committee is to be considered in continuous session. I have not felt that with the problems here and along the line I could give that amount of time to the work, but the Board will meet monthly and will exercise a large function in the effort to make the plan work in an effective manner."

As illustrating the extent to which the framers of the A. A. R. had in mind its utility as a move to discourage proposals for government operation, Mr. Holden further said in his letter:

> "The foregoing is a rough outline of the present situation, which has been about the best that could be accomplished and, assuming that the President and Mr. Eastman are in the frame of mind above stated,"

[63] S-30, Vol. A, 135.

(i. e., pleased with the A. A. R. plan) [64] "we may hope for a cooperative atmosphere and postponement of any further talk of government operation for some time to come; meanwhile of course the test will come as to the action of the Executive Committee and the President in carrying out the powers granted to them."

The record does not, however, reveal the extent to which the Executive Committee actually functioned in practice.

2. *The Tasks Assigned to the A.A.R.*

In keeping with the varied functions of the national organizations absorbed by the Association of American Railroads, the Association upon its establishment created five departments, each in charge of a vice-president appointed by the Board of Directors.[65] The Departments consisted of: Law, Research, Operations and Maintenance, Traffic, and Finance, Accounting, Taxation and Valuation.[66]

The defendants introduced in evidence an elaborate chart of these departments,[67] including their divisions and sections; and Pelley testified regarding their varied operations.[68]

This evidence need be noted only insofar as it may serve to put into perspective the functions of the Association in relation to freight rates, and thereby to aid in understanding the motives of those who organized the Association. For this purpose I shall summarize first the evidence relating to the work of the Operations and Maintenance Department, the largest in the Association, and secondly the work of the Traffic Department, which has to do with rates as well as with other matters. While the evidence relates to the present functions of the Departments, there is no reason to suppose that these functions

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[64] *Supra*, note 53.

[65] As provided in Article IX of the Articles of Association, I, 106.

[66] Article IX(a) of the original Articles so provided: S-29, I, 106.

[67] AD-2, Vol. D, 10.

[68] In XVI, 5577-5626.

differ in any important respect from the functions assigned to the Departments at the time of the A.A.R.'s organization.

(a) *The Operations and Maintenance Department.*

This Department is organized in seven divisions (under which are some 32 sections or their equivalent), 1 bureau and 3 special committees.

Of the 7 divisions the Car Service Division is the most important and the largest group in the Association. Its primary function is the administration of car service rules. Pelley testified that these rules, "which arose out of the necessities of interchange traffic among railroads, are based on the principle of ownership by each road of its proper proportion of the total pool of cars of various types in the entire country, with reasonable flexibility in the use of those cars. The principle is that the road which builds and pays for a freight car is entitled to its reasonably prompt return, but that to promote economy and minimize empty mileage the return movement should be under load to the greatest practicable extent." [69]

The Car Service Division not only checks the performance of each railroad but has authority "to assemble and move empty cars from road to road, and from territory to territory, to meet anticipated demands such as some of those arising in the war, or such as the necessity for meeting the rush of combine-harvested wheat out of the West each Summer and Fall. Where such movements are necessary, the Car Service Division orders them, and the railroads carry out the orders, even at considerable loss to revenue and additional operating expenses to the roads from which such cars are taken." [70]

The Division works closely with the National Association of Shippers Boards and its thirteen regional boards,

[69] XVI, 5590, 5591.

[70] XVI, 5591. Mr. Pelley went on to describe the work of the Division in handling the unprecedented traffic of war time.

whose membership consists of some 22,000 shippers and receivers of freight. The railroads, through the Car Service Division, contribute to the Association secretarial service and other costs. One of the main tasks of the boards is to forecast car requirements for three or four months ahead.[71]

Other major items of the work of the Operations and Maintenance Department include:

(1) The preparation, revision and interpretation of the standard codes and rules of train operation, block signals and interlocking. This standardization, according to Pelley, makes it possible "for the trains of several different railroads to use joint terminals and union passenger stations." [72]

(2) The rules and regulations governing car service, demurrage and storage, and per diem payments by one railroad for the use and detention of cars owned by the others.[73]

(3) Methods of freight station work and the problems of local freight agents.[74]

(4) Physical standards for railroad employees; periodic physical examinations; various safety and protective measures for passengers, employees, trespassers and persons using grade crossings; and protective devices against fires.[75]

(5) Development of all forms of communication for railroad use.[76]

(6) Improvement of packing methods and loading rules.[77]

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[71] XVI, 5596, 5599-5601.
[72] XVI, 5578.
[73] XVI, 5579.
[74] XVI, 5580.
[75] XVI, 5580-5582.
[76] XVI, 5581.
[77] XVI, 5582.

(7) Standardization and improvement in the design, construction and maintenance of road beds and structures, including bridges, terminals, electrical apparatus, signal appliances, facilities for servicing locomotives and cars, etc.[78]

(8) Standardization and interchangeability of freight cars and couplers. "We take for granted," said Pelley, "the fact that any one of the nearly 2,000,000 freight cars in the United States can be coupled up at either end with any other one of those cars, automatically and safely, and we usually overlook the significance of this fact in the development of American commerce." [79]

(9) Cooperation with shippers, refrigerator car lines, and the Department of Agriculture in improving refrigerating cars.[80]

(10) Standardization of materials, and methods of inventory control and storage and of economical distribution. Pelley commented: "When you consider that railroads buy approximately 100,000 different items of materials and supplies, coming from something like 12,000 communities . . . and that sufficient but not excessive stocks of these items must be kept on hand, in numerous warehouses, and must be made available at the points of work scattered all over the railroad system, it is obvious that there is a large and important field for the work of this Division." [81]

(11) Procedures for the investigation and settlement of freight claims and the apportionment of settlements among carriers; together with a continuing campaign, in cooperation with shipper organizations, "to reduce the economic waste involved in loss and damage to freight in transit." [82]

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[78] XVI, 5582-5584.
[79] XVI, 5585.
[80] XVI, 5586.
[81] XVI, 5586, 5587.
[82] XVI, 5587.

(12) The use of motor transportation by railroads for both freight and passenger service.[83]

(13) Promotion of safe transportation of explosives, in cooperation with railroads, express companies, shipper organizations, some steamship companies, and public authorities.[84]

(b) *The Traffic Department*

This Department, as described by Pelley, "is a liaison office in traffic matters among the railroads, between the railroads and shippers' organizations, and between the railroads and the several shipping departments, agencies and corporations of the Government, as well as the Interstate Commerce Commission." [85] It has to do with both freight and passenger traffic.

Pelley testified that neither the Association nor its Traffic Department had any authority to make rates. The Traffic Department "not only does not have the authority, it does not have the organization to make this possible. "The personnel of the Department consists only of a Vice-President, two assistants, and five stenographic and clerical workers." [86]

However, the evidence shows that the Traffic Department was intended to be the branch of the A.A.R. which would concern itself with rate questions of importance to the industry. In this field Cleveland, who served as a Vice-President and as Chairman of the Traffic Department from its inception up to and including these proceedings,

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[83] XVI, 5588.

[84] XVI, 5588. Mr. Pelley noted that "the Interstate Commerce Commission has delegated to this Bureau duties in connection with the inspection and enforcement of the rules." *Ibid.*

[85] XVI, 5608.

[86] XVI, 5608, 5609. From an organization chart of the A.A.R. introduced by the defendants (AD-2, Vol. D, 10) it appears that the Traffic Department is the smallest of the Departments of the A.A.R.

was given broad discretion.[87] On November 7, 1934, shortly after the formation of the A.A.R., a meeting of its Executive Committee was held at which the following action was taken:[88]

> "After much consideration and discussion the Committee unanimously agreed that the policy of the organization is to bring about every possible economy and every increase in revenue possible for the railroads as a whole; and there is no limit to the scope of the various departments in the direction of economy and efficiency and increasing and conserving revenues. The Committee called in Vice Presidents Downes and Cleveland, separately, and had a detailed discussion with them as to the policy as outlined above. The President has also advised the other Executive Officers of the Association to the same effect."

At a meeting of the Executive Committee on November 15, 1934, "the President read a memorandum of suggestions prepared by Cleveland of action he proposed in the conduct of his Department."[89]

Within the next few weeks Cleveland organized a Traffic Advisory Committee to assist the Traffic Department. It was composed of eight traffic executives from the West, eight from the East, and six from the South, and included the top chairmen from the three territories. Cleveland served as Chairman of this Committee, but without voting authority.[90] On December 8, 1934 Pelley wrote a letter

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[87] Mr. Cleveland was present throughout the taking of testimony in these proceedings but was not called upon to testify.

[88] S-67, Vol. I, 190.

[89] S-34, Vol. A, 143-144.

[90] Mr. Kerr, Chairman of the Southern Freight Association, testified that as originally organized it consisted of five traffic officers from the South, five from the East and five from the West. "Shortly afterwards . . . the chairmen of the Traffic Executive Committees in the three major territories were added as members, making six from each section. Subsequently the Eastern lines, and also the Western lines, desired to add two more chief traffic officers to the Committee and that was done. The Southern lines made no such request." V, 1423, 1424. Mr. Kerr went on to say that "the Southern lines decided that inasmuch as it was merely an advisory

to the member roads in which, after describing the formation of the Traffic Advisory Committee, he said:[91]

> "As a result of a unanimous recommendation of the Committee above described, I am writing you to see if you cannot require within your respective organizations the adoption of a policy that *rate changes must be considered from the viewpoint of the industry as a whole rather than that of the individual carrier*, and that conclusions should be reached which will bring about that result. The universal adoption by the individual lines of a policy such as suggested would appear to be absolutely necessary if any substantial improvement is to be expected in the earnings of the carriers.
>
> "My attention has further been directed to the fact that *the attendance of chief traffic officers at meetings of their executive committees in the various associations is not what it should be.* The Advisory Committee are strongly of the opinion that these meetings should, as far as possible, be personally attended by the chief traffic officers, and that *constructive action such as present conditions demand can only be achieved through attendance of those directly responsible for freight and passenger revenues.* Under the circumstances, may I respectfully urge each and every one of you to endeavor to see that the executive meetings within the various rate associations are personally handled, so far as practical and possible, by your respective chief traffic officer?" (Emphasis added)

The record contains no evidence of any important activity by the Traffic Advisory Committee until 1938, when the railroads were making particular efforts to avoid "frittering away" their revenues through improvident rate reductions, and to raise the level of rates which had been lowered to meet truck and other competition. At that time the railroads were engaged in a campaign to secure increased freight rates from the Commission, and the Commission

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committee and had no power to make rates or anything of that kind, their interests were amply protected by the five chief traffic officers and the chairmen who were already on the Committee."

[91] S-105, I, 225.

had admonished them in several successive opinions to make efforts of the sort just mentioned. The railroads then, among other things, re-emphasized the responsibility of the chief traffic officers in rate matters, which the Traffic Advisory Committee had first stressed in 1934, by adopting temporary rules requiring those officers to sign all proposals for rate reductions. These developments will be described more fully beginning at p. 343. After the exigencies of this 1938 period had disappeared, the Traffic Advisory Committee figures very little in the history, and Doss of the Atlantic Coast Line testified that the Committee had had no meeting since 1940. He also testified that:[92]

> "Committees, like the Traffic Advisory Committee, and meetings of the chief traffic officers are sometimes called Association of American Railroads Committees, but the members are designated by the individual railroads as their own representatives and not as representatives of the Association of American Railroads, and those Committees are not responsible in any way to the Association of American Railroads or its officers."

By way of further illustrating the varied activities of the Traffic Department in rate matters, Georgia introduced a report by Cleveland, summarizing the main accomplishments of the Department during its first four years.[93] The purpose of the report was to state the "high points" of what the Department had done and to give a "very rough estimate of the amount of money its activities had saved to the railroads. * * *" Cleveland listed twenty-one items as representative of "some of the matters of large moment where we know substantial savings in revenue have been secured."

Several of the items had to do with rate increases. For example, the report stated that an increase in the rates on rice "resulted through cooperation between the common

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[92] XV, 4840.
[93] S-104, Vol. I, 222.

carrier barge lines operating on the inland waterways and the competing rail lines, largely brought about by the efforts of this Department." Another item consisted of "securing an advance in the cotton rates in both Southwestern and Southeastern territories." Cleveland also reported that it was "largely through cooperative efforts of this Department" that the effective date of certain rate increases granted by the Interstate Commerce Commission was set forward "at least fifteen days earlier than was anticipated."

Other activities in connection with the Interstate Commerce Commission were noted; for example, "assisting in avoiding suspension of increased rates by the Interstate Commerce Commission and in obtaining modification of other orders or requirements of the Commission that might have resulted in reductions in rates or in other unnecessary expense." Cleveland also reported having persuaded the Comptroller General to change certain rulings, with resulting savings to the railroads. And steps were taken "in the direction of simple and economical publication of freight tariffs."

Cleveland also had to do with shippers. He had "participated in conferences with shipper groups and obtained, as a result thereof, higher rates with the retention of traffic than the shippers were originally demanding." His Department also "assisted in forestalling a demand on the part of Florida and Texas shippers for an emergency reduction in rates on grapefruit which would have represented a large loss in revenue."

In nine of the twenty-one items Cleveland took credit for having persuaded the carriers in one or another territory to refrain from rate reductions or other proposed adjustments which would have resulted in loss of revenue. For example, "we were successful in persuading the Southern lines not to make a reduction in their citrus-fruit rates which, if made, would have caused a similar reduction in rates from producing points in Texas and California and

which saved well over $1,000,000 per annum." The Department had "persuaded the Eastern lines to refrain from rescinding their wharfage charges on coal which, if done, would have required similar action on the part of the Southern lines and would have represented a considerable loss in revenue." The Department had "induced the Southwestern lines to refrain from establishing transit arrangements [94] on cotton, the effect of which would have required similar action in the Southeast and which would have cost the railroads considerable money."

Another item: "persuading the railroads from establishing intermediate transit at grain markets in Western Trunk Line Territory." This adjustment "might reasonably have led to the breaking down of the grain rate structure through a large portion of the Western district, and the resulting loss to the railroad industry as compared with the present adjustment, which was prescribed by the Interstate Commerce Commission, would have reached large figures." Another item: "Saved a lot of reductions in the rates on soda products and created an understanding as between the producing lines in the Eastern and Southwestern territories that will reduce cooperative handling of this rate adjustment and not lead to action by one group that will adversely affect the other."

It is apparent from the foregoing illustrations, first, that the Traffic Department under Cleveland exercised a wide range of functions in rate matters designed to conserve and increase revenues; secondly, that these functions were of a mediatory and persuasive rather than judicial nature; and thirdly, that they had to do with general poli-

[94] A transit arrangement is a species of rate reduction. It permits a shipper, for a small charge, to break the course of a through shipment at a particular point, to store or hold the goods there for some particular purpose, and then to continue the shipment to the destination point without losing the benefit of the joint through rate. In the absence of such an arrangement the shipper would have to pay the sum of the two local rates, which would add up to more than the joint through rate plus the transit charge.

cies or with large-scale proposals, rather than with the day-to-day adjustments which were the regular grist of the territorial associations.

The record further discloses, as will be shown, only two instances in which the Board of Directors of the A.A.R. acted upon specific rate controversies, and in one of these the Board's recommendations were disregarded.

The activities of the Traffic Department in rate matters under Cleveland's leadership, as described above, began to be carried on sufficiently soon after the formation of the A.A.R. to warrant a finding that they were within the scope of the objects for which the A.A.R. had been set up.

On the other hand, the records which Georgia introduced in evidence of the meetings of the Executive Committee and the Board of the A.A.R. during the formative stage of the A.A.R. in the latter part of 1934 and the early part of 1935 showed that their attention was directed in the main toward matters other than rate questions. Among these matters were plans for the pooling of box cars;[95] securing Congressional appropriations for highway grade crossing elimination;[96] removal of arch bar trucks, and elimination of billing between carriers for car repairs;[97] private (shipper-owned) car mileage rate and cost of ownership of such

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[95] See S-39, Vol. A, 152 (draft of a letter dated December 4, 1934 from Mr. deForest to Mr. Pelley conveying the congratulations of the Directors Committee to Mr. Pelley and his associates "on the fine start that has been made . . . All were particularly pleased at what Mr. Dick told us of the proposed plan for car pooling; this not alone because of the promised economies and efficiencies, but for the evidence it gives of the determination of the industry to deal with problems of this sort promptly and vigorously, for the good of the industry as a whole." The Federal Coordinator had a pooling plan, which the A.A.R. analyzed, and the A.A.R. had plans of its own. These were considered at meetings of the Executive Committee, on December 11, 1934 (S-42, Vol. A, 156-157) and December 20, 1934 (S-37, Vol. A. 147-148); and of the Board of Directors on April 19, 1935 (S-47, Vol. A, 163).

[96] Executive Committee, November 15, 1934 (S-34, Vol. A, 143-144).

[97] Executive Committee, December 20, 1934, supra, note 95.

cars, consolidated purchases, and legislative proposals regarding regulation of highways and waterways and fourth Section relief;[98] studies of Merchandise Report and Passenger Traffic Report of the Coordinator, proposals for joint unification of service and facilities, simplification of interline divisions and elimination of reaudits of interline freight accounts, and organization of research projects;[99] study of "wastes involved in expensive practices inaugurated by one railroad for competitive reasons and which must be followed by others. • • •", and question of railroad wage situation;[1] consideration of and opposition to Congressional Extension of Emergency Railroad Transportation Act of 1933, pension legislation and rivers and harbors bill;[2] question of free freight transportation for grade crossing elimination program and for charities, consideration of report of Finance, Accounting, Taxation and Valuation Department, and methods of top icing of vegetables in transit.[3]

To sum up: one of the purposes of the A.A.R. was to deal with rate questions of broad importance at the national level, but the Association had other purposes related to the economic well-being of the railroad industry; and these other purposes, with one minor exception,[4] were the only ones of which mention appears in the record of the events

[98] Executive Committee, December 11, 1934, *supra*, note 95; also as to shipper owned cars, Board of Directors, *supra*, note 95.

[99] Letter from Mr. Pelley to a director of the Chicago, Milwaukee & St. Paul, April 2, 1935 (S-44, Vol. A, 159).

[1] Board of Directors, *supra*, note 95.

[2] Board of Directors, May 17, 1935 (S-48, Vol. A, 169).

[3] *Ibid.*

[4] This was a statement by Mr. Willard, president of the B. & O., at a meeting of the Advisory Committee of the Association of Railway Executives on July 12, 1934, to the effect that he had received a communication from Mr. Dick of the Directors Committee which was "rather critical of what we were doing in the matter of reduction of rates and in which he made the assertion that the traffic managers seemed to be vying with each other in the making of such reductions and suggesting that the presidents were practically doing nothing to prevent it." This statement appears at p. 314 above.

leading up to the establishment of the A.A.R., while after its establishment they appear to have occupied more of the agenda of the Board of Directors and the Executive Committee than questions of rate policy. Indeed the rate activities of the A.A.R. were carried on with but few exceptions entirely by Cleveland in his small Traffic Department along the lines of mediation and persuasion recounted by him in the report which I have set forth above.

IV. *Alleged Integration of the Territorial Associations Into The Association of American Railroads.*

A. *The Alleged Changes Brought About in the Character of the Territorial Associations as a Result of the Formation of the A.A.R.*

In numerous passages in her Final Brief Georgia asserted or suggested that the establishment of the A.A.R. had brought about basic changes in the structure and functions of the territorial rate associations.

For example, these associations were described, in the period before the A.A.R., as organizations whose "basic function * * * was to maintain a small group of technical rate experts to assist the railroads on various mechanical aspects of rate modification."[5] They were further described as, for the most part, "small in area" and "narrow in scope."[6] But "not even the larger regional associations constituted a serious threat to lessen substantially competition in the formation of through rates."[7]

Upon the establishment of the A.A.R., Georgia alleged, all the associations were "merged into a single integrated hierarchy of trade associations to create a cartelized private rate-making machinery. * * *"[8] This "integration of the pre-existing regional rate mechanisms into the newly-organized A.A.R. created so fabulous a graduated series

[5] Final Brief, p. 6.
[6] *Ibid*, p. 16.
[7] *Ibid*, p. 16.
[8] *Ibid*, p. 7.

of rate sub-committees, committees, bureaus and conferences as to defy adequate description."[9] The defendants' conspiracy consisted in their having agreed "to organize coercive regional rate mechanisms" and "to integrate them into a coercive national association."[10]

In actual fact, the historical evidence and the analysis of the Articles of Association of the A.A.R., summarized at pp. 326, 327 above, shows that (and I so find):

1. The establishment of the A.A.R. brought about no immediate changes in the structure, functions or procedures of the territorial associations.

2. The only associations which were merged into the A.A.R. were the pre-existing national associations (which had to do not with rate adjustments but with operational, technical and broad policy questions).[11]

3. No appeals from the rate actions of the territorial associations were provided for.[12] The A.A.R. was authorized in Article 1 to deal with "all matters of general interest to the industry," within the scope of the preamble of objects, which were "to promote trade and commerce in the public interest, further improve railroad service and maintain the integrity and credit of the industry" and "to

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[9] *Ibid*, p. 39.

[10] From the first of Georgia's two proposed Conclusions of Law, Final Brief, p. 267.

[11] *Supra*, pp. 281-283, 305, 325.

[12] In Part Two of this Volume, at pp. 447-460 I take up the A.A.R. Board Resolution of May 17, 1935, the substance of which was that railroads should not move to suspend each other's rates before the I.C.C. without a preliminary conference with officers of the I.C.C. Georgia contended that this resolution provided for a form of "appeal" in rate matters to the A.A.R., and the defendants themselves used the word "appeal" in certain documents which referred to the resolution. However, as set forth in the pages indicated, the evidence showed that the resolution envisaged, and that in fact there took place, only mediatory conferences in an effort to avoid litigation before the I.C.C., without any decision or other disposition of the controversies by the A.A.R. except such as might result from mutual agreement.

accomplish said ends where concert of policy and action were required." Under this broad grant of authority the A.A.R. could, and the evidence to be summarized later shows that in a few exceptional instances it did, undertake to act in rate controversies, but no regular method was provided, and none was developed, for reviewing the actions of the territorial associations.

4. The only specific relationships between the A.A.R. and the territorial associations which the A.A.R.'s articles provided for were as follows:[13]

(a) These associations were to "preserve their identities and activities, cooperating with" the A.A.R.;

(b) The Board or Executive Committee of the A.A.R. could direct the modification of any of their rules and regulations which provided "means for the settlement of disputes";

(c) One of the objects of the A.A.R. was to "coordinate the activities" of the associations.

5. The record reveals no specific invocation by the A.A.R. of any of the above clauses. The only steps which the A.A.R. might be regarded as having taken thereunder in pursuit of a policy of "integration" were those described under "B" below.

B. *The Formation of the Traffic Executive Association-Southern Territory, the Strengthening of the Southern Freight Association, and Related Events in 1937-38.*

1. *Summary of the Allegations*

Georgia's Final Brief, after describing the relationship between the territorial associations and the A.A.R., as stated above, and after referring to the set-up of the Traffic Department, stated that:[14]

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[13] *Supra*, pp. 326, 327.
[14] Final Brief, p. 32.

"In an effort to devise proper machinery for controlling the rate situation and avoiding to the fullest possible extent rate erosion, the Traffic Department caused a survey to be made of the existing regional rate mechanisms."

As a result of this survey, Georgia said, President Pelley of the A.A.R. urged upon the Southern railroad presidents the creation of an authoritative Traffic Executive Committee along the lines of the Traffic Executive Association-Eastern Territory, which could "better control the rate situation" and "avoid to the fullest extent consistently possible rate erosion."[15] The Committee was to be composed of the chief traffic officers of five principal Southern roads. The Presidents unanimously approved "Mr. Pelley's idea"[16] and decided at the same time to undertake "a complete revision of the Southern price-fixing machinery." They had "long recognized the effectiveness of the intricate price-fixing procedure followed in the East in restraining competition", and they desired to follow the same pattern in the South.

The Traffic Executive Association-Southern Territory, which was formed as a result of these steps, was an "elite organization" composed of the twelve largest Southern railroads. It was given appellate jurisdiction over the subordinate committees of the Southern Freight Association and to this "plebian" Association was given "basic original jurisdiction over the price-fixing machinery of the South."[17]

The traffic executives, "under renewed proddings from Cleveland to speed the upward revision of rates * * *, hastened to put the plan into operation."

Summing up these events Georgia stated that:[18]

"*With the organization of Traffic Executive Association-Southern Territory, the immediate purposes of*

[15] *Ibid*, p. 33.
[16] *Ibid*, p. 34.
[17] These quotations are from the Final Brief, p. 35.
[18] *Ibid*, p. 38.

the conspiracy were consummated. Regional machinery had been *imposed on the South* designed to insure that the proposals of the many should be reviewed only by the few. Regional machinery had been perfected in the North to guarantee that any interterritorial proposal that succeeded in running the rate bureau gamut in the South should not be effectuated until subjected to the prejudiced scrutiny of all Northern roads, irrespective of the wishes of the roads physically participating in the proposed movement. The regional mechanisms were integrated into a national organization vested with extraordinary powers to quell any competitive traffic urge that might survive the hierarchy of regional pressures." (Emphasis added)

This passage gives the impression that the establishment of the Traffic Executive Association-Southern Territory was one of the purposes for which the A.A.R. was organized and that through it rate controls were imposed on the South against the will of the South. To the same effect counsel for Georgia stated in the presentation of Georgia's case: [19]

"The evidence will show that the Association of American Railroads brought pressure to bear upon the southern roads and, because of these elements of coercion which I described earlier, the southern roads were, after a bit, compelled—to use their words—to tighten up and organize the Traffic Executive Association, Southern Territory, for that explicit purpose.

"In the Traffic Executive Association, plenary control over all rate matters in the South, involving perhaps between forty and fifty carriers of one type and another was delegated to eleven chief traffic officers of the larger southern roads.

"It is the State's contention that these actions occurred directly in pursuance of the conspiracy on the part of the northern defendants to tie into the northern conspiracy the southern rate making organization and, further, that the southern roads were coerced to pursue that policy at the instigation of the northern roads, and their northern industrial ally."

[19] Mr. McGovern's opening statement, I, 307.

According to the defendants the Southern roads were not coerced but formed the Traffic Executive Association-Southern Territory as a result of their own studies and plans. The defendants contended that this action grew out of a chapter of history between the railroads and the Interstate Commerce Commission, in the course of which the Commission urged the railroads to take cooperative measures to check improvident rate reductions. This history will now be summarized, and in the course of it I shall deal with the conflicting contentions of the parties.

2. *The Events Leading Up To The Formation Of The Traffic Executive Association-Southern Territory*

(a) *Ex Parte No. 103 (1931), and Ex Parte No. 115 (Main Decision, March 26, 1935)*

In the depression years the railroads made a series of attempts to secure from the I.C.C. a general increase in freight rates.[20] A petition for an increase was filed in 1931. It was denied in the *Fifteen Per Cent Case, 1931, Ex Parte No. 103*.[21] A second petition was filed on August 27, 1934, about a month before the A.A.R. came into being. It was denied on March 26, 1935, in *Emergency Freight Charges, 1935, Ex Parte No. 115*.[22]

In each case the Commission denied the petition on the

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[20] The railroads' efforts to secure increases were not, however, confined to the depression years. Thus in the *Fifteen Per Cent Case, 1937-1938, Ex Parte No. 123*, 226 I.C.C. 41, 78, the Commission said: "Since a time antedating the World War, the adequacy of the rate structure of the country has been almost continually under review by us, and usually upon the request of the rail carriers for an increased basis of rates generally, or in some district. From the 1911 advance rate cases until the present proceeding, one case was scarcely determined before another was begun."

[21] The main decision was in 178 I.C.C. 539 (1931). Supplementary decisions were in 179 I.C.C. 215 (1931); 191 I.C.C. 361 (1933). This case has been mentioned at p. 283 *supra* in connection with the events leading up to the establishment of the A.A.R.

[22] 208 I.C.C. 4, the main decision, followed by two others which will be noted below.

principal ground that in view of the railroads' loss of traffic to competing forms of transportation, such as trucks, busses, waterways and pipelines, general rate increases would simply drive more traffic away from the railroads.[23] In each case, however, the Commission granted certain temporary emergency increases for the immediate alleviation of the acute financial distress of the railroads.[24]

In each case also the Commission directed its attention to the future of the railroads and, among other suggested measures for improving their financial condition, called upon them to make an intensive study of their rate structures, with a view to *reducing* rates wherever this would bring in profitable traffic, and *increasing* rates wherever this would not drive away profitable traffic.[25]

The defendants stressed the second of these two admonitions, namely, the desirability of increasing particular rates whose level was below what was necessary to hold the traffic. This admonition, they argued, pointed the need of cooperative action to discourage the reduction of rates to an uneconomic level. In support of this argument the defendants pointed to a passage in *Ex Parte No. 115*, supra, in which the Commission said that, with regard to the emergency increases allowed by the Commission:[26]

> "No exceptions [i.e., reductions] should be made primarily to influence the routing of traffic, to attract traffic from one carrier or route to another, or to favor

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[23] 178 I.C.C. 539, 576, 577; 208 I.C.C. 4, 58. The Northern defendants placed the ground of denial in *Ex Parte No. 103* on the Commission's finding that the railroads could make large savings through reduction of expenditures. (Brief on the Facts, p. 702). The Commission's opinion does not in my judgment support this argument.

[24] 178 I.C.C. 539, 576-580; 208 I.C.C. 4, 58-60. In a later proceeding in *Ex Parte No. 115* the Commission said: "The emergency charge was unknown in rate terminology" prior to the decision in *Ex Parte No. 103*. "As a form of rate it may be regarded as a phenomenon of the economic depression, having been devised as an expeditious means of increasing freight rates temporarily under circumstances deemed not to warrant or require permanent increases." 219 I.C.C. 565, 570.

[25] 178 I.C.C. 539, 577; 208 I.C.C. 4, 62.

[26] 208 I.C.C. 4, 60.

an industry on one line at the expense of industries on other lines."

This passage the defendants regarded, I think correctly, as an indication that the Commission would look with favor, at least in connection with any further relief which the Commission might grant, upon cooperative steps by the carriers to avoid the reduction of authorized rates for purposes merely of competition within the industry, as distinguished from competition with other forms of transportation. However, the Commission at this time was certainly not affirmatively urging such steps upon the railroads. It was emphasizing rather the necessity of action to avoid competitive wastes in service and to improve operating efficiency;[27] and it was emphasizing also the positive benefits which might be had from rate reductions when judiciously made. Thus in *Ex Parte No. 103* the Commission said that the intensive study of rate structures which it was advising, with a view to appropriate readjustments, "does not necessarily mean increases in rates. It is quite likely that there are now many rates which will produce more revenue if they are reduced, and we include in this category rates which we ourselves have prescribed as maxima. Some such rates have already been reduced, but we fear that there is at times a reluctance on the part of traffic officers, because of possible contingent effects, to cut below these rates even when they believe that the result would be to railroad advantage. But in addition to reductions it is not at all unlikely that there are a considerable number of rates which can reasonably be advanced substantially, even under present conditions."[28]

Similarly, in *Ex Parte No. 115*, the Commission said that the railroads' proposals for general rate increases "call for much more intensive study than has preceded these proposals, and it is probable that in many instances more is to be gained by reducing rates than by increasing them..."[29] Then, after stressing, as the Commission had done in *Ex*

[27] See, for example, the passages quoted from the decision in *Ex Parte No. 103* at pp. 283-286 above, cited in conection with the history of the events leading up to the formation of the A.A.R.

[28] 178 I.C.C. 539, 577.

[29] 208 I.C.C. 4, 62.

Parte No. 103, the necessity of devising ways and means of reducing operating costs and improving equipment and service, the Commission said:[30]

> "In this process of gradual change, it is equally desirable to subject the rate structure to the most detailed analysis, for the purpose of discovering where it now repels or impedes traffic, where reductions can be made which will by their effect on traffic increase aggregate revenues, and where increases are possible which industry and traffic can bear without harm."

Thus these two decisions, the one in 1931 and the other in 1935, pursued the same course of reasoning with regard to the tasks which lay before the railroads.

In the 1935 case, however, a new element had appeared: the Association of American Railroads had been brought into being after the case had been initiated. The Commission took note of this development in the following passage in which the Commission again emphasized cooperative action to effectuate operating economies:[31]

> "The railroads have recently associated themselves in an organization intended to promote the cooperation which we urged as essential in Ex Parte No. 103. The Coordinator and his staff have exhaustively studied and reported upon proposed improvements in railway and freight passenger service, pooling of equipment, and other plans intended to bring about operating economies through a greater degree of coordination in railway transportation. We are hopeful that these studies, together with the increased opportunities for cooperative action made possible by the formation of the Association of American Railroads, will result in important reductions in the cost of railway transportation and other improvements in the railroad situation."

A little further, after recurring to the need of intensive studies by the railroads of the rate structure as well as of operating policies, the Commission said:[32]

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[30] 208 I.C.C. 4, 63.
[31] *Ibid*, 61, 62.
[32] *Ibid*, 63.

"We hope that through their new Association of American Railroads the railroads may be able vigorously to engage in these analyses of existing conditions, and believe that such efforts hold forth much more promise of beneficial results than could be obtained from a permanent increase of freight rates."

(b) *Ex Parte No. 115 (First Supplementary Decision, June 9, 1936)*

In the main decision in *Ex Parte No. 115*, as has been stated, the Commission granted the railroads certain temporary emergency freight rate increases. These were to terminate on June 30, 1936. On January 24, 1936 the railroads filed a supplementary petition to continue the emergency increases indefinitely.[33]

In support of their petition the railroads stated, among other things, that as a result of the restoration of wage rate reductions their labor costs would be increased by $160,000,000 per year based on 1935 operations; that increased operating expenses caused by price rises since 1933 had amounted to $100,000,000 per annum based on 1935 operations; that by the end of 1935 railroads representing over 27 per cent of the mileage of the United States were in receivership; that railroad insolvency had increased in 1935; and that there had been little complaint from shippers against the emergency charges and but little loss of traffic to competing forms of transportation.[34]

The Commission, on June 9, 1936, denied the petition on the same ground as the original petition had been denied, namely, that permanent rate increases would drive an excessive amount of traffic from the rails.[35] At the same time the Commission with certain modifications granted a further extension to December 31, 1936. In doing so the Commission explained that:

"The extension is permitted only because other

[33] 215 I.C.C. 439, 442.
[34] *Ibid*, 443.
[35] *Ibid*, 458, 464.

> and more permanent avenues of improvement in the railroad situation, principally for causes beyond applicants' control, have not had time enough as yet to operate effectually. Applicants should bear in mind that these charges cannot be regarded as a permanent remedy for their situation and they should explore diligently every possible avenue of improving their situation, not only individually but collectively, through coordination of services and facilities, through revision of the rate structure to meet changed conditions, and in such other ways as are open to them."[36]

Thus once again the Commission emphasized the need of collective action by the railroads to improve their operating methods and their rate structures. The "causes beyond applicants' control" which the Commission cited as a principal cause for the lack of progress in these directions were elsewhere discussed by the Commisson. They consisted first of provisions of the Emergency Railroad Transportation Act, 1933, "limiting reductions in the number of employees as the result of consolidation of terminals or similar transportation economies. . . ."; these provisions "have been a deterrent influence against actual accomplishment of such economies. . . ".[37] The Commission noted, however, that since the close of the hearings an agreement had been reached "between a large number of railroads and employee organizations providing for dismissal compensation to displaced employees,"[38] and this was regarded as an encouraging step forward.

The second obstacle had been "the inevitable delay in making fully effective the provisions of the Motor Carrier Act, 1935." This delay had hampered the railroads in the making of "a comprehensive survey of the rate structure with a view to its revision in the light of existing conditions, particularly competition with other forms of transportation. . . .", because in the absence of "authoritative in-

[36] *Ibid*, 464.
[37] *Ibid*, 461
[38] *Ibid*, 461.

formation as to the charges of their competitors, the opportunity for constructive revision of railroad rates to meet such competition was necessarily limited." Again the Commission sounded a hopeful note:

> "Since April 1, 1936, common carriers by motor vehicle have been required by law to publish and observe their tariff rates in the same manner as the railroads. The way is thus opened for the rail carriers to give this subject consideration and to take such definite corrective measures as conditions may warrant or dictate. . . ."[39]

Nothing was said in this decision as to whether the revision of rates should be upward or downward but the Commission quoted a passage from the main decision indicating the need of making both types of adjustments where increased revenues would result.[40]

In this decision a passage from an opinion by Commissioner Aitchison, who dissented from the further extension of the emergency rates, should be noted. It casts light upon the types of rate reductions which the railroads had had to make since the emergency charges had been put into effect, and upon the problems of discrimination which may arise as between competing shippers when reductions are given to one group of shippers but not to another. Mr. Aitchison said:

> "The rail carriers point to literally innumerable instances in which they have scaled down or eliminated the general nation-wide surcharges permitted by the Commission, to enable them to get or retain business, and they announce of record their intent to continue this practice. The record shows that many of these reductions have had as their motivation a yielding to the big stick of large tonnage controlled by shippers powerful enough to enforce their demands. This form of exercise of 'managerial discretion' has demonstrably increased the inequality in charges as between those so

[39] *Ibid.* 461.
[40] *Ibid.* 458.

reduced for the fortunate and those borne by the remaining shippers, whose lack of power compels them to look to us to secure them the equality which the Interstate Commerce Act was designed to make universal. Continuance of these surcharges as such, and of the managerial policy of reducing or eliminating them according to the apparent ability of the shipper to make good his threats to divert tonnage, will inevitably still further increase the inequalities now existing and make our own rate adjustments even more obsolete and useless than they now seem to be." [41]

(c) *Ex Parte No. 115 (Second Supplementary Decision, December 18, 1936)*

As noted above, in the first supplementary decision to Ex Parte No. 115, the emergency charges were extended to December 31, 1936. On October 23, 1936 the railroads filed a petition for permanent increases in rates on certain heavy basic commodities.[42]

On November 21, 1936, the railroads petitioned for a further extension of the emergency charges until these requested commodity rate increases, which would take considerable time for investigation, could be passed upon.[43] The disposition of this petition constituted the second supplementary decision in *Ex Parte No. 115*. In this decision (handed down on December 18, 1936) the Commission denied the petition for a further extension. The case need not be noted except for two passages from the Commission's opinion which shed further light on what the Commission expected the railroads to do to improve their financial condition.

In the first of these passages the Commission, explaining some of its objections to the continuance of the emergency charges, said:[44]

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[41] *Ibid*, 472.

[42] This case became known as *General Commodity Rate Increases, 1937, Ex Parte No. 115*, 223 I.C.C. 657 (1937).

[43] 219 I.C.C. 565.

[44] 219 I.C.C. 565, 571.

"They produce tariff complications and make it difficult to ascertain applicable rates. In numerous instances the emergency charges have either been eliminated or the base rates have been so reduced that the total charge is less than before the imposition of the charges. That many of these reductions were necessary and proper is beyond question, *but others apparently serve little or no purpose other than to give one carrier or group of carriers a temporary advantage over others in the solicitation of traffic. Such reductions make for undue prejudice.* In other cases competing commodities are differently treated." (Emphasis added)

In this passage, as in the passage from the main decision which I set forth at pp. 347, 348 above, the Commission expressed its disapproval of rate reductions which were made simply to attract traffic from one carrier to another—a further indication to the railroads that the Commission would look with sympathy upon cooperation among the railroads to discourage that type of intra-industry competition, at least at a time when the railroads were laboring under such financial difficulties.

In the second passage the Commission returned to its twin themes of the necessity of cooperative action to readjust the rate structure (the Commission this time emphasizing the need of upward revisions) and to reduce competitive waste in services:[45]

"Five years ago in *Fifteen Per Cent Case, 1931, supra,* we stated our belief that a considerable number of rates could reasonably be advanced substantially. The same opinion was stated somewhat differently at page 63 of our original report: 'In this process of gradual change, it is equally desirable to subject the rate structure to the most detailed analysis, for the purpose of discovering where it now repels or impedes traffic, where reductions can be made which will by their effect on traffic increase aggregate revenues, and where increases are possible which industry and traffic can bear without harm.'

[45] 219 I.C.C. 565, 572, 573.

"The only evidence of compliance with this suggestion in the period of 18 months after it was made is to be found in the two proposals by the carriers to apply the emergency charges indefinitely when the first extension was sought and later in July of this year. As before pointed out, the plan proposed in the petition of October 23, 1936, is somewhat different. We are prepared to give the promptest possible consideration to that plan. We believe that such consideration will be simplified and expedited if the emergency charges are definitely out of the way. * * * It is of the utmost importance also to bear in mind that rate adjustments are only one of the possible means of bringing about enhancement of net revenue. * * * In the interest of brevity we omit quotation of extended statements in our prior reports concerning the necessity for elimination of competitive waste and a greater degree of cooperation between carriers."

It will be noted that in this passage the Commission gave evidence of some impatience with the lack of progress made by the railroads both in studying and readjusting the rate structure and in eliminating competitive waste.

(d) *Ex Parte No. 115 (Third Supplementary Decision, October 19, 1937)*

On October 19, 1937 the Commission handed down its decision on the railroads' petition for increases in certain commodity rates, referred to above.

In considering this petition the Commission again expressed its impatience with the railroads' lack of progress in following the Commission's admonitions, particularly with regard to the revision of the rate structure. The Commission said, for example:[46]

"Applicants claim that they have given heed to these admonitions, and that the increases now proposed are the result of such an intensive study of the rate structure as we have urged. * * * *No increase is proposed in any rate which has been reduced to meet*

[46] 223 I.C.C. 657, 735.

competition and is earmarked in the tariff as such a competitive rate, and some other rates on the selected commodities are excluded, apparently because of competitive conditions. There is in general, no indication that the rate structure on any of the selected commodities, or commodity groups, has been thoroughly studied to determine what relatively *high or low spots* [47] it may have and to adjust the proposal accordingly." (Emphasis added.)

Further, the Commission said:[48]

"In their need for increased revenues, applicants have been careful to avoid proposing any increases in rates which have been published to meet the competition of other forms of transportation, *although these are the depressed rates which are so largely responsible for their financial troubles.* * * * Yet it is by no means clear that these competitive rates are not capable of being increased, with advantage to the railroads. The fact is well known to us, and is to some extent developed in this record, that conditions similar to those which have adversely affected the railroads have operated to like, or possibly greater, financial disadvantage of the motor carriers and water carriers. *It is not at all unlikely that they would be glad to join with the railroads in an increase in the level of competitive rates which would leave the relative position of all unchanged and at the same time improve the financial condition of all.*" (Emphasis added)

As to the extent and importance of the "depressed rates" the Commission noted that:[49]

"Railway traffic has not kept pace with the produc-

[47] Mr. Franklin of the Pennsylvania Railroad testified that a "low spot" was a term used from time to time by the Commission and railroads in rate cases; that it meant "rates that are below what the Commission considers to be reasonable rates and that they think can be raised up to what they have prescribed as reasonable rates"; and that at one stage following the Commission's admonitions in this case "there was a committee called the Low Spot Committee formed by the traffic officers." X, 3237.

[48] 223 I.C.C. 657, 739.

[49] *Ibid*, 731, 732.

tion of the country and the chief reason for this has been the growth of competitive forms of transportation. Not only have the railroads lost since 1929 a continually increasing share of the total traffic to these competitors, but they have also found it necessary, in order to retain much other traffic, to make competitive reductions in their rates and fares. The table on page 671 of this report indicates this latter fact clearly, showing that the average revenue per net ton-mile (notwithstanding the emergency charges) was 9.4 percent lower in 1936 than in 1929, and the average revenue per passenger-mile 34.5 percent lower. That such reductions have been progressively necessary is indicated by the following table:

	Revenue per ton-mile	Revenue per passenger-mile
Year 1929	Cents 1.076	Cents 2.81
Year 1930	1.063	2.72
Year 1931	1.051	2.51
Year 1932	1.046	2.22
Year 1933	.999	2.01
Year 1934	.978	1.92
Year 1935	.988	1.94
Year 1936	.974	1.84

"In considering this table, it should be noted that emergency charges became effective in 1932, were discontinued October 1, 1933, and became effective again April 17, 1935. While it is true that reductions in average revenue per ton-mile may be caused by changes in average length of haul and composition of traffic, as well as by reductions in rates, competition of other forms of transportation has been an important factor in such changes of this character as have occurred, so that we believe the above table in the main reflects the effect of this competition."

This decline of revenue per ton-mile, due chiefly to rate reductions, is commonly referred to as "rate erosion".[50]

[50] Mr. Franklin of the Pennsylvania described this as "a familiar term which is used by the Commission and by railroad men to indicate that the rate level reflected in the average ton-mile revenue has a constant tendency to decline as a result of many rate reduc-

The Commission in this case, in spite of its criticisms of the railroads for not having followed the Commission's suggestions more energetically, granted the requested commodity rate increases with some exceptions and modifications.[51]

In taking this action the Commission, after reviewing the railroads' financial needs, made the general finding that "the net earnings of the railroads are now inconsistent, in general, not only with constitutional standards as to the rights of the private owners, but also with the conditions necessary for the proper conduct of the public service of railroad transportation by private enterprise."[52]

The Commission then noted the upward trend in taxes, prices, wages, and expenditures for maintenance, and finally the expiration on June 16, 1936 of the act establishing the Federal Coordinator of Transportation. While again expressing the belief "that by greater cooperation with each other and the coordination of many of their facilities and operations further and material reductions in operating expenses are feasible", the Commission seemed to regard the expiration of this legislation as a retarding factor in the reduction of operating expenses.[53] The Commission concluded, after some further discussion, that the question of whether or not the increased rates would add to or diminish railroad revenues was "within the province of managerial judgment. . . ."[54]

The decision granting the increases in certain commodity rates was handed down on October 19, 1937. It was followed

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tions made here and there throughout the rate fabric or structure." X, 3227. He testified that the Commission was "particularly concerned over the matter of rate erosion in the years between 1933 and 1938, when it had before it such cases as Ex Parte 115 and Ex Parte 123 . . ." X, 3229.

[51] 223 I.C.C. 657, 749. This case was followed by a fourth supplementary decision, 229 I.C.C. 435, having to do with increased rates on coal. It need not here be considered.

[52] 223 I.C.C. 657, 730.

[53] *Ibid*, 733.

[54] *Ibid*, 736.

almost immediately by several actions on the part of the railroads which must now be noted.

(e) *The Institution of Ex Parte No. 123 on November 7, 1937.*

On October 29, 1937 a meeting of the member roads of the A.A.R. voted to petition the Interstate Commerce Commission for a general 15 percent permanent increase in freight rates, subject to some exceptions, and for certain increases in passenger fares in Eastern Territory.[55] In accordance with this action a petition was filed with the I.C.C. on November 7, 1937 and became known as the *Fifteen Per Cent Case, 1937–1938, Ex Parte No. 123,* 226 I.C.C. 41.

The only explanation in the record for the institution of this new proceeding upon the very heels of the commodity rate increases granted by the Commission is that which appears in Commissioner Eastman's concurring opinion in *Ex Parte No. 123.* Mr. Eastman's explanation should here be noted because it helps to shed light on the importance with which the railroads regarded their new petition and on the action which the A.A.R. took in support of it, as described below. Mr. Eastman said:[56]

> "In view of the repeated insistence for six years upon the need for a well-considered revision of the rate structure in the light of new conditions, the country had reason to believe that the proposals for revision made by the railroads in the fall of 1936" (i.e., the requested increases in certain commodity rates) "represented their best judgment of what was desirable and necessary; and, as has been seen, they were allowed to put most of them into effect. Before some of these increases had actually become effective, however, the carriers came forward with the present proposal, to increase all freight rates 15 percent, including those which had recently been, or were in

[55] The minutes of the meeting are in ND-12, Vol. G.
[56] 226 I.C.C. 41, 146, 147.

process of being, raised. What were the reasons for this sudden and extraordinary change in policy?

"The fact seems to be that at the time when the revision of 1937 was formulated the carriers, like this Commission, believed, or at least entertained the hope, that the revival of business would continue for some time, and that from this source they might confidently anticipate growing traffic and revenues unaccompanied by any marked increase in expense. Shortly after the hearings on the revision had been concluded, however, they found it expedient to agree to an increase of $130,000,000 annually in the wages of their employees, comparing with the $84,000,000 estimated from rate increases in 1937; they found themselves faced with an increase in taxes and a sharp increase in the price level of their materials and supplies, and threatened with a further increase in coal prices; and as a climax to these discouraging changes in conditions, the bottom fell out of their traffic. A severe decline in October last became precipitous in November and December."

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"That the railroads were influenced, in their proposal, by the impending severe decline in their traffic and revenues, as well as by the wage, price, and tax increases, I have no doubt. However, they contend that the rise in rates which they are seeking is wholly justified, quite apart from the present depression or recession in business, and that, even if the increase is approved, they cannot hope for a fair and adequate return until traffic rises materially above what they now deem to be normal."

(f) *Action Taken at the Annual Meeting of the Member Roads of the A.A.R. on November 19, 1937.*

On November 19, 1937, twelve days after the filing of the petition in *Ex Parte No. 123*, the annual meeting of the member roads of the A.A.R. took place.[57] The action taken at that meeting vividly reflected the importance

[57] The minutes are in ND-13, Vol. G, and the extracts which follow are from that exhibit.

which the railroads attached to the new proceeding before the I.C.C. The President reported that "the Executive Committee had personally presented the railroads' petition in *Ex Parte No. 123* to the Interstate Commerce Commission, and had been received by Chairman Miller and Commissioners Mahaffie and Porter"; he described "the conference had with them and the conferences which the Executive Committee has held with representatives of industry."[58]

There was presented to the meeting a recommendation from the Board of Directors regarding steps to be taken to retain to the fullest extent possible whatever increases the Commission might grant. The point of the recommendation was to place responsibility for avoiding unnecessary reductions in any new rates upon the traffic executives of the member roads (i.e., the Vice-Presidents in charge of Traffic). The text was as follows:

> "In order that there may be no embarrassment caused by any of the representatives of the railroads during the pendency of the Ex Parte 123 proceeding and *in order further that whatever the Commission allows in those proceedings should be kept to the fullest extent consistently possible in the future rate structure, to the end that there may be avoided to the fullest extent possible the heretofore rapidly downward trend in the average return per ton mile*, which has most seriously affected railroad revenues, it is
>
> "RECOMMENDED, That the Executives of the member-roads at once instruct their traffic organizations to make no promises with regard to the re-establishment of relationships or reductions in rates which may be authorized in Ex Parte 123 and that the traffic depart-

[58] In his concurring opinion in *Ex Parte No. 123*, Mr. Eastman referred to the theory that if the rates were increased the railroads, who were "practically out of the market now because of their financial stringency", would resume buying "to the great benefit of business conditions. Because of the faith which this theory has inspired among those who sell to the railroads, the industrial support for the proposed increases is unusually large, and far more of a factor than in 1931." 226 I.C.C. 41, 147.

ment of each line shall be instructed further to so handle its rate adjustments as to retain to the fullest extent possible such increases as may be authorized in Ex Parte 123.

"It is not the intention of this recommendation to attempt to freeze the rate structure; all proposals are to be handled in accordance with regular procedure, such changes made as may be justified after proper investigation; but it is believed that *the traffic executives should keep control of the situation and no reductions in the rates that may result from Ex Parte 123 authorized unless approved by the traffic executives.*" (Emphasis added)

The recommendation was unanimously adopted in principle and was referred to counsel and to Cleveland, to be put into final form and issued. As issued it followed the substance of the original, with two additions. One of these affirmed the right of each railroad "to take individual action in any case." The other recommended that rates in existence during the progress of the case, as well as any rates which might be increased as a result of it, should not be reduced except with the approval of the chief traffic executive of the line involved.[59]

At this same meeting the members took one more step. They adopted a resolution instructing Cleveland, with the Traffic Advisory Committee of the A.A.R.,[60] to "review the established procedure in all of the rate territories for the purpose of recommending the establishing in any territory where it is necessary, machinery to protect the railroads' revenues by proper handling of rate matters." This review constituted the "survey of the existing regional rate mechanisms" which Georgia described in her Final Brief in the passage quoted at p. 344 above.

Before tracing the events which ensued upon the meet-

[59] The text of the recommendation as issued appears in Kerr's testimony, V, 1477, 1478.

[60] As explained above at p. 334, this Committee was organized soon after the establishment of the A.A.R. with traffic officers from the East, the West and the South to advise from time to time with the Traffic Department on matters of common policy.

ing, including the establishment of the Traffic Executive Association-Southern Territory, I shall summarize the action taken in *Ex Parte No. 123*, insofar as it bears upon this case.

(g) *The Action Taken in Ex Parte No. 123 on March 8, 1938.*

The Commission handed down its decision in *Ex Parte No. 123* on March 8, 1938. With certain exceptions, it granted a general freight rate increase of 10 percent instead of the 15 percent which the carriers had sought.[61] The Commission granted an increase because it found that:[62]

> "The present revenues of the applicants are inadequate, whether the simple common-law tests be applied, or if they be judged by the statute with reference to their sufficiency, under honest, economical, and efficient management, to provide in the public interest adequate and efficient railway transportation service at the lowest cost consistent with furnishing such service. The record shows that the existing basis of rates is not sufficient to maintain in full vigor either rail or water transportation, or to permit improvement of the relations between and the coordination of transportation by motor and other carriers."

The Commission granted 10 percent rather than 15 because it found that 15 was larger than reasonably necessary and would be "such a deterrent to traffic as to stifle movement." Moreover, the Commission said, the granting of the 10 percent, "*coupled with the increasing of the many rates which are now below levels we have already approved as reasonable*," would result in a more harmonious structure and would compensate for the added costs shown.[63] Here again, as upon previous occasions in *Ex Parte No. 115*, the Commission indicated its desire that

[61] 226 I.C.C. 41, 1938.
[62] *Ibid*, 136.
[63] *Ibid*, 136. (Emphasis added)

these depressed rates be increased by voluntary action on the part of the carriers. That the Commission expected this action to be taken, and to be taken collectively, is indicated by Chairman Splawn's concurring opinion in which, after referring to the depressed rates, he said:

> "The restoration of the rates requires concerted action by all the carriers. Such action is promised on this record." [64]

Commissioner Eastman in a concurring opinion summed up the railroads' situation, and the effect of the rate reductions which they had made, as follows:[65]

> "The situation, in short, is one in which the railroads, by reason of the greatly increased competition from other forms of transportation, have been wholly unable to maintain a traffic growth in pace with the growth of the country and the increase in their own property investment, and have been obliged, in order to prevent further traffic losses, to reduce many of their rates and charges materially. They have compensated to a considerable degree for these adverse factors by operating economies largely made possible by the improvement of their properties, but this compensation has fallen short of their necessities. With passenger traffic which does not cover its pro-rata share of expenses, with less-than-carload traffic of which the same is true, and with many other rates producing at best only a small margin over out-of-pocket costs, they have been forced to charge the noncompetitive freight traffic more than its pro-rata share, so that the rates on such traffic generally are now disproportionately high in comparison with the increase in unit costs of service."

Then after considering the problem of the effect of a general increase in rates on the movement of traffic, Mr.

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[64] *Ibid*, 142. Mr. Franklin of the Pennsylvania, who participated in the proceedings, testified that a number of the railroad witnesses had been asked on the stand whether the railroads were going to make an effort to raise the "low spots" by concerted action, and that the witnesses had said they would. X, 3241, 3242.

[65] *Ibid*, 150.

Eastman stated that the Commission's decision was permissive only and imposed no obligation on the carriers to make particular increases effective. He then added:[66]

> "In the course of the hearings they gave assurances that they would, without exception, make effective all increases that we might approve, but in view of the evidence I do not believe that they should be held to this promise, where their traffic officers are convinced that no good can result. There is no virtue in an advance which can only be followed by an immediate retreat. At the same time I fully recognize that it is the *competitive rates that are low; that an increase in these rates is particularly appropriate and desirable, if it can be accomplished;* and that the present financial distress of both the motor carriers and the water carriers makes it probable in many instances that their competition will present no obstacle to an increase." (Emphasis added)

Finally the defendants drew attention to the following passage from the majority opinion:[67]

> "The applicants have throughout the record indicated their intention, if granted the general authority sought, to proceed with diligence to make the necessary readjustments which commercial and traffic conditions may require, while at the same time resisting any efforts to *fritter away the increases by improvident reductions for casual or competitive purposes, or because of the pressure of shippers who wield the threat of diversion of traffic.*" (Emphasis added)

Franklin of the Pennsylvania testified that the railroads regarded themselves as having made commitments to the Commission, as a result of the questions put to their witnesses by the Commission and the answers given, to make an effort by concerted action to raise the "low spots" and to avoid the "frittering away" of the increases granted by the Commission through improvident reductions of the sort criticized by the Commission.[68]

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[66] *Ibid*, 152, 153.
[67] *Ibid*, 140.
[68] X, 3239, 3241, 3244, 3245.

Franklin also pointed out that the Commission's decision fell short of giving the railroads the increases which they felt were necessary; and he stated that because of the time involved in working out the new rates, the increases did not "provide the railroads with any net income during the year 1938", and that "the railroads as a whole in that year had a deficit of over $123,000,000, the largest deficit they have ever had in any year, except the year 1932." [69]

One week after the Commission's decision had been handed down a conference was held at the White House with the President and certain railway executives and Chairman Splawn of the Commission. At that conference, as reported in a letter the next day from Gray of the Union Pacific to Pelley,[70] Chairman Splawn stressed, as the Commission had done in its decision, the railroads' opportunity to gain needed and substantial revenue by increasing depressed rates without Commission interference. According to Gray, "Chairman Splawn of the Interstate Commerce Commission, in explaining the rate increase, said that there were many depressed rates which the railroads can increase without exceeding the maximum rates prescribed by the Commission for the particular commodities, which would yield as much as 10%, and added to the 5% would give the full 15% for which the railroads had petitioned. He did say that he believed the railroads were very anxious to increase their rates and the fact that they had not done so on these commodities had satisfied the Commission that they felt that they were held down by competition and not through any action of the Commission. In other words, the railroads were free to advance these

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[69] X, 3238, 3242. "At that time", said Mr. Oliver of the Southern Railway, referring to the latter part of 1938, "we were all desperately in need of revenue. The breath of the sheriff was on the neck of most of us . . ." IX, 2878.

[70] AD-17, Vol. D, 223.

rates without Commission interference if they wanted to." [71]

Cleveland at once wrote to the Chief Traffic Officers of the member roads as follows:[72]

> "Supplementing my letter of March 12th which dealt with the imperative necessity of advancing as rapidly as possible on thirty days' notice the subnormal rates and as further indicating the importance of this subject, I am attaching hereto (with the consent of President Pelley and Mr. C. R. Gray) copy of a letter written by Mr. Gray to Mr. Pelley under date of March 16th.
>
> "I personally have no doubt but what you already fully appreciate the importance of a rapid, sustained, and effective progression of this subject but I felt that you should have this additional information regarding its importance and that I should further advise you that in talking with Mr. Gray he stated that the President was very much impressed with the statements made that the railroads could secure further increases amounting to not less than 10% without any further authorization from the Commission if they would advance those rates that are unduly low.
>
> "I want to further advise you that I have been requested by the officers of the American Trucking Associations, Inc. to take lunch with them today, as they wish to discuss this same question and are prepared, as I understand it, to fully cooperate with the railroads in this direction."

The record in Georgia's case does not show what progress the railroads thereafter made in raising the depressed rates. As befits a case in which the complaint is grounded upon an alleged conspiracy to keep the Southern carrier from *reduc-*

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[71] Mr. Gray added: "This is the second or third time I have run into this matter and I must confess that it is very embarrassing. If there is such a condition, then we have a very considerable remedy in our own hands. If it does not obtain then it seems to me that a very clear statement of the reasons should be given." No reply to these last observations appears in the record.

[72] AD-17, Vol. D, 222.

ing rates, the record concentrates upon procedures and actions relating to rate reductions. The record does show, however, that soon after the decision in *Ex Parte No. 123* the carriers appointed a temporary Committee of Sixteen, representative of the three major territories, and temporary "low spot" committees in the respective territories, to do what could be done to advance subnormal rates.[73]

I shall now return to the history of the Traffic Executive Association-Southern Territory.

(h) *President Pelley's Letter of November 22, 1937 to the Southeastern Presidents.*

On November 22, 1937, fifteen days after the railroads had initiated *Ex Parte No. 123* and three days after they had met and adopted the resolutions which have previously been described, designed to keep to the fullest extent possible the new rates they hoped to obtain from that proceeding, President Pelley of the A.A.R. wrote a long letter to Mr. Downs, Chairman of the Southeastern Presidents' Conference.[74] The first two paragraphs were as follows:

> "You will recall that at the meeting of the Member-Roads held in Chicago on Friday, November 19th, there was considerable discussion as to organizations that had been set up in the East and West *the purposes of which are to better control the rate situation and to avoid to the fullest extent consistently possible rate erosion.* It was finally concluded that the Traffic Department of this organization should obtain a full statement of the set-ups in the various territories at the present time and, after reviewing same with the Traffic Advisory Committee, submit a recommendation to the three territorial traffic executive committees.
>
> "During the discussion *Mr. Hill requested that some machinery be set up at once in the South, as he felt that*

[73] This evidence is reviewed at pp. 394-398 *infra*.
[74] S 149, I, 260, 261.

a great deal of harm might be done in connection with the decision in Ex Parte 123 unless they had an organization that would take charge of this situation and he did not think that it should await a recommendation from the Traffic Advisory Committee to the several territories, his idea being, as I understood it, that this proposed organization should be temporary in character and superseded by such an arrangement as might be worked out in the more deliberate way which the motion referred to had in contemplation." (Emphasis added)

These passages show that:

(1) The request "that some machinery be set up at once in the South" came in the course of discussion at the November 19 meeting of the member roads, and the request was that the machinery be set up at once without awaiting the proposed survey by the Traffic Department of the territorial set-ups.

(2) Mr. Hill, who made the request, was the President of the Louisville & Nashville Railroad Company, one of the Southern defendants.[75] Thus the impulse for immediate action in the South came from the South, and there is nothing to indicate that Mr. Hill's request grew out of any prior plan or design by the Northern defendants or by the A.A.R. to stiffen up the checks upon rate reductions in the South.

(3) On the contrary it appears that the request for new machinery in the South was directly connected with the pending proceedings in *Ex Parte No. 123.*

Pelley's statement that the purposes of the territorial associations in the East and the West were "to better control the rate situation" and to avoid "rate erosion" as far as possible appears to have expressed the common understanding of the railroads.

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[75] Mr. Kerr so testified at IV, 1343, 1344. See also S-148, I, 259, which sets forth the members of the Southeastern Presidents' Conference as of June 12, 1943, and lists Mr. Hill as President of the Louisville & Nashville Railroad Company.

Pelley's letter, taken literally, implied that there was no organization at all in the South for dealing with rate proposals. This, of course, was not the case. As has previously been shown, the Southern Freight Association, with its long history of development, contained a three-level procedure for the processing of rate proposals—Standing Rate Committee, General Committee, and Executive Committee. And the Articles of Association contained an agreement among all the members to file their rate proposals with the Association before making them effective. In Official Territory there was a five-level procedure (Auxiliary Committee, General Freight Committee, Freight Traffic Managers Committee, Traffic Executive Association-Eastern Territory, and Presidents Traffic Conference).[76] Thus in Official Territory appeals could be carried through two more steps than had been provided for in Southern Territory; and, in addition, the chairman (a paid official) of each committee above the rank of the lowest was given appellate authority not enjoyed by the corresponding officials in Southern Territory. Each chairman was authorized to appeal to a higher committee any action of his own committee which he deemed to be inimical to the best interests of the carriers as a whole; and the rules provided that pending such an appeal the proposed action would be stayed.

In the upshot, as will be seen, the set-up in the South was modified to incorporate these appellate devices and to add two appellate levels above the three-level procedure of the Southern Freight Association.

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[76] As already noted, in cases of conflicts between the sub-territorial associations with regard to rate adjustments involving two or more of the sub-territories, a sub-territorial committee could appeal to the Buffalo Conference and in turn from that Conference to the Traffic Executive Association-Eastern Territory and thence to the Presidents Conference. In such instances, if all appellate means were exercised, the procedure would consist of six levels rather than five. The South, of course, was free from the complications caused by the historical development in Official Territory of three separate sub-territories.

Pelley's letter to Downs recommended that these several changes be made, the balance of his letter reading as follows:[77]

"We have discussed this situation with certain parties and have reached the conclusion that if something is desired to be shortly available that it can only be accomplished under the direction of the Southeastern Presidents' Conference, of which you are Chairman. I would therefore strongly recommend that you put before your members the following suggestion:

"In the event that the Executive Committee of the Southern Freight Association has taken action or an individual line has given notice of contemplated action and either of these situations are considered by an individual line or Chairman J. G. Kerr to be detrimental to the interests of the roads generally, an appeal within five days may be made to an Appeal Traffic Executive Committee consisting of the Chief Traffic Officers of the Atlantic Coast Line, Seaboard Air Line, Southern Railway, Louisville & Nashville, and Illinois Central, and that any appeal to this Committee will be concluded by it within 45 days after its receipt. In the event that the action of this Appeal Committee is such as to be deemed by an individual line or Chairman J. G. Kerr to be detrimental to the interests of the southern railroads as a whole, a further appeal within 5 days after receipt of said Committee's decision may be made to the Chief Executives' Committee to be set up for such purposes by the Southeastern Presidents' Conference. While matters are on appeal, tariffs will not be published.

"No line will be precluded from taking such action as it ultimately concluded to be desirable but will publish tariffs only after notifying Chairman J. G. Kerr of its intention to proceed and will thereafter conform to such effective dates as he may designate.

"This is substantially the plan which is operating successfully in the Eastern Territory and is also in line with the suggestions which have been received from some of the Chief Traffic Officers in Southern Territory."

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[77] S-149, I, 260, 261.

As will be seen, the plan finally adopted by the Southern railroads differed in some respects from the one suggested by Pelley. The last sentence in Pelley's letter shows that before his letter was written some of the chief traffic officers in Southern Territory had been considering their rate association procedures and were in favor of modifications along the lines proposed. Kerr, Chairman of the Southern Freight Association, testified that "the matter had been under consideration" by the Chief Traffic Officers of the Southern lines "in one form or another since December, 1936." [78]

(i) *Southeastern Presidents' Meeting of December 17, 1937*

On December 17, 1937 the Southeastern Presidents' Conference met and considered Pelley's letter. In approving the principle of Pelley's letter the Presidents made it clear in the minutes of their meeting that the project was already being studied by the traffic executives of some of the major Southern railroads and that the Presidents would await the completion of their study before taking action. The minutes were as follows:[79]

> "The principle of Mr. Pelley's letter was unanimously approved by the members of this Conference, it being understood that Traffic Executives of some of the major lines of the Southeast were already making

[78] IV, 1343. The concern of the Southern executives was reflected in a letter from Mr. Cameron, the Vice-President of the Illinois Central, a Southern defendant, to Mr. Kerr, saying with reference to some unidentified meeting that "I think it was pretty generally agreed that for the past several years it has been entirely too easy a matter to get on the docket propositions for reductions in rates." S-150, I, 261, letter dated December 18, 1937. The letter went on to say: "I am willing to obligate the Illinois Central organization to not file any proposals for reductions without first having my personal approval. Of course this involves work, and on that account some of our traffic executives may object to such suggestion, but I don't know any work that we could better or more profitably undertake."

[79] S-149, I, 261.

a study of the situation. The Chairman was authorized to request these Traffic Executives to complete their study and submit recommendations to this Conference as soon as feasible in order that the Traffic Executive Organization might begin functioning with the least possible delay."

(j) *Adoption on April 4, 1938 of the Plan for Establishing the Traffic Executive Association-Southern Territory.*

On January 22, 1938 Kerr sent to the Chairman of the Southeastern Presidents' Conference a proposed plan of reorganization "for the purpose of providing the checks necessary to conserve revenues of the Southern group as a whole. * * * This general plan represents the best view of the chief traffic officers who have participated in its formation. * * *"[80]

The plan envisaged the creation of a new organization, the Traffic Executive Association-Southern Territory, "to have general supervision over all rates, fares, charges and practices within the jurisdiction of the Southern Freight Association, Southeastern Passenger Association, and the Southern Classification Committee."[81] The plan further contemplated certain changes in the committee set-up and in the appellate provisions of the Southern Freight Association.

The plan outlined by Kerr was circulated and discussed. On March 12, 1938 the Presidents of the Southern railroads at a conference unanimously approved in principle the proposal for a Traffic Executive Association-Southern Territory.[82] Three days later there took place the White House

[80] S-151, I, 262, 263.

[81] Paragraph I of the outline of the plan, S-151, I, 263. In the plan as finally adopted the declaration of purposes did not refer specifically to rates but expressed the purposes in more general language, closely following the preamble of the Association of American Railroads. Part XII, p. 1 of SD-2, Vol. N, and, for the A.A.R., S-29, I, 105.

[82] S-153, I, 271.

conference which I have previously described (pp. 366, 367 above), at which Chairman Splawn of the I.C.C. stressed the importance of the railroads raising their depressed rates in accordance with the views expressed by the Commission in its decision in *Ex Parte No. 123*, handed down the week before. As has been noted, immediately following this conference Mr. Gray wrote to Pelley about it, expressing his concern over the depressed rate situation, and Cleveland, with Pelley's consent, thereupon sent copies of Mr. Gray's letter to the member roads, emphasizing in vigorous language the need of taking action to raise the depressed rates.

Upon receipt of Pelley's communication Mr. Rice, the Chief Traffic Officer of the Seaboard Air Line Railway, wrote to Kerr on March 19, 1938 as follows:[83]

> "In view of all that is being said about advancing depressed rates to the normal level wherever practicable, I think we should perfect the best possible organization to accomplish that result just as quickly as it can be done, and I assume that is a matter that would be handled by the newly authorized Traffic Executive Association. I assume you have all seen letter from Mr. Cleveland dated March 17th, enclosing copy of a letter from Mr. Gray, Vice Chairman, of the Union Pacific Railroad, with reference to discussion of the depressed rate situation at the Presidents' Conference on March 15th with respect to the railroad situation."

Kerr thereupon wrote to Mr. Rice and to certain Southern railroad executives, calling a meeting for March 30th to organize the new association, and saying:[84]

> "The several letters you have received directly from Mr. A. F. Cleveland concerning upward revision of subnormal rates serve to emphasize the importance of such action."

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[83] S-154, I, 271.

[84] S-155, I, 271, 272.

On April 4, 1938 the Articles of the new Association were adopted and made effective, conforming very closely to the plan originally outlined by Kerr.[85]

Georgia, commenting on the correspondence set forth above, said that "the traffic executives, under renewed proddings from Cleveland to speed the upward revision of rates, hastened to put the plan into operation."[86]

The implication is that the Southern railroads were subservient to Cleveland in expediting the adoption of the plan, but the evidence shows clearly that Cleveland did not link the desirability of advancing depressed rates with any particular form of organization or procedure in any territory.

The letters are of some interest as indicating that the purposes of the new Association included not merely the checking of rate erosion but the increasing of depressed rates in accordance with the Commission's admonitions and Cleveland's recommendations pursuant thereto. However, as I have said previously, the record contains no evidence of the steps, if any, which were taken to effectuate such increases.

3. *The Structure of the Traffic Executive Association-Southern Territory*

The Traffic Executive Association-Southern Territory as established consisted of the chief traffic officers of twelve major Southern railroads, as compared with the fifteen represented on the Executive Committee of the Southern Freight Association (which also included 2 short line representatives and 4 steamship line representatives, making a total Committee of 21).[87] It was authorized to "supervise and coordinate the affairs of the Southern Freight Association, Southern Passenger Association, and Southern Classification Committee."[88]

[85] S-156, I, 272 and SD-2, Part XII, Vol. N.
[86] Final Brief, p. 35 (citations omitted).
[87] SD-2, Vol. N, Part XII, Article IV; and Part XI, Article III.
[88] *Ibid.* Article II.

The Articles contained provisions designed to ensure so far as possible the presence of the chief traffic officers in person at the Association meetings.[89] The Chairman of the Association was authorized to appeal to the Southeastern Presidents' Conference any action which he might regard "as inimical to the interests of the Southern carriers as a whole."[90] Pending the decision on appeal, "no action shall be taken towards publication." There were similar provisions in the rules of the Traffic Executive Association-Eastern Territory.[91]

The rules of the new Association went further than the rules of the Traffic Executive Association-Eastern Territory in permitting any member, as well as the Chairman, to appeal to the Presidents' Conference; and pending the decision on appeal it was again provided that "no action shall be taken towards publication."[92]

Finally, it was provided that "nothing in these Articles shall be construed as a limitation upon the *final* right of any member of this Association, or any member of the Southern Freight Association, Southern Passenger Association, or Southern Classification Committee, to take separate and independent action."[93] (Emphasis added) The corresponding provision in the rules of the Traffic Executive

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[89] *Ibid,* Article VII, reading as follows: "The members of the Association must personally attend all meetings, except that in case of illness or other good cause a member may be represented by a subordinate officer provided the written authority therefor of the Chief Executive Officer of the member line for each such meeting is filed in advance with the Chairman. Where a subordinate traffic officer is delegated to represent a member of this Association he shall not vote on any question where he has voted on the same question as a member of a committee of the Southern Freight Association, Southern Passenger Association, or the Southern Classification Committee."

[90] *Ibid,* Article X.

[91] Rule 7 of the Articles of that Association, ND-31, Vol. I, p. 143.

[92] SD-2, *supra,* note 87, Article IX.

[93] *Ibid,* Article XII.

Association-Eastern Territory was simply that "no carrier surrenders anything of its individual liberty of action." [94]

Georgia made much of the fact that membership in the Traffic Executive Association-Southern Territory was limited to twelve major railroads, thus "disenfranchising" six steamship lines and twenty-six of the thirty-eight railroad companies which were members of the Southern Freight Association.[95] In response to a protest from one of the steamship lines, cited by Georgia, the Association proposed a plan under which the line would be invited to attend and participate without vote in all meetings in which matters of interest to the line might be up for consideration.[96] The record does not reveal the sequel. Georgia further cited a letter from the President of a small railroad (the Atlanta & St. Andrews) to Kerr stating that the new Association "will do more harm to the railroad situation than anything done in the South before. On the face of it, it shows there is a centralization of power, which will handicap the railroads in times of need.

"Please understand this is no reflection on the personnel of the T. E. A. as it includes some of the best brains in the South.

"In patterning this after the Trunk Line territory procedure, the Presidents evidently did not take into consideration the qualifications of the Traffic Men in the South." [97]

The record contains no record of Kerr's reply. Nor is there any specific evidence as to why membership in the new Association was limited, except for an inconclusive remark

[94] Rule 7, *supra*, note 91.

[95] The list of the membership as of March 17, 1943 is contained at the end of the Articles of Association of Southern Freight Association, Vol. N, SD-2, Part XI.

[96] S-163 and S-164, I, 282-284.

[97] S-158, I, 272. Georgia also cited a letter from Mr. Kerr dated May 19, 1938 to another railroad executive, Mr. Rankin, with regard to certain details of signing and of expenses; I do not construe Mr. Kerr's letter, however, as necessarily involving any protest by Mr. Rankin against the set-up of the new Association. S-159, I, 273.

by Kerr in his letter to the steamship line, referred to above, that:

> "For obvious reasons it is desired that the membership be limited to the smallest number reasonably consistent with the purposes to be accomplished. At the same time it is certainly not the desire of the organization to proceed in disregard of the views or rights of other members of the Southern Freight Association. In fact, one complements the other, the T. E. A. being a sort of appellate body."

It may be noted that ever since 1922 the principle of a limitation of membership has been applied to the Executive Committee and the General Committee of the Southern Freight Association. Thus in the 1922 Articles, at a time when some 43 railroads and 7 steamship lines were members of the Association, the Executive Committee consisted of 21 Chief Traffic Officers elected by the members, and the General Committee consisted of 22 traffic officers appointed by the Executive Committee.[98] Under the present Articles the set-up is substantially the same.[99]

By way of minimizing the importance of limiting the membership of the new Traffic Executive Association-Southern Territory to 12 major railroads, Kerr, who held the Chairmanship of the new Association in addition to his Chairmanship of the Southern Freight Association,[1] testi-

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[98] Articles III and IV of Part X, SD-2, Vol. N. The membership lists (unsigned) appear at the end of this document.

[99] The Executive Committee consists of 21 Chief Traffic Officers (15 from Class I railroads, 4 from steamship lines, 1 representing lines members of the American Short Line Railroad Association, 1 representing short lines not members of that Association). The General Freight Committee consists of 21 traffic officers (subdivided substantially like the Executive Committee). The total membership as of March 17, 1943 was 38 railroads and 12 steamship lines. Articles III and IV, and last page of SD-2, Part XI, Vol. N.

[1] Mr. Kerr wrote to one of the railroad executives on May 19, 1938 that "while I have been elected Chairman of the new Traffic Executive Association, there is no separate salary connected with the position, and I expect to carry on that work along with my duties as Chairman of the Southern Freight Association. As a

fied that these 12 railroads "included approximately 33,000 miles out of 39,000 miles of Class I railroads in the South."[2] Kerr further testified that the Norfolk & Western Railway and the Chesapeake & Ohio Railroad, which, though Northern railroads and among the Northern defendants in this case, were members of the Southern Freight Association because portions of their roads extended into Southern territory, were not included in the membership of the Traffic Executive Association-Southern Territory.[3] It appears from the record that the Norfolk & Western specifically requested representation in the new Association, joining with the Nashville, Chattanooga & St. Louis Railway in making this request; and that the request of the Norfolk & Western was denied while the request of the Nashville, Chattanooga & St. Louis Railway, a strictly Southern railroad and a relatively small one, was granted.[4]

The defendants contended that the exclusion of the two Northern railroads just mentioned, and particularly the exclusion of the Norfolk & Western, negatived Georgia's charge that the composition of the Traffic Executive Association-Southern Territory had been limited by Northern pressure. The defendants further pointed to Tilford's testimony that the members of the new Association included all of the railroads in Southern territory which "reach the

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matter of fact, it is almost impossible, except as to a few passenger matters, to distinguish between the duties of the two positions." S-159, I, 273.

[2] IV, 1345.

[3] *Ibid.*

[4] S-153, Vol. B, p. 454, containing a letter from Mr. Oliver of the Southern Railway to Mr. Kerr with regard to the requests of the two carriers; and S-156, Vol. B, p. 457, items 1 and 2 (omitted from plaintiff's excerpts in I, 272) re action taken on the two requests. The request of the Nashville, Chattanooga & St. Louis was contained in a letter from its President, Mr. Hall, to Mr. Kerr dated March 4, 1938 saying that: "I have been looking over your letter of January 22nd . . . about an organization in the South to prevent improper whittling away of rates . . . this Company cannot agree to a Traffic Executive Association on which it will not be represented." S-152, I, 271.

interterritorial gateways between the South and the various sections of the United States."[5]

Two questions remain to be answered:

First. Was the limitation of membership on the Traffic Executive Association-Southern Territory caused by pressure from either the A. A. R. or the Northern roads? The evidence does not warrant such an inference. It is true that the first suggestion of the limitation was contained in Pelley's letter to Downs, as chairman of the Southeastern Presidents' Conference, in which he suggested that the new body be composed of 5 major Southern railroads. On the other hand, Pelley's letter itself stated that the plan he was proposing was "in line with the suggestions which have been received from some of the Chief Traffic Officers in Southern Territory"; and, as has been noted above, the principle of a limitation of membership had been applied to the two top Committees of the Southern Freight Association since 1922. No inference of pressure can be drawn from this evidence.

Secondly. Could the limitation fairly be regarded as one more device for checking rate erosion? The limitation must have been intended, at the very least, to enable the new association to discharge as effectively as possible the purpose for which it was established, by concentrating responsibility on a small number of important officials. Clearly the purpose for which the new association was established was, primarily, to check rate erosion. In addition to the evidence on this point already reviewed, Tilford's admission on p. 385 and Cleveland's statement on p. 388 below should be particularly noted. In the light of this evidence the limitation of membership can be reasonably viewed as one of the steps taken to check rate erosion.

4. *Conclusions as to the Alleged Imposition on the South of the Traffic Executive Association-Southern Territory*

The only evidence in support of Georgia's charge that

[5] VI, 1694-1695.

"regional machinery had been imposed on the South designed to insure that the proposals of the many should be reviewed only by the few,"[6] was Pelley's letter of November 22, 1937 (supra, p. 371), recommending the appointment of a temporary "Appeal Traffic Executive Committee" of five members. As has been seen, the Southern carriers instead established a permanent Association of twelve members, and the evidence taken as a whole does not warrant a finding that this structural form was imposed on the Southern railroads by Northern pressure, or by pressure from the A. A. R.[7] On the other hand, in view of Pelley's important position and of the A. A. R.'s acute concern over the rate association set-ups in this period and over the whole problem of controlling rate erosion, Pelley's recommendations must be considered as having had some influence both on the shaping of the T. E. A.-Southern and on the accompanying revision of the Southern Freight Association described below.

5. *Changes in the Southern Freight Association Following the Establishment of the Traffic Executive Association-Southern Territory.*

On June 14, 1938 the members of the Southern Freight Association adopted revised Articles of Association embodying most of the changes which had been outlined in the plan distributed by Kerr on January 22, 1938.[8]

The revised Articles provided for appeals to the newly established Traffic Executive Association-Southern Territory, and strengthened the Committee set-up and appellate

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[6] Final Brief, p. 38.

[7] Georgia suggested that a recommendation was enough to produce action in view of the provision of Article 20(f) of the A.A.R. that "where there exist means for the settlement of disputes in organizations to be brought under the Association such rules and regulations may be continued, unless otherwise ordered by the Board of Directors or the Executive Committee." S-29, I, 107. The evidence does not warrant a conclusion that the existence of this Article had any influence on the formulation by the Southern railroads of the Traffic Executive Association-Southern Territory.

[8] S-160, I, 274.

procedure within the Southern Freight Association, as follows:

(a) *Appeals to the Traffic Executive Association-Southern Territory*

It was provided that any member line could appeal from action of the Executive Committee of the Southern Freight Association to the Traffic Executive Association-Southern Territory. And the Chairman of the Executive Committee was authorized and directed to appeal to the new Association any action of the Executive Committee which he regarded as "inimical to the interests of the Southern carriers as a whole."[9] In case of either type of appeal, pending its disposition "no action shall be taken towards publication."[10]

(b) *The Strengthened Committee Set-Up and Appellate Procedure*

It will be recalled that the structure of the Southern Freight Association consisted of a Standing Rate Committee of full-time experts; a General Committee (rechristened "General Freight Committee" by the revised Articles, and hereafter so called); and an Executive Committee. The Articles of Association were not very precise in specifying the officials who should constitute the General Committee and the Executive Committee, and the practice with regard to representation appears to have been rather loose.[11] Thus Sheppard of the Illinois Central testified:[12]

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[9] Article III, Part XI of SD-2, Vol. N

[10] Ibid.

[11] In the case of the General Freight Committee the Articles simply provided that it should be composed of 22 "traffic officers" without stating their rank; they may have been a mixture of freight agents and freight traffic managers (who were not as in the North assigned to a committee of their own, intermediate between the general freight agents and the vice-presidents). In the case of the Executive Committee the Articles provided that it should consist of 21 chief traffic officers, each of whom, however, was authorized to designate an alternate. Articles III and IV, Part X of SD-2, Vol. N.

[12] VIII, 2312.

> "Now in the South I recall that frequently the same man would go to the General Committee, the same man would go to the Executive Committee. . . . with the result that you were getting no new thought in connection with the subject."

The revised Articles sought to end this intermixture of personnel by specifying that the General Freight Committee should consist of traffic officers of the rank of assistant general freight agent or higher, and that the same officer could not serve regularly on both the General Freight Committee and the Executive Committee.[13]

The appellate procedure was further strengthened by authorizing the Chairman, as well as individual members, to appeal to the Executive Committee any action by the General Freight Committee which he regarded as "inimical to the interests of the Southern carriers as a whole"—the now familiar phrase. To this was added the provision,

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[13] Articles III and IV of Part XI of SD-2, Vol. N. The former provided that the same officer could not serve on both Committees "except in the case of illness or for other good cause, and then only upon written notification by the Chief Traffic Officer to the Chairman of such appointment to cover the particular meeting to be so attended." The plan originally outlined by Mr. Kerr on January 22, 1938 contemplated the elimination of the Executive Committee and the substitution for it of a Freight Traffic Managers Committee—a logical change in view of the fact that the chief traffic executives, normally vice-presidents, would be serving on the new Traffic Executive Association-Southern Territory and there would be no point in having them sit also on the Executive Committee of the Southern Freight Association and then appealing their own decisions to themselves. In the plan as finally adopted the Executive Committee was retained, with the same provision as before, that each of the chief traffic officers who composed it could designate an alternate, who could, of course, be a Freight Traffic Manager. Though the record is not specific on this point, it seems likely that the reason why the Executive Committee was not converted into a Freight Traffic Managers Committee was because only twelve railroads were represented on the new Traffic Executive Association-Southern Territory, as compared with twenty-one on the Executive Committee of the Southern Freight Association, with the result that if the latter Committee had been limited to Freight Traffic Managers nine of the roads would have been deprived of representation by their chief traffic officers.

likewise familiar, that pending decision on the appeal "no action shall be taken towards publication." [14]

Thus the device of Chairman-conducted appeals, with stays pending decision, which had long been in existence in Official Territory, was imported into the South by the Southern carriers in 1938, first into the new Traffic Executive Association as described above, and then into the revised Southern Freight Association. The defendants contended that the right of independent action, expressly reserved in the Articles or rules of all the organizations, North and South, cut across and rose superior to these provisions for stays during appeals, both in theory and in practice. I shall consider these contentions when I come to take up in Part Two Georgia's allegations regarding the coerciveness of the power acquired by the defendants.

Meanwhile I shall review in a summary way certain evidence offered by the Southern defendants as to the practical effects of the steps which they took in 1938.

6. *The Practical Effects of the Establishment of the Traffic Executive Association-Southern Territory and of the Changes Effected in the Southern Freight Association in 1938.*

Generally speaking, the Southern defendants sought to minimize the significance of these steps. Thus Tilford of the Louisville & Nashville testified as follows: [15]

> "I have previously explained that the Traffic Executive Association in Southern territory was created for the purpose of coordinating the activities of the three rate bureaus of Southern territory, namely the Southern Freight Association, the Southern Classification Committee, and the Southeastern Passenger Association.
>
> "Naturally, the organization, being composed of the Chief Traffic Officers of the principal southern rail-

[14] Article IX(h) of Part XI of SD-2, Vol. N.
[15] VI, 1692, 1693.

roads, one of its purposes was to dispose of disputes and differences of opinion with respect to rate adjustments or other traffic matters having in mind the interest of the southern railroads as a group.

"This would include, also, ill considered rate proposals which depleted unnecessarily the revenues of the railroads and which was criticized by the Interstate Commerce Commission.

"I have previously stated that the Chief Traffic Officers composing the Traffic Executive Association are also members of the Executive Committees of the several rate bureaus, and the control of traffic affairs of the southern railroads has remained in *exactly the same hands as before the organization of Traffic Executive Association.*

"The change was in the form and not in substance.

"Q. Does the Association of American Railroads assert any control over the rates of southern railroads through Traffic Executive Association-Southern Territory?

"A. No, sir." (Emphasis added)

On cross-examination, when asked if the establishment of the Traffic Executive Association-Southern Territory was "designed to prevent to the fullest extent possible the erosion of the rate structure," he replied in the affirmative.[16] He insisted, however, that the change was not "substantial", because "we had the right before any Traffic Executive Association was organized, and still have the right of independent action and we very definitely exercise that right of independent action. All this does is to get consideration by the executives. . . ."[17]

As to what the Traffic Executive Association had actually done, Doss of the Atlantic Coast Line, a member of the Association, testified that the Association had not held regular or frequent meetings in recent years "due principally to the fact that there have been few, if any, subjects on the docket.

[16] VIII, 2312.
[17] VIII, 2313.

"There have been few subjects on the docket because of our ability to dispose of the subjects in the subordinate committees, such as the General Freight Committee and the Executive Committee."[18]

Kerr, Chairman of the Traffic Executive Association-Southern Territory, testified that during the approximately eight years of its existence the Association had held 25 meetings and had received 149 subjects of appeal from the Southern Freight Association.[19] Of these, "37 were struck from the docket for various reasons, but chiefly because the appeal was withdrawn or the proposal itself was withdrawn by the proponent," leaving 112 proposals to be acted on. Of these 112, only 33 were disapproved; and of these 33, 13 were independently announced by the proponents in disregard of the Association's action.[20]

Only 5 of the remainder were appealed to the Southeastern Presidents' Conference during the entire eight years. "As to one of these, the president of the proponent line, independently; announced the purpose of his road to proceed with publication and this was prior to final consideration by the members of the Southeastern Presidents' Conference."[21] Of the remaining 4, only one was disapproved, and that was a proposed rate *increase*.[22] In the case of one of the others "the Presidents' Conference suggested to the two roads involved that they should give the matter further consideration in the light of the facts developed";[23] subsequently certain shippers took the case to the I.C.C., which declined to permit the proposed reduction to be published because, in the words of the Commission, "it would mean the disturbance of long existing origin rate

[18] XV, 4843, 4844.
[19] IV, 1347.
[20] IV, 1348.
[21] IV, 1349.
[22] Ibid.
[23] V, 1357.

relations which have been approved or prescribed by this Commission." [24]

From this evidence it is possible that the establishment of the Traffic Executive Association-Southern Territory and the provision for appeals from the Southern Freight Association to it, and from it to the Southeastern Presidents' Conference, did not produce consequences very materially different from those which would have occurred had these steps not been taken. The defendants' testimony, as summarized above, suggested that the only real change was that the chief traffic officers scrutinized proposed rate reductions with greater care, and attended meetings in person more regularly, than before.

On the other hand, as has been shown above, the declared purposes of the defendants were, as variously expressed, to "protect the railroads' revenues by proper handling of rate matters," [25] to "better control the rate situation," [26] to "prevent to the fullest extent possible the erosion of the rate structure," [27] to provide "the checks necessary to conserve revenues of the Southern group as a whole," [28] to "prevent the improper whittling away of rates," [29] to "discourage unnecessary rate cutting or reductions in rates," [30] and to advance "depressed rates to the normal level wherever practicable." [31]

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[24] V, 1358, quoting from *Pocahontas Operators Association, et al., v. Norfolk and Western Railroad, et al.*, 243 I.C.C. 731, 741.

[25] Resolution of member roads of A.A.R., Nov. 19, 1937, *supra*, p. 362.

[26] Pelley, *supra*, p. 368.

[27] Tilford, *supra*, p. 385, and Cleveland to same effect, pp. 388, 392, 393.

[28] Kerr, *supra*, p. 373.

[29] Hall, note 4, *supra*.

[30] General Attorney Smith of Illinois Central in letter to Kerr dated April 28, 1938, adding: "If we are not able to do this job, some one is going to do it for us. I can't help but feel that the protection that the public has, so far as freight rates and charges are concerned, is in the Interstate Commerce Act and not in the Sherman Act. However that may be, the Articles provide for the right of independent action." S-157, I, 272.

[31] Rice, note 83, *supra*.

In view of the clarity and unanimity of these objects, the energy with which the defendants went about the task of achieving them, and the substantial nature of the changes which the defendants made in their procedures and organizational set-up, I think it reasonable to find that these changes were more than mere changes in form.

This finding is supported by the following passage from a letter written by Cleveland on June 27, 1938 to rate association chairmen in the several territories, reviewing developments in the preceding months:[32]

> "As a result of this consideration" (by the Traffic Advisory Committee at a meeting on February 1-2, 1938 reviewed *infra* at pp. 389, 390) "in Western territory certain changes were made which gave much better control of this situation than had previously existed. In Southern territory there was established a Committee of Traffic Executives and an appeal committee of Presidents, with which changes in these two territories a *basis was set up for very much better controlling the situation than had previously existed.* No action was necessary in Eastern territory on account of there having been already in effect a Presidents' Conference Committee which was properly functioning in reference to matters of this nature." (Emphasis added)

Several similar observations by Cleveland will appear in the section below, which deals with the revision of the rate procedures of the Illinois Freight Association. The steps taken in connection with this revision are relevant only because of the light they throw on the purposes of the defendants in this period, and the role played by Cleveland in furthering the recommendations for better rate control adopted at the A.A.R. member-roads meeting of November 19, 1937.

7. *Proposals for Revising the Set-up of the Illinois Freight Association in 1938.*

Although Illinois lies within Central Freight Association Territory, which is a subdivision of Official Territory, his-

[32] S-461, IX, 2818.

torically Illinois and certain adjacent areas have been regarded for some purposes as a separate rate territory known as "Illinois Territory." Within this Territory a number of railroads whose lines extend north, south, east and west have terminals and exchange traffic.

Because of the resulting rate complexities, the Illinois Freight Association was formed in 1921, as a consolidation of earlier committees, to deal with particular rate adjustments, switching charges, etc., in this area.[33] It is independent of all other rate associations, including Central Freight Association.[34]

The Association consists of several subordinate and specialized rate committees which consider rate proposals in the first instance, and one appellate committee called the Traffic Executive Committee, which exercises general supervision over the Association.[35]

It will be recalled that at their meeting on November 19, 1937 the member roads of the A.A.R. instructed Cleveland, with the Traffic Advisory Committee of the A.A.R., to "review the established procedure in all of the rate territories for the purpose of recommending the establishing in any territory where it is necessary, machinery to protect the railroads' revenues by proper handling of rate matters."[36] In connection with this review certain action was taken regarding the procedures in Illinois Freight Association. The nature of this action may be summarized as follows.

The Traffic Advisory Committee of the A.A.R. met on February 1 and 2, 1938. This Committee, as previously stated, consisted of 6 traffic officers from the South and 8 each from the East and West. Its function, as the name implies, was advisory only; except for the incidents now to be recounted it appears to have been inactive, and it

[33] The history and nature of the Association was described by Mr. Raasch, its Chairman, in XVI, 5382-5395.

[34] Raasch, XVI, 5386, 5387.

[35] Ibid, 5394, 5395.

[36] *Supra*, p. 362.

has not met since 1940.[37] Prior to the meeting of this Committee on February 1 and 2, as has already been noted, Kerr, Chairman of the Southern Freight Association, in consultation with Southern traffic executives, had formulated and distributed (on January 22, 1938) a plan for a revised set-up in the South which, with a few changes, was later formally adopted by the Southern carriers.

The fact that this plan had been developed was reported to the meeting; Franklin of the Pennsylvania testified:[38]

> "The matter came before the Traffic Advisory Committee at a meeting on February 1 and 2, 1938, at which I was present, and, after receiving information from the southern lines and as well as from the eastern and western lines, we reported that, according to our information, the Traffic Executives in the Southern territory had worked out a plan which, in their judgment, would work satisfactorily in that territory."

He was asked why the railroads in other rate territories —specifically in the North—should have an interest in what was being done in the South, and he replied:[39]

> "Only as I have already testified: Because the Interstate Commerce Commission had addressed certain admonitions to all the railroads of the country, and, to that extent, every railroad in whatever territory it was located had some interest in what was done by the other railroads wherever they were located since the Commission's criticism was addressed to all alike, and each would have to suffer from the action of the Commission if the Commission did not like what some of the others were doing or were not doing."

At the meeting the situation in Illinois Freight Association was considered,[40] and, because of the overlapping of

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[37] *Supra*, pp.

[38] X, 3258, 3259.

[39] X, 3259, 3260.

[40] And apparently also in Western Territory. See Cleveland's letter of June 27, 1938, *supra* note 32, indicating that as a result of the Committee's consideration certain changes were made in that Territory. For a description of Illinois Territory, see p. 238.

Eastern, Western and Southern lines in Illinois Territory, a special committee was appointed consisting of Sperry (Chairman of the Illinois Freight Association) as Chairman, together with the Chairman of the Central Freight Association (Morris), the Chairman of the Western Traffic Executive Committee (Farmar), and the Chairman of the Southern Freight Association (Kerr).[41]

Following that meeting, on February 22, 1938, an official of the Illinois Central wrote to Farmar and Kerr, representing the Western and Southern lines, as follows:[42]

> "The arrangements for rate control during the pendency of and after Ex Parte 123 have not extended to the Southern Ports Foreign Freight Committee."

(The Southern Ports Foreign Freight Committee, which does not otherwise figure in this record, was composed of railroads interested in export and import rates to and from the South and points in Illinois, Central Freight Association and Western Trunk Line Territories.[43] Its headquarters were in Chicago.)[44] The letter continued:

> "Before long you will be dealing with the Illinois Freight Association to improve the rate control there. Of course the eastern chairman will not be interested in the Southern Ports Foreign Freight Committee, but when you two gentlemen get together with Chairman Morris to discuss the Illinois Freight Association, may I suggest that you two see what can be done to extend the rate control now applying in the major committees to the Southern Ports Foreign Freight Committee?
>
> "I shall be glad to have you advise what conclusions you reach."

The record does not show what happened as the result of this letter. The next item in the record was a letter from Cleveland to Sperry of the Illinois Freight Association,

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[41] Per Cleveland's letter, *supra* note 32.
[42] S-462, IX, 2819.
[43] Doss, XV, 4835.
[44] Sheppard, VII, 2116.

dated April 5, 1938, pointing out that "the Southern territory and the Western territory have now perfected arrangements for strengthening the organization in their territories to the end of preventing to the fullest extent possible erosion of the rate structure," in view of which Cleveland suggested that Sperry's Committee "ought now be able to take this proposition up and to submit a plan for consideration." [45]

On July 19, 1938, Sperry's Committee having previously met and agreed upon a plan,[46] Sperry wrote to the members of the Traffic Executive Committee of the Illinois Freight Association, quoting from Cleveland's letter appointing Sperry's Committee, and submitting a memorandum of proposed changes in the Articles of the Association. These changes, Sperry said, would in the opinion of his Committee "place the legislative machinery of the Illinois Freight Association on a more nearly comparable basis with that followed in the territories under the jurisdiction of the Eastern Executive Association, Southern Executive Association and Western Traffic Executive Committee." [47] Sperry then added:

> "Copy of the call is forwarded to Mr. Cleveland as a matter of information. The special committee agreed that no definite advices could be given Mr. Cleveland for further consideration of the subject by the Traffic Advisory Committee pending consideration of the proposed changes by your committee."

Sperry's memorandum of the proposed changes in the "legislative machinery" of the Association revealed that the major proposals were to authorize the Chairman (a) to appeal to the Traffic Executive Committee action from the

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[45] S-463, IX, 2820.

[46] As stated in a letter from Mr. Farmar to Mr. Cleveland, dated June 30, 1938, Mr. Farmar said that the Committee had "agreed upon certain principles" which were "in harmony with the rules and machinery already effective within Western Trunk Line, Southern Freight, and Official Classification territories." S-464, IX, 2821.

[47] S-465, IX, 2823.

subordinate committees, and (b) to appeal to a new special committee of six Presidents (two each from the North, West and South) action of the Traffic Executive Committee.[48] It was provided in each instance, in accordance with the pattern long since set in the East and recently adopted in the South, as described above, that the Chairman's appeal should be taken when any action in his opinion would be inimical to the general interests of the carriers as a whole, and that the appeal would operate as a stay on further action pending a decision.

It appeared from Sperry's memorandum that the substance of the proposal to authorize Chairman-appeals from subordinate committees to the Traffic Executive Committee had already been approved by the latter Committee on December 4, 1936, nearly a year before the A.A.R. member roads took their first action to stiffen up the rate procedures, and that Sperry's memorandum was merely suggesting minor changes in this provision.[49] Whatever these changes were, they were adopted at a meeting of the Traffic Executive Committee on July 29, 1938; no agreement, however, was reached in regard to the proposal for an appeal to a special committee of Presidents.[50]

No further progress in this direction was made and in the following year on March 18, 1939, Sperry wrote Cleveland in substance that the Traffic Executive Committee would not agree to the proposal for an appeal to a Presidents' Conference.[51] On March 21 1939 Cleveland, under the caption of "MACHINERY BY WHICH TO PREVENT TO THE FULLEST EXTENT POSSIBLE THE EROSION OF THE RATE STRUCTURE", wrote to the Traffic Advisory Committee briefly reviewing the history of the subject in its bearing upon the Illinois Freight Association, beginning with the member-roads

[48] S-466, IX, 2824, Article X, Sections 2 and 3.
[49] Ibid, note to Section 2.
[50] S-467, IX, 2825, letter from Sperry to Cleveland dated August 4, 1938.
[51] S-468, IX, 2826.

meeting on November 19, 1937. He pointed out that as a result of the actions taken the "arrangement in the West" had been "strengthened"; that in the South "an appeal to the Southern Presidents' Conference" had been provided; and that "the only territory that did not appear to be covered was Illinois Freight Association Territory." He then referred to the "Final Report" from Sperry and called a meeting of the Traffic Advisory Committee for March 29, 1939. At that meeting the following minute was adopted.[52]

> "It developed that the situation in Eastern, Western and Southern territories was in a satisfactory condition and that the Chairman should make a final report to Mr. Pelley with regard to the failure, and the reasons therefor, in connection with the situation in Illinois Freight Association territory."

The story ends at that point, so far as the record discloses.

8. *Other Steps Taken in 1937 and 1938 Regarding Rate Reductions and Increases*

In addition to the evidence thus far reviewed relating to rate association set-ups and procedures, Georgia introduced certain other evidence relating to steps taken to check rate reductions and to increase depressed rates. These steps have little, if anything, to do with the alleged integration of the territorial associations into the A. A. R., but they further illustrate the aims of the defendants in this period. For that reason the evidence is briefly reviewed below.

(a) *The Signature by Chief Traffic Officers of Proposals for Rate Reductions, and the Appointment of Special "Low Spot" Committees*

It will be recalled that one of the recommendations sent out as a result of the A. A. R. member-roads meeting of

[52] S-470, IX, 2828.

November 19, 1937 provided that any rates which might be increased through Commission authority in *Ex Parte No. 123* should not be reduced except with the approval of the Chief Traffic Officer of the line involved (p. 362 above).

On March 18, 1938 the Board of Directors of the A. A. R. reaffirmed this action, and also laid new stress upon measures to increase depressed rates—an undertaking which, as we have seen, the Interstate Commerce Commission had repeatedly urged upon the railroads. The Board's resolution began by stating that [53] "by repeated inquiries and statements from the bench during the hearing of Ex Parte 123 the Interstate Commerce Commission elicited from the carriers assurance that they will put into effect every increase authorized in that proceeding and thereafter will study the situation, and if experience shows that any increase so put into effect retards traffic will reduce or take off such increase. . . ." The Board resolved as follows:

> "1. That there should be no whittling of Ex Parte 123 increases and any changes therein should not be made except by authority of executive traffic officers and, where other lines are concerned, of their traffic executive associations.
>
> "2. Where definite previous relationships of rates have been disturbed and it is desired to re-establish such relationships it shall be accomplished, if possible, by increases rather than reductions.
>
> "3. Full advantage should be taken of the inferred invitation of the Commission in this decision to raise subnormal rates by the filing of tariffs in the usual manner.
>
> "4. That the executives individually advise their respective traffic departments of this approved policy and direct compliance therewith.
>
> "5. That beginning with June 1, 1938, a monthly report shall be made to the President of the Association of American Railroads showing the number of tariffs filed advancing subnormal rates during the pre-

[53] S-395, Vol. C, 1026

> ceding month with an estimate of increased revenue that may be expected therefrom on an annual basis."

At about this time there was established a Traffic Executive Committee of Sixteen [54] (5 from the North, 5 from the South, 6 from the West) "for the purpose of obtaining as much additional revenue as might be consistently possible by advancing subnormal rates", and similar committees (sometimes referred to as "low spot" committees) [55] were established in the several territories. The Board of the A. A. R. unanimously approved this step and urged that the advancement of the "subnormal" rates "be given preferred attention and progressed as rapidly as possible; furthermore, that in this endeavor, no possible source of new revenue should be overlooked." [56]

The record does not show what the Committee of Sixteen and the territorial low spot committees accomplished; they were, as will be seen, relatively short-lived. The record is not clear as to what was done with regard to the method of initiating rate *reductions*. On June 30, 1938 Cleveland wrote to the chairmen in the East, West and South, saying: [57]

> "My attention has been directed to the fact that the practices are not as uniform in this particular as the necessities require and that it might be helpful if the roads would adopt a plan whereby proposals for reductions in rates must bear the personal signature of the Chief Traffic Officers. I think under the circumstances it would be highly desirable to have this matter further considered in an attempt not to freeze the rates, but (to) guarantee the maximum of caution in endeavoring to protect to the fullest extent possible the general rate level."

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[54] Pursuant to a recommendation on March 10, 1938 by the "Ex Parte 123 Traffic Executive Committee"—a Committee of member roads whose principal task was to implement and carry out the Commission's authorizations in that case. S-396, Vol. C, 1028.

[55] Ibid; and S-395, Vol. C, 1027.

[56] S-396, Vol. C, 1028.

[57] V, 1495, 1496.

The testimony indicates that in Southern Territory the recommended practice of obtaining the Chief Traffic Officers' signature was followed.[58] In addition, provision was made in the Southern Freight Association for approval by the Executive Committee of certain proposals for rate reductions.[59]

In the fall of 1938 the Committee of Sixteen was disbanded, and on September 22, 1938 Cleveland in a communication to the traffic executives of the several territories noted their desire that the A. A. R. resolutions regarding signature of rate reductions by Chief Traffic Officers and monthly reports of the increasing of depressed rates be rescinded.[60] The Board of the A. A. R. rescinded these resolutions in January, 1939.[61] The Eastern railroads rescinded their requirement of the signing of rate reductions by Chief Traffic Officers in March, 1939,[62] but the Southern roads did not do so until May, 1939.[63] The utility of the rule prompted this delay in abrogating it; shortly after the receipt of Cleveland's letter just referred to, Kerr wrote in reply that the Southern roads were not then disposed to make any change, saying that "while the personal approval of the chief traffic officers of proposals involving reductions in rates may result in a few days delay and require a good deal of attention on the part of the chief traffic officers personally, it is felt that a good many pro-

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[58] See Mr. Kerr's testimony in V, 1473-1495, which leaves something to be desired in point of clarity but which shows that the Southern lines had adopted the practice of Chief Traffic Officers' signatures prior to the recommendations from the A.A.R., and subsequently had gone further than the recommendations by requiring the approval of the Chief Traffic Officers of all initial lines serving the origins covered by the proposal.

[59] S-397, Vol. C, 1030-1031.

[60] S-395, Vol. C, 1026, 1027.

[61] Franklin, X, 3255.

[62] Ibid.

[63] Kerr, V, 1611, 1612.

posals which would otherwise be filed are not filed because of this check . . ."[64]

In July, 1939 the remainder of the temporary rules in the South, having to do with approvals of rate reductions by the Executive Committee of the Southern Freight Association, were rescinded.[65]

(b) *The Adoption in Official Territory of Special Requirements for Voting on Rate Reductions*

At a meeting of the Traffic Executive Association-Eastern Territory on October 14, 1937, "it was the consensus that no reduced rates should be authorized for the time being without approval thereof by the appropriate Traffic Executive Committee, or in cases where no such committee exists, without approval of the proper traffic executive or executives. The foregoing is not to interfere with .... the right of individual action by any railroad" or the "publication of rates to meet well-established rates of competing rail routes."[66] Burgess of the B. & O., former Chairman of the Traffic Executive Association-Eastern Territory, testified that this action had been taken "to meet the Commission's criticism of wasteful eroding of the rate levels. . . ."[67]

Burgess then stated that "shortly after this first action of the executives at their meeting of October 14, the rule was modified to provide that where proposals to reduce rates received the approval of all the lines represented in the subordinate committee where they were normally considered, the traffic executives would not require such cases to be submitted to them for their personal consideration."[68]

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[64] S-397, Vol. C, 1031. Mr. Kerr went on to state: "further, that the modified plan under which we are listing for consideration by the Executive Committee of the Southern Freight Association certain proposals contemplating reductions, is working out very satisfactorily and without materially interfering with the ordinary duties of the General Freight Committee or other subordinate committees."

[65] Kerr, V, 1611.

[66] ND-32 and ND-33, Vol. L.

[67] XIII, 4179.

[68] Ibid, 4183.

Subsequently, on August 2, 1938 (the decision in *Ex Parte No. 123* having been issued on March 8 of that year) "the procedure was again relaxed by changing the rule to provide that if only three-fourths of the members of a subordinate committee" (e.g., in the case of the Trunk Line Association, the General Freight Committee or the Freight Traffic Managers Committee) "favored a rate reduction, the executives shall accept their judgment. That is the way the rule now reads."[69]

In other words, unless a proposed rate reduction is approved by at least a three-fourths vote in the General Freight Committee or the Freight Traffic Managers Committee of the Trunk Line Association, it cannot (except where independent action is taken) become effective without the approval of the traffic executives (normally through the Traffic Executive Association-Eastern Territory).[70] In commenting upon the three-fourths rule Burgess testified:[71]

> "The three-fourths rule is merely the Executives' way of trying to meet, through the action of their subordinates in the subordinate committees, the Commission's criticisms to which I have referred. The rule in no way changes or limits the right of any member in a subordinate committee to appeal from, or take independent action contrary to, the results of the three-fourths vote. If a line proposes a rate reduction and it is not favored by as many as three-fourths of the members of the subordinate committee, that line as to that proposal, as in the case of any other proposal, may appeal it to the appropriate executive committee, where the three-fourths rule does not apply. Of course, the proponent of the reduction can also go ahead and independently reduce the rate, if it so chooses."

I shall consider hereinafter Georgia's contentions regarding the restrictive nature of this rule.

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[69] Ibid.

[70] As noted at p. 261 above, the Traffic Executive Committee of the Trunk Line Association functions only in those exceptional cases in which a rate proposal affects shippers or carriers in Trunk Line Association territory only.

[71] XIII, 4183-4185.

(c) *Exchange of Information Between the Several Traffic Executive Associations*

After describing the establishment of the Traffic Executive Association-Southern Territory and the strengthening of the Southern Freight Association, Georgia's Final Brief states at p. 37:

> "At the same time Chairman Kerr geared the new Southern rate controls into the national machine by arranging with the chairmen of Traffic Executive Associations in other major territories for the confidential exchange of the proceedings of their respective Executive Committees. Since such proceedings were not disclosed to the disenfranchised members of Southern Freight Association, the preferred Northern defendants were better informed concerning Southern rate adjustments than many Southern roads." (Citation omitted)

Actually the arrangement which Kerr made for the interchange of information was in June, 1939, and it seems to have had no particular connection with the events in 1938 described above.[72] Kerr testified that the arrangement "did not have the slightest thing to do with the organization of the Traffic Executive Association-Southern Territory"; that the arrangement was made with Chairman Farmar of the Western Traffic Executive Committee and Chairman Lawrence of the Traffic Executive Association-Eastern Territory "in order that we might effect some improvements in the routine machinery that had been set up in the several territories for the handling and disposition of rate proposals of carriers and shippers"; that Chairman Farmar suggested the arrangement and that Kerr thought well of it on the theory "that if these procedures were properly exchanged we might have in our records the actions or recommendations of the carriers in the other

[72] S-165, I, 284, being a letter from Mr. Kerr to the members of the Traffic Executive Association-Southern Territory dated June 10, 1939, explaining to them the arrangement he had entered into and submitting it to them for their approval.

territories, so that if a proposal of Southern lines, or any proposal for that matter, came before one of our committees, we might have a little advance information of what action or recommendation carriers in other territories had taken.

"It was particularly important in connection with proposals involving interterritorial rates." [73]

The information thus received was not disseminated to the member lines because it was sent to Kerr for his information as an administrative officer and was sent in advance of the final disposition of the particular rate matter; as soon as notice of the final disposition was received copies were distributed in accordance with the regular procedure to all of the interested lines.[74]

I do not find in the evidence on this point anything bearing upon the charges of coercion or discrimination, nor does it seem to me to be related to the alleged integration of the territorial associations into the Association of American Railroads.

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[73] IV, 1284-1286.

[74] Kerr, IV 1286-1290.

PART TWO

The Nature and Alleged Coerciveness of the Power Acquired by the Defendants

I. *The Alleged Binding Authority of the A.A.R. in Rate Matters*

[*Note:* The statements in this Section do not relate to the revised form of Plan of Organization which the railroads adopted following the recent enactment of Section 5a of the Interstate Commerce Act.]

A. Nature and Effect of the Authority Conferred by the Plan of Organization (Hereinafter Referred to as the Articles of Association)

1. *The Decision of "Controversial Questions"*

Article 4 provided that "a vote of the majority of the Board is required for decision," but that any member of the Board could declare a question "controversial", in which case a three-fourths vote would be required.[1] Moreover, "no decision shall be reached nor any order made against any railroad company with respect to any controversial question without notice and opportunity to be heard."[2]

Article 19 contained an agreement that in any case declared under Article 4 to be controversial, and decided by a three-fourths vote of the Board, the members "*will accept and carry out such decision* or, within twenty days, institute arbitration proceedings as hereinafter provided."[3] Article 19 further provided that arbitration awards "*shall be conclusive and binding* upon the parties to the controversy."[4] (Emphasis added)

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[1] S-29, I, 105.
[2] Ibid.
[3] S-29, I, 106.
[4] S-29, I, 107.

The obligations thus assumed by the members were reinforced by Article 22, which stated that:[5]

> "Attached, as Exhibit 'A', is a form of contract under which all Members will agree to the above provisions and which they will be required to enter into at the time of signifying their intent to become members of the Association. * * *"

Exhibit "A" provided that a signatory road, by executing it, would become a member of the A.A.R., "covenanting with all the others who shall sign a counterpart hereof to be bound by the provisions of the said Plan, so long as the undersigned shall remain a member of the Association, reserving the right, however, to cease to be a member upon the expiration of ninety days after giving notice of intention to withdraw from membership. * * *"[6]

As previously observed, a provision for expulsion from the Association for failure to abide by the obligations thus undertaken had been contained in the earlier drafts of the Articles[7] but, because of opposition led by Mr. Holden of the Southern Pacific, had been eliminated in the end.[8] In the Articles as finally adopted, therefore, there were no express penalties or sanctions for violations of the agreements of the members.

Georgia contended, however, that the objectives of the defendants had been to "eliminate competition in the rate-making process" and to "impose a private government, invested with power to discipline its subjects, on the railroads of the United States", and that, in spite of the elimination of express penalties or sanctions, the defendants had sought to achieve their objectives in a "more palatable form without changing the substance."[9]

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[5] Ibid.

[6] Ibid.

[7] The provision was that a road or group of roads "which shall disregard the *decisions* or *announced policies* of the Board of Directors" and is unwilling to arbitrate or to abide by an arbitration shall cease to be a member (Emphasis added). S-25, I, 102.

[8] Pp. 320-323, supra.

[9] Final Brief, pp. 20, 21.

In support of these contentions, and to show the defendants' motives, Georgia cited Pelley's expressed desire during the drafting of the A.A.R. Plan to put "teeth" into the arbitration provisions;[10] and Georgia also relied upon a letter from Holden to deForest, written just after adoption of the A.A.R. Articles, saying: "It is likely that some roads will subscribe with reservations because certain railroad counsel, particularly of the C. B. & Q. and associated lines,[11] are understood to feel distinctly that directors have no right to authorize execution of a document of this character which passes so large a degree of authority over the property into the Association."[12] This letter, in Georgia's view, showed that the Articles of the A.A.R., even without penalty or expulsion provisions, were expressed in sufficiently binding terms to cause doubts as to their legality.

Holden's letter, however, continued as follows:

> "There is possibly a remote substance to the idea but I am not able to feel that it has practical importance and I think that is the view of Mr. Day with whom I have discussed it. You will observe in the preamble the words 'in every lawful way' were inserted both to meet possible criticisms account antitrust laws and also to allay anxiety of any effort to invade the charter powers or fundamental obligations of directors. It is exceedingly unlikely that the Board of the Association will take action on any subject seriously affecting the interests of any individual company although, on the other hand, if pooling, common use of terminals, etc., are developed and which may

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[10] Discussed at pp. 318-320 above in connection with the formation of the A.A.R.

[11] These were the Great Northern, Northern Pacific, Colorado & Southern, and the Fort Worth & Denver City Railway Company. Pelley, XVII, 5761, 5762.

[12] Letter dated September 26, 1934, S-32, I, 109. Georgia also cited a letter from Holden to deForest of September 18, 1934 (S-30, I, 108) expressing legal doubts, but these doubts related to the compulsory expulsion provisions which apparently had been removed from the Plan prior to Holden's letter. See p. 323, supra.

in individual situations produce some unhappiness,[13] these matters will be handled under the authority of the Coordinator and where anti-trust laws are involved, under the protection of an order by him[14] or the Interstate Commerce Commission where needed."

Holden's letter indicates that the arbitration provisions were designed primarily to settle controversies between carriers over operating matters such as pooling,[15] common use of terminals, etc. Similarly, as I have previously noted, Pelley, referring to his remark about the "teeth", testified that "what I had in mind was that there might be a situation where four railroads, for instance, were involved in some coordination of facilities or consolidation of facilities, and three of them had agreed to do it and the fourth would say 'no' and it could not be accomplished. * * * I thought we ought to have a plan that would obligate the fourth man who didn't want to go through with it to arbitrate and settle it on an arbitration basis."[16]

Pelley also cited typical situations in the past in which arbitration had been resorted to in the railroad industry; rate controversies were not among them. He stated:[17]

"This idea of arbitration of well-defined differences is not new in the railroad business.

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[13] Cf. letter from Williamson of the New York Central to General Atterbury of the Pennsylvania, dated September 27, 1934, referring to the A.A.R.: "I presume we are all going to be pinched in places where it will hurt, but this seems to be necessary under the circumstances." S-33, I, 110.

[14] As the Coordinator Act authorized, XVII, 5764.

[15] The Interstate Commerce Act authorizes agreements for the "pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof," but only when the Commission finds that they "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition," and only when they are "assented to by all the carriers involved." 49 U.S.C., Sec. 5, 54 Stat. 905.

[16] XVI, 5630.

[17] XVI, 5630, 5631.

"For example: For many years it has been the practice to submit differences between railroads as to the proper charges for the mechanical repair of a freight car of one railroad by another to an arbitration committee. In the same way, differences as to the proper apportionment among interline carriers of freight loss and damage claims paid, have been disposed of through arbitration. The same thing is true of a great variety of contracts and agreements among railroads as to joint use of tracks and terminals, for example."

He further testified that the A.A.R.'s arbitration clause had never been invoked, and that the possibility of using it had been discussed on only two occasions. The first "related to a controversy between the Southern Pacific and the Santa Fe in regard to the Santa Fe's proposal to establish a bus line between Los Angeles and Bakersfield, California, in connection with train service between the latter point and San Francisco, so as to create a new route between Los Angeles and San Francisco competitive with the Southern Pacific's line between Los Angeles and San Francisco, or between those two points. This matter was discussed by the Board at several meetings in the Spring of 1938, but the case was before the California Public Service Commission for adjudication and it was felt that it would be improper for the Association to take any action, and no action was taken.

"The other case in which arbitration was considered but was never invoked was a dispute between the Seaboard Air Line Railway and the Atlantic Coast Line Railroad, relative to an arrangement for circle tours by bus across the Florida peninsula, made by the Atlantic Coast Line Railroad in competition with the cross-State rail service of the Seaboard Air Line Railway. The subject was discussed at several meetings of the Board in 1936 and in 1937, with the result that the Board decided that the contention of the Seaboard was not sustained. No further action was taken.

"In view of the fact that the arbitration provision had not been used, in the revision of the Plan of Organization of the Association of American Railroads it was omitted."[18]

There is no specific evidence that in providing for arbitration the framers of the A.A.R. intended such procedure to be used in *rate* controversies. What little evidence there is, in the shape of Holden's letter and of Pelley's testimony cited above, and of Cleveland's letter to Pelley regarding the functions of the Traffic Department in rate matters, set forth at pp. 414-416 hereinafter, indicates that the framers were thinking rather in terms of other sorts of controversies, as for example controversies over competitive wastes in *service*.

In any event, as Pelley testified, arbitration was never resorted to in practice. And the evidence contains only one example of a matter declared by the Board to be "controversial", and in that case, after a hearing had been held, no decision was ever made. That case, discussed infra at p. 428, involved an alleged violation by the Chicago Great Western Railroad of a resolution adopted by the Board prohibiting the making of joint rates with trucks and busses where so doing would invade the territory of another railroad.

In the *Furniture Case*, discussed hereinafter at pp. 491-500, Cleveland recommended to the Board of the A.A.R. that a rate dispute between the Western, Southwestern, Southern and Eastern lines be declared "controversial" and be adjudicated by the Board. The Board did not act upon the recommendation and did not assume jurisdiction or take any action. At a later meeting, at Cleveland's suggestion, the subject was stricken from the docket. The reason for the inaction of the Board is not stated in the record.

The record contains no other evidence of any use or suggested use of the Article 4 procedure for adjudicating

[18] XVI, 5631, 5632.

"controversial" questions by binding decisions. On February 14, 1946, after the present suit had been instituted, the members of the A.A.R. adopted revised Articles [19] in which, among other things, this procedure was eliminated along with the arbitration provisions, and all references to "decisions" by the Board were omitted. Pelley, President of the A.A.R., testified that the revised Articles had been adopted "to reflect more correctly the purposes and activities of the Association as they had worked out in actual practice, after some ten years of experience with the original plan. For example: as I mentioned a moment ago, we found that the arbitration clause was not used, so the Board of Directors and the member roads came to the conclusion that since it had proved to be of no value to the railroads, it might as well be dropped out of the revised plan." [20]

In all of the instances in the record in which the Board took definite, affirmative action in rate matters, the action was by simple resolution, as distinguished from the decision of controversies by a binding adjudication between rival carriers or groups of carriers. The question then arises whether under the Articles of the A.A.R. the members bound themselves to comply with the Board's rate policy recommendations. That question will now be examined.

2. *Resolutions Laying Down Policies in Rate Matters*

The preamble to the Articles of the A.A.R. was as follows: [21]

> "In order to promote trade and commerce in the public interest, further improve railroad service and maintain the integrity and credit of the industry, the Railroad Companies of the United States do hereby establish an authoritative national organization which shall be adequately qualified and empowered in every

[19] AD-3, Vol. D, 11-20.
[20] XVI, 5634, 5635.
[21] S-29, I, 105.

lawful way to accomplish said ends where concert of policy and action are required. For the purpose of facilitating the realization of this constructive object, the Members do hereby declare that these announced policies shall be authoritative and will be supported."

Georgia contended that the phrase "these announced policies" referred to *any policies (including rate policies) which the Board of Directors might from time to time announce.*[22] The defendants contended that the phrase referred to the *objectives of the Association*, as set forth in the previous sentence, namely, that in order to "promote trade and commerce in the public interest, further improve railroad service and maintain the integrity and credit of the industry," the railroads "hereby establish an authoritative national organization which shall be adequately qualified and empowered in every lawful way to accomplish said ends where concert of policy and action are required."

Georgia, following its own interpretation as described above, contended that since the members had covenanted, as set forth at p. 403 above, "to be bound by the provisions of the said Plan, so long as the undersigned shall remain a member of the Association," the members had bound themselves to support the "announced policies" of the Board, or to get out. And Georgia even suggested that in the light of the covenant the A.A.R. could expel a member for not abiding by an announced policy[23] (in spite of the deliberate elimination from the Articles of a proposed expulsion clause, as set forth at p. 403 above).

The defendants on the other hand argued that Georgia was reading the phrase as though it were "*the* announced policies", whereas it read "*these* announced policies", which, grammatically, could have reference only to the

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[22] See the running colloquy between Mr. McGovern and Mr. Franklin in XI, 3551-3567, with interjections by Mr. Dickinson.

[23] E.g.: Mr. McGovern at XI, 3565.

preceding sentence, with its recitation of objectives, and not to any actions by the Board of Directors.

Franklin of the Pennsylvania, when being examined regarding the effect of the preamble, at times seemed to be accepting some of Georgia's contentions,[24] but on the other hand he persisted in asserting the independent right of each carrier to do as it saw fit in rate matters.[25]

I conclude that, so far as the text of the Articles is concerned, the defendants did not expressly bind them-

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[24] E.g.: (a) Georgia cited a Board resolution authorizing the President "to direct line haul carriers serving Chicago to refuse to grant increased allowance to Chicago terminal carriers covering the equivalent of trap car arrangements . . ." (a matter not directly involving freight rates, but simply the absorption of an allowance, according to Franklin, XI, 3561). Franklin said that "if any railroad did not want to carry that out" (assuming the President gave the direction in question) "they did not have to do so."

"Q. Could they refuse to do so and still remain a member of the Association of American Railroads?

"A. That again becomes a question of whether the members would agree that what they had done in their own best judgment was proper and would allow them to stay as a member." XI, 3561.

(b) Georgia cited another resolution "that it be the general policy" of the members not to handle free freight for charity, but that a reduction in rates of not more than 50% could be made in transporting supplies donated by the producer for charitable institutions. Franklin was asked whether ignoring this declaration of policy could be construed "in the terms of the preamble . . . as a refusal to abide by terms of the announced policy or by the terms of an announced policy." He answered: "Oh, strictly, yes; but this is a very relatively unimportant situation." XI, 3565. A little later he testified: "So, we had a perfect right to move that traffic free if we wanted to.

"Q. And the Association, if it saw fit, could ignore that action on your part or call you to turn for it?

"A. That is right." XI, 3567.

[25] E.g.: "We agreed we would work with the railroads, with the rest of the roads in carrying out those policies, but we have, as every road has, the right to do what we want to under that plan and every road has that right to do what it wants under the plan if it determines to do so.

"There is no obligation shown and no penalty and no force under which they can make us do anything, and we can do anything that we like." XI, 3552.

selves to comply with all resolutions of the Board. On the other hand, accepting as I do the defendants' interpretation of the preamble that the "announced policies" referred to the objectives of the Association and not to policy actions by the Board, it seems to me that the preamble cannot be dismissed as of no significance. Among the recited objectives was to "maintain" the "credit of the industry"—another way of saying that steps would be taken to conserve revenues. In the conservation of revenues action upon rate matters of importance to the industry would be included; such action I have already found to have been among the Association's objectives. When, therefore, the defendants declared in the preamble that they were establishing an "authoritative" organization and that its objectives "will be supported", it seems to me that members signing the Articles and agreeing to be "bound by the provisions" can fairly be found to have given a general pledge of support to such actions as the Association might take, including actions in rate matters. At the same time, however, this general pledge of support cannot be construed, as Georgia would construe it, into an agreement to be bound by every resolution the Board might pass. For the defendants were careful to insert in the Articles only one explicitly binding commitment, namely, to abide by decisions in "controversial" cases or by arbitration awards. The omission of any other explicitly binding commitment cannot be regarded as accidental in a document prepared with such care.

The most reasonable interpretation of the preamble, therefore, in the light of the remainder of the Articles, is that the subscribing members declared in general terms their intention to recognize and support the Association as an authoritative body without, however, committing themselves in advance to abide by every action it might take. They were willing to give such a commitment only in special cases declared to be "controversial" and decided by

a three-fourths vote; and even then the commitment was qualified by the right of an aggrieved member to disregard the decision and try his luck with an outside arbitrator, whose award would be final.

As has been seen above, so far as the record discloses, this commitment was never put to the test in actual practice; and since this suit was begun it has been expunged from the Articles. It might be argued that so long as the commitment remained in the Articles, it constituted an overhanging threat that if policy resolutions were violated, the resulting disputes could be declared "controversial" and could then be authoritatively adjudicated, so that the existence of this reserve power in the Board of Directors could properly be regarded as giving to the Board's policy resolutions a binding force which they might not otherwise have had. If the record contained even one example of a decision by the Board under this reserve power, it would afford some basis for such an argument. However, there is nothing in the record to go on but the inaction of the Board after assuming jurisdiction in the *Great Western Case*, and the Board's failure to act upon Cleveland's recommendation that it assume jurisdiction in the *Furniture Case*. That is not enough, in my view, to justify an inference that the members of the A.A.R. were kept in line under Board resolutions by a fear of possible Board decisions under the "controversial" procedure of Article 4.

Consideration will now be given to two other aspects of the Association's set-up as presented by Georgia, namely, the absence of any provision for independent action, and the alleged practical necessity of becoming and remaining a member of the A.A.R.

3. *The Alleged Intentional Omission from the Articles of any Provision for Independent Action.*

Georgia contended that the omission from the Articles of an express authorization of independent action was

deliberate,[26] and that it revealed the purpose of the defendants to destroy the railroads' freedom of action in rate matters. Georgia pointed to the fact that when the Bangor & Aroostook Railway Company, and the Wheeling & Lake Erie, sought to join the A.A.R. with reservations retaining the right of independent action, the Executive Committee of the A.A.R. declined to let them join.[27]

Franklin of the Pennsylvania sought to explain this action by saying that "there was no occasion to let one railroad come in with any exceptions as against the other railroads."[28] He also said, with reference to the Wheeling & Lake Erie's reservations, that "if you knew Mr. Duncan" (the chairman of the Board) "you would clearly understand why he would take that type of a position; he was a lawyer and headed that railroad, and he was just simply protecting himself, as he always did in every instance. . . ."[29] As to the Bangor & Aroostook, Franklin remarked that its president, Mr. Todd, "was a very care-

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[26] Express provisions of that sort had long been contained in the Articles of the territorial rate associations, as noted at pp. 518-524, and the member roads were thoroughly familiar with them; indeed, when, after the period of Federal Control in the first World War, the Traffic Executive Association-Eastern Territory was established and its Articles failed to contain a provision for independent action, some question arose as to the conclusive effect of majority decisions, and an express provision for independent action was then inserted (see p. 519).

[27] The reservations of the Bangor & Aroostook as to the right of independent action covered wages, hours, rates of pay, working conditions, construction and operation of side tracks, etc., design and size of standards of maintenance and road structures, and freight and passenger rates and divisions of freight rates; and the application was declined on November 15, 1934. S-34, I, 110, minutes of Executive Committee meeting. The Wheeling & Lake Erie reservations were "that at all times it may act individually and not in consort in connection with all traffic matters, and to determine whether or not controversies in which it is involved should be submitted to arbitration as provided in the plan." The application was declined on December 20, 1934. S-37, I, 111, minutes of Executive Committee meeting.

[28] XI, 3542.

[29] XI, 3541.

ful man—a New Englander"; he was a "down Easter"; and "he was not going into any proposition of that kind without an explicit understanding, if he could help it."[30]

In connection with the Bangor & Aroostook's application, Cleveland, in charge of the Traffic Department of the A.A.R., wrote to Pelley,[31] that he did not believe that Mr.

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[30] XI, 3543. The record contains an instance in which a proposal by the New England roads to reduce rates on newsprint paper from a point in Maine to New York City to meet truck and water competition was adversely recommended, first by the Trunk Line Association and then by the Traffic Executive Association-Eastern Territory. At the meeting of the latter, held in April, 1939, a representative of the Bangor & Aroostook was present and gave notice of his Company's intention to establish the proposed rates by independent action—exactly as if the Company had been a member. S-514, XIII, 4402-4404. The Chairman thereupon stated that he would appeal to the Presidents' Conference-Eastern Territory. In the case of a member, such an appeal would, by the terms of the Articles of the Association (supra, p. 260) require the member to withhold publication pending action on the appeal (which would normally be disposed of within a month: Burgess, XIII, 4405). The record does not show whether the Bangor & Aroostook withheld publication or whether an appeal was actually taken. Georgia contends (Final Brief, p. 83) that "not only was Mr. Todd . . . compelled to pay his dues to the A.A.R. . . . but the Record also discloses him wrestling with appeals to the Traffic Executive Association-Eastern Territory and having his attempt to take individual action contrary to the Committee's recommendation frustrated by an appeal by the Chairman to the Presidents Conference-Eastern Territory . . ." There is no evidence in the record to show that the Bangor & Aroostook paid its dues under compulsion, or that the Company was involved in any other case of an appeal to the Presidents Traffic Conference, or that the taking of this appeal (if in fact it was taken) frustrated the taking of independent action. Judge Fletcher as counsel to the A.A.R. interjected a comment about Mr. Todd's relationship to the A.A.R. to the effect that: "I think he is in it by an estoppel in pais. He pays his dues, if I may refer to an old equity term." XVII, 6008. Georgia cites this comment (Final Brief, p. 83) in support of its assertion that the Bangor & Aroostook paid its dues under compulsion, but the comment of course was not evidence. The stipulation of the parties (XVIII, 6341, 6342) simply states that the Bangor & Aroostook has been assessed and has paid "its share of the expenses" of the A.A.R. on the same basis and in the same way as members.

[31] S-35, I, 110, 111, letter dated December 1, 1934.

Todd would desire to insist on his reservations with regard to rate matters "if he were informed as to the policy which this Department intends to follow.

"I think a brief outline of that policy would remove his fears as to what may be expected and that would persuade him to come into the organization without insisting on these reservations."

Cleveland then outlined what he conceived to be the functions of his Department. He said that it could succeed "only providing it can secure the wholehearted support of the Traffic Departments of the individual member lines," and that "its policy will endeavor to be at all times, a cooperative one through leadership rather than through coercion."[32] It intended, he said, "to function exclusively through the rate committees and machinery" previously established in the various territories. It would also observe the agreement with the National Industrial Traffic League, the national organization of shippers previously described at pp. 248-252. Finally, the Department would operate "with the advice and assistance of the Traffic Advisory Committee" (the Committee of traffic officers from the North, South and West, described at p. 334 above) whose rate activities "will not be legislative but will be recommendatory to the proper rate committee" in the particular territory.

This letter seems to me further evidence of the fact that in establishing the A.A.R. the defendants contemplated that rate matters would be handled through the

[32] Commenting upon this sentence Georgia said: "Significantly, he did not disavow the power to coerce in the event his leadership should prove ineffectual" (Final Brief, p. 29). The record, however (pp. 491-507 infra) discloses no instances of attempted coercion by Cleveland, nor was the Traffic Department given authority to make decisions or issue orders (pp. 333-341 above); and the letter, taken in its most natural sense, does not seem to me to contain any implication that coercion would be used if necessary, but rather the contrary; the substance of it was that while recommendations might from time to time be made upon rate matters, the actual disposition of rate proposals would continue to be made as theretofore by the appropriate committees of the territorial associations.

Traffic Department in a recommendatory fashion rather than through decision-making by the Board of Directors.

I think it is reasonable to conclude that the omission of any provision authorizing independent action was not an oversight. The probabilities are that the omission was linked up with the defendants' desire to make as authoritative as possible, without courting legal attack, the clauses whereby the members agreed in "controversial" cases to be bound by a three-fourths decision or to submit to arbitration and abide by the result. Clearly a provision for independent action would have destroyed the effectiveness of these clauses. At the same time, it was possible to leave out any provision for expulsion or other penalties and still expect that the railroads would live up to the express agreements embodied in these clauses.[33]

The omission of a provision for independent action is not, therefore, in and of itself, evidence that the defendants intended the members to be bound by policy resolutions of the Board, as distinguished from decisions or awards in "controversial" cases.

4. The Alleged Necessity of Becoming and Remaining a member of the A.A.R.

Georgia contended in substance that although the Articles of Association of the A.A.R., as has been seen, contained no expulsion provision, and permitted withdrawal on ninety days' notice,[34] a railroad could not as a practical matter afford to withdraw from the Association; and that, therefore, its covenant "to be bound by the provisions of the said Plan, so long as the undersigned shall remain a mem-

[33] Note, for example, Judge Fletcher's comment, at the time of the elimination of the expulsion clause, that "it is difficult to believe that a railroad which has agreed to all the terms of the plan will thereafter in violation of its agreement refuse to conform thereto or to arbitrate"; that "we should proceed upon the theory that the railroads, if they agree to a plan, will carry it out in good faith"; and that a railroad breaking its agreement "would simply be outside the pale. . . ." S-27, I, 103, 104.

[34] S-29, I, 107, Article 22 and Exhibit "A".

ber of the Association" meant in effect that the member agreed to be bound in perpetuity since the right of withdrawal was illusory.

"The evidence is clear," according to Georgia,[35] "that the undisputed intent of the framers of the A.A.R. was to leave the carriers no alternative but to join the new Association," and that "the carriers had absolutely no choice." They "were not at liberty to refuse to subscribe" to the new "system of controls. . . ."

"The compulsion to join the A.A.R. derived from the fact" (a fact as to which there is no dispute between the parties, although they differ as to its compulsive consequences) "that the old American Railway Association had maintained and supervised certain interchange arrangements, such as car service and per diem rules, contracts relating to repairs on foreign cars, and general car interchange agreements, participation in which was indispensable to each individual railroad as a practical operating matter.[36] When the American Railway Association was merged in the newly organized A.A.R., the A.A.R. succeeded to the role of its predecessor as joint agent[37] for all the railroads in the administration of the interchange agreements."

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[35] Final Brief, p. 81.

[36] Georgia elsewhere contended (Final Brief, p. 82) that each railroad was compelled to join "or to *cooperate actively*" with the A.A.R. in order to participate in these agreements. There was no evidence of any requirement of "active cooperation" except the payment of expenses incident to participation in the agreements, as discussed hereinafter. Georgia relied upon the evidence summarized in note 30 above, but the facts there stated do not in my judgment sustain the charge, and I so find.

[37] Judge Fletcher as general counsel of the A.A.R. said that "the individual railroads signed an agreement under which the Car Service Section, originally of the American Railroad Association and now of the Association of American Railroads, becomes their agent for the purpose of agreeing upon per diem rates and upon rules for the interchange of cars, rules for the repairs of cars, which may become defective on lines other than those owned, and the like." XVII, 6004.

The argument is inconclusive. If, as Georgia contended, the practical situation was that each railroad had to become and remain a member of the A.A.R., and therefore assumed in perpetuity an obligation "to be bound by the provisions of said Plan," the question still remains: What were the provisions which each railroad bound itself to observe? If they were only the provisions relating to three-fourths decisions and to arbitration awards in "controversial" cases, the obligation would have no real significance in this case, for reasons already indicated.

In any event, whatever may have been in the minds of the framers regarding the practical necessity of membership in the A.A.R.,[38] in actual practice it turned out that withdrawal or non-membership did not affect participation in the per diem and other agreements. Thus at the conclusion of the proceedings before me the parties stipulated that:[39]

(a) The Bangor & Aroostook, since January 1, 1935, though never becoming a member of the A.A.R., has par-

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[38] During the process of preparing the plan of organization of the A.A.R. there seems to have been some doubt upon the subject. On August 1, 1934 Holden of the Southern Pacific wrote to Atterbury of the Pennsylvania (the chairman of the Drafting Committee of Railroad Presidents) protesting against the provision for expulsion, which was then a part of the draft, on the ground that it "presupposes a practical boycott . . ." and would "produce a situation either of unjustified duress or confusion as to relationship with other lines, which would find its way to public authority and shippers and lead to public dissatisfaction and complaint." S-24, I, 101. Two weeks later Holden wrote to Judge Fletcher stating that Atterbury's assistant, Mr. Eysmans, was of the view that exclusion from the proposed Association would result in exclusion from the car service and other agreements, and asking whether there had been any precedents under the American Railway Association set-up. S-26, I, 102. Judge Fletcher replied that "no member has ever withdrawn from the American Railway Association, so that the question has never arisen as to the status of the withdrawing line with respect to per diem and car exchange agreements. It is true, however, that railroads, members of the American Railway Association, have some arrangements with railroads not members of the Association whereby cars are exchanged, repaired and handled cooperatively." S-27, I, 103.

[39] XVIII, 6341 to 6342.

ticipated in the car service, per diem, and interchange agreements, and in all of the activities of the A.A.R., and has been assessed and paid its share of the expenses of the A.A.R. on the same basis as a member; and its representatives have regularly attended the meetings of the member lines of the A.A.R. and have participated in their deliberations:

(b) The Wheeling & Lake Erie did not become a member until July 5, 1940,[40] and prior thereto participated in the car service, per diem and interchange agreements;

(c) The Pittsburgh & West Virginia Railway Company similarly participated in the agreements before becoming a member of the A.A.R. on August 30, 1940;

(d) The following Class I railroads during the following periods of time withdrew from and ceased to be members of the A.A.R. but continued during such periods to participate in the aforesaid agreements: the Akron, Canton & Youngstown (September 9, 1939 to April 27, 1942), and the New York, Ontario & Western Railway (September 20, 1939 to August 1, 1946); and

(e) As of March 1, 1947 there were seven Class I railroads and 102 Class II, Class III and switching and terminal railroads which were not members of the A.A.R. but were parties to the agreements.[41]

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[40] The stipulation does not state that the Wheeling & Lake Erie joined without reservation but Franklin testified that so far as he knew there were no reservations and he stated flatly that "no railroad entered the Association of American Railroads with any reservations whatever." XI, 3542.

[41] XVIII, 6343. The seven Class I railroads were the Missouri & Arkansas Railway, the Toledo, Peoria & Western Railway, the Utah Railway Company, the Bangor & Aroostook, and the Chesapeake & Ohio Railway with its associated roads, the New York, Chicago & St. Louis and the Pere Marquette. The stipulation further shows that the Chesapeake & Ohio gave notice of resignation from the A.A.R. effective October 15, 1946, in accordance with Article 2 of the Articles of Association as amended on February 14, 1946, which in their amended form provided that "Members may resign upon

Pelley, the president of the A.A.R., on cross-examination before me, expressed certain views as to the impracticality of withdrawing from the A.A.R., which did not seem consistent with the facts set forth above in the stipulation. He was first asked whether, in the light of the language of the preamble of the A.A.R.'s Articles regarding the support of its policies, it was not accurate to say that each member "agreed to be bound by the policies so long as the line did remain a member of the Association." He replied:

> "Well, I think that is a fair construction of it. That was the idea, that they would go along with the policies if they could, and if they could not they would get out—they had a right to get out." [42]

He was subsequently asked whether the covenant by each railroad to be bound by the Articles "so long as the undersigned shall remain a member of the Association" did not carry with it the implication that if the railroad "declined to go along with the provisions of the Plan" it would have to get out. The following colloquy then ensued: [43]

> "A. Well, as a practical matter, it could not well get out of the Association.
>
> There are so many things connected with railroad operation, like the car service rule, per diem demurrage rule, you could not very well get out.
>
> "Q. You mean as a practical matter of feasible railroad operation any member of the Association of American Railroads could not afford to withdraw from the Association?

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notice in writing to the Board of Directors." AD-3, Vol. D, 13 (previously referred to in note 19 supra in this Part Two). The Chesapeake & Ohio's withdrawal was stated as not to be construed as affecting the company's rights and responsibilities under the several agreements (XVIII, 6355) and the Board accepted the withdrawal upon that basis together with an accompanying reply that "Membership in the Association is purely voluntary" (XVIII, 6357-6359). These events, including the amendment of the Articles of the A.A.R., took place after the proceedings in the instant case had been commenced and I therefore assign them no evidentiary value as indicating the state of affairs prior to the commencement of the suit.

[42] XVII, 5735.

[43] XVII, 5739, 5740.

"A. I mean that.

"Q. That leaves unanswered the question whether or not if a railroad, if it wishes to remain a member, is not by this contract bound to abide by the provisions of the Plan?

"A. Well, I think the thing was drawn so that the railroads would feel if they subscribed and joined they would certainly go along with the policies enunciated in the preamble of the charter.

It would not necessarily follow that they had to do everything that the Board of Directors might suggest, or drop out.

It did not mean that to me.

"Q. But none the less, any railroad refusing to abide by the Plan, would theoretically, under this particular exhibit, be required to drop out in order to keep its contract?

"A. Well, as a matter of fact, this dropping out did not concern me a great deal because I thought I knew as a practical matter that they could not drop out.

"Q. You knew as a practical matter they could not drop out?

"A. They could not."

Subsequently Pelley was asked:[44]

"You yourself, and Mr. Eysmans and Mr. Holden[45] all expressed the view that it would be impractical for any railroad to withdraw from the Association?"

He replied:

"Well, I have always thought it would be."

On re-direct Pelley sought to explain his statements as follows:[46]

"Q. Now, when you say it may be impractical for a railroad to withdraw from the Association of American Railroads, will you restate your views on that point, in view of the fact that we have a number of different rail-

[44] XVII, 5755.

[45] See note 38 supra.

[46] XVII, 6008.

roads so withdrawing and they still have the benefit of the per diem agreement.

"A. Judge, what I have in mind when I say as a practical matter they would not withdraw, I mean a complete severance, going on their own in every respect, and that was all. But I say that absolutely I do not think we could deny them membership in the per diem rules agreement; I do not think we would want to, and if we were to, I think they could get the matter before the Interstate Commerce Commission,[47] but, as Judge Swiggart pointed out,[48] it is a very important thing to the roads that are in to have them all in this per diem agreement."

On the whole Pelley's testimony left me with the impression that he had originally been of the view first stated by him on cross-examination, namely, that as a practical matter a railroad could not afford to withdraw from the Association. His testimony on cross-examination was essentially directed to the point that this practical necessity of remaining in was unimportant because in fact a member could disregard with impunity particular policy declarations by the Board of Directors; thus he testified: "I think if any railroad said that they did not wish or that they did not see fit to go along with an announced policy of the Board, that would end it. There would be no way to make them do it."[49] On this question of compulsion he had

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[47] Judge Fletcher, in his letter to Holden of August 17, 1934 referred to in note 38 above, said he assumed that a withdrawing railroad would "have the right to apply to the Interstate Commerce Commission and secure an order requiring railroads members of the Association to interchange cars with them and generally to enter into arrangements which would not interrupt the regular flow of traffic."

[48] Judge Swiggart (of counsel for the Southern defendants) at a previous point in the proceedings had made the suggestion, to which Pelley assented, that "it is obviously to the advantage of the member roads to have the per diem agreement with non-member roads over whose lines the cars of member roads pass; otherwise, the member roads [would] have no way of settlement." XVII, 6006.

[49] XVII, 5740.

earlier testified that "in the entire history of the Association of American Railroads, no railroad has been expelled from the Association or otherwise subjected to penalties or sanctions of any kind." [50]

I have cited Pelley's testimony at some length only because, in view of the position he occupied, his views regarding the meaning of the Articles of the A.A.R. and the obligations of the members thereunder might properly be given a certain representative weight. On the other hand, whatever may have been the state of Pelley's mind with regard to this subject, the fact remains that particular roads were permitted to participate fully in the car service, per diem and interchange agreements without having become members of the A.A.R. or after having withdrawn from membership in the A.A.R.

It is apparent from the review of the evidence up to this point that the existence or non-existence of coercive constraint upon the freedom of action of the members of the Association in regard to rate policy resolutions by the Board of Directors cannot finally be determined without considering the nature and the practical effect of the resolutions of that sort which the Board actually adopted.

B. *The Nature and the Practical Effect of the Resolutions of the Board of Directors of the A.A.R. Relating to Rate Policy Matters*

1. *Alleged "Absolute Power to Dictate Rates": The Resolution of September 20, 1935 (Joint Rail-Truck Rates).*

(a) *The Nature of the Resolution*

Georgia contended that the A.A.R. was "the repository of absolute power to dictate the rate when occasion requires . . ." [51] In support of this charge Georgia cited

[50] XVI, 5632.
[51] Final Brief, p. 57.

the resolution referred to above. The circumstances attending its adoption were as follows:

On August 9, 1935 the railroads were authorized by the Motor Carriers Act to make joint rates with bus and truck companies.[52] At a meeting of the A.A.R. Board on September 20, 1935, Cleveland pointed out that the authority was permissive only; that the I. C. C. was not empowered to require such rates; that it seemed desirable to the Executive Committee "that the Association should take jurisdiction and the Board adopt a definite policy regarding it"; and that the following resolution had been submitted to the member roads and, with very few exceptions, had been approved by them:[53]

> "RESOLVED, that the President be directed to issue an order forbidding the establishment of joint rates as between member roads on the one hand and common carrier truck or bus companies on the other except in cases where, after consideration by the proper Traffic Executive Association where such an arrangement may be proposed or where in territory not subject to the jurisdiction of any traffic association then by the chief traffic executives of all lines interested, it is unanimously agreed that the territory involved is not served by railroad and such arrangement therefore would not constitute an invasion of another railroad's territory."

This resolution was unanimously adopted, with an explanatory note which had also been recommended by the Executive Committee:[54]

> "The Board explains that the prohibition in the exception does not apply to arrangements made by a

[52] Embodied in Interstate Commerce Act, 49 U.S.C., Sec. 216(c); 49 Stat. 558, reading in part as follows: "Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water."

[53] S-53, I, 145, 146.

[54] Ibid, 146.

railroad between points on its own operated lines where such an arrangement is for convenience or economy, but does *conclusively prohibit the invasion of a territory by another line which is already served by one or more railroads.*" (Emphasis added)

Pelley in his testimony explained the purpose of the resolution as follows:[55]

"This resolution was based upon the fact that under the Interstate Commerce Act one railroad could not project its rail lines to points served by another road without formal application to the Interstate Commerce Commission and a hearing at which it established that such an extension was necessary in the public interest.

"After the passage of the Motor Carrier Act of 1935, it became apparent that it was possible for a railroad, by entering into through routes and joint rates with motor carriers, to produce the same effect of invading the territory of another railroad which it was prohibited from doing with its rails without authority of the Interstate Commerce Commission.

"The resolution was directed, therefore, as appears upon its face, at the possibility of one railroad doing, through arrangements with motor carriers, that which it could not do directly with its own lines under the Interstate Commerce Act.

"The same sound reasoning which was followed by Congress by passing the Interstate Commerce Act applied to this situation. Indeed, the reasoning was even stronger, for in the case of the building in of a second rail line, the newcoming railroad would at least have capital investment and pay taxes on property, whereas, by the use of joint rates and arrangements with a motor carrier, it might invade the territory of a neighboring railroad without capital expenditure and without any property on which taxes could be assessed. Such a course of conduct, if embarked upon, was bound to result in reprisals and counter action which would have been in the interest of neither the railroads nor the public, as had been well recognized by Congress

[55] XVI, 5638-5639.

in that portion of the Transportation Act [56] which required that railroads seeking to extend their lines should secure certificates of public necessity and convenience."

On cross-examination Pelley testified as follows regarding the purpose and effect of the resolution:[57]

"Now, Mr. Pelley, that resolution appears in the form of an absolute mandate, does it not?

"The wording is:

'That the President be directed to issue an order forbidding the establishment of joint rates',

and that was precisely the purpose you had in mind in stating the resolution in that form, was it not?

"A. Yes.

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[56] Section 1 (18) of the Interstate Commerce Act (49 U.S.C.), 49 Stat. 543 provides that no carrier "shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad" without a certificate from the Commission that "the present or future public convenience and necessity require or will require" such additional or extended line. The defendants cited several decisions of the Commission holding that the authority would not be granted to one railroad to extend its line into the territory of another where adequate service was being given by the latter (*Public-Convenience Application of Utah Terminal Railway*, 72 I.C.C. 89; *Proposed Construction by Sacramento Northern Railway*, 154 I.C.C. 447; *Missouri Pacific Railroad Company Proposed Extension*, 187 I.C.C. 77), and certain cases including *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 U.S. 266, in which Justice Brandeis at p. 278, speaking for the Court, said: "* * * But where the proposed trackage extends into territory not theretofore already served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest."

[57] XVII, 5793, 5794.

"Q. To make it an absolute mandate? Is that correct?

"A. That is the way it reads."

It was then pointed out to Pelley that when the member roads were asked to signify their approval of the resolution before it was adopted by the Board of Directors a few roads did not approve it, and he was then asked:[58]

"Q. Now, in view of that mandate, what could the railroads who had taken exception to this resolution do about it?

"A. They could do as they pleased.

"Mr. Fletcher: And one railroad did do as it pleased.

By Mr. Fletcher:

"Q. It did, did it not?

"A. Yes.

By Mr. McGovern:

"Q. Do you mean by that that the railroads had any reserved right to take independent action?

"A. Oh, yes.

They could do as they pleased.

If they wanted to go along with the resolution they could and if they did not want to go along with the resolution there was nothing we could do about it.

If a man voted to go along with it, it was presumed he would go along with it.

"Q. Presumably. But I was referring to the case of a man who voted against it.

"A. He would do just as he pleased."

He also said:[59]

"Q. And the effect of this resolution was that the Association arrogated to itself the right to make what the Congress might say was permissive in an affirmative sense absolutely mandatory in a negative sense.

Is that not so?

"A. That is right."

[58] XVII, 5795.

[59] XVII, 5801.

The road referred to by Pelley as having taken independent action was the Chicago Great Western Railroad Company, whose case is described below.

(b) *The Practical Effect of the Resolution*

(i) *Independent Action by the Chicago Great Western Railroad Company in Publishing Joint Rates with the Keeshin Trucking Company in 1936.*

The resolution, as has been stated, was passed on September 20, 1935. Some time thereafter, and before February 18, 1936, the Chicago Great Western Railroad Company filed with the I.C.C. for approval a tariff covering rates on loaded trucks and trailers between Chicago and the Twin Cities.[60] Arrangements for handling this type of traffic had been made with the Keeshin Trucking Company. Apparently the filing of this tariff had been contemplated at the time of the passage of the resolution on September 20, 1935 because a reference to some discussion of it appears in the Board's minutes;[61] at the same meeting the Board also passed an additional resolution announcing "the

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[60] S-54, I, 147. Georgia cited a recommendation by Mr. Eastman as Coordinator advocating experimentation with interchangeable uniform containers and then stated (Final Brief, p. 119) that it was in pursuance of this recommendation that the Chicago Great Western entered into the arrangement referred to above, which contemplated transportation by rail of loaded trucks and trailers between Chicago and the Twin Cities. There is no evidence in the record that this action was in pursuance of the Coordinator's recommendation. Georgia then cited certain criticisms of the Coordinator's recommendations by the A.A.R. Traffic Department (S-49, I, 142 and S-51, I, 144, 145) to the effect that the recommendation would lend itself to joint arrangements between railroads, trucks and waterways under which the railroads would perform only a part of the service which should be fully performed by them. However this may be, it is clear that the basic objection to the action by the Great Western was not the use of uniform interchangeable containers but the potential invasion of the territory of other railroads by the joint rail-truck service which the Great Western was inaugurating; see particularly the correspondence between Pelley and the Chicago Great Western at I, 150 to 153.

[61] S-53, I, 146, heading to "Docket No. 3."

policy that no new rates should be published on loaded trucks, trailers or truck bodies . . . until further action by the Board. The President is directed to notify member roads accordingly." [62]

After the Great Western had gone ahead in spite of the September 20 action and had filed the tariff in question, the Board met on February 18, 1936 and considered the matter, under a docket heading to the effect that the Great Western's action was "contrary to the policy announced by the Board, and objectionable to many other carriers in the belief that it constitutes a menace which might seriously affect their roads and possibly their territories." [63]

The Board then unanimously declared the matter "controversial". This declaration automatically set in motion the provisions described at p. 402 above calling for a hearing, a three-fourths vote, and an obligation to comply with the decision or to arbitrate and comply with the award. As will be seen, however, the machinery never advanced beyond the hearing steps.

The hearing before the Board was set for March 27, 1936. Some time prior thereto the tariff which the Great Western had filed was suspended by the I.C.C. (the suspension to be effective until October 10, 1936).[64] The record does not show the circumstances under which the I.C.C. took this action; it shows only that certain unnamed shippers,[65] as well as certain unnamed railroads, opposed the tariff before the I.C.C., but whether the motion to suspend the tariff

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[62] S-53, I, 147.

[63] S-54, I, 147.

[64] S-55, I, 147. Docket heading showing that the suspension had already occurred; as to October 10 date, letter from Great Western to Pelley dated April 17, 1936. S-56, I, 154.

[65] As appears from letters from the Great Western to Pelley, one dated April 2, 1936 (S-56, I, 149) referring to "protesting shippers", and another dated April 17, 1936 (ibid at 154) referring to the "protestants, other than the railroads".

was made by shippers, or by railroads, or by both, or by the Commission on its own initiative,[66] does not appear.

At the March 27, 1936 meeting of the Board, action was deferred after the Great Western representatives had been heard, because an insufficient number of Board members were present.[67]

A few days later, on March 31 and on April 1 and 2, the I.C.C. held hearings on the suspended tariff. At these hearings it appeared that the *shipper* protestants objected to the tariff because it constituted a separate tariff for the railroad service (so much per carload for loaded trucks and so much for unloaded, etc.), and they were afraid (for reasons not stated in the record) that this would adversely affect the rate structure.[68] The I.C.C.'s Trial Examiner, according to the Great Western, then asked the railroad why it did not withdraw the suspended tariff and, in lieu thereof, establish *joint rates* with the Keeshin Trucking Company via the through route of that Company and the Great Western between Chicago and the Twin Cities.[69] The protesting shippers, but not the protesting railroads, approved this suggestion,[70] and the Great Western at once described the situation in a letter to Pelley, and stated its intention to establish joint rates accordingly.[71] Joint rates, the Great Western said, would cover the same service as that embraced in the suspended tariff and would accomplish the same purposes.[72]

Pelley at once wrote to the members of the A.A.R. Board about the projected joint rates, stating that "this action is in contravention of the resolution unanimously adopted by the Board at its September 20, 1935 meeting. This sub-

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[66] Which the Commission may do under Interstate Commerce Act, Secs. 15(7) and 406(e), 44 Stat. 1447 and 56 Stat. 288.
[67] S-55, I, 147.
[68] Letter, Great Western to Pelley, April 17, 1936, S-56, I, 150.
[69] From April 2 and April 17 letters, supra note 65.
[70] From April 17 letter, supra note 65.
[71] From April 2 letter, supra note 65.
[72] From April 17 letter, supra note 65.

ject will be listed for further consideration at the April meeting."[73]

Some correspondence then ensued between Pelley and the Great Western, in the course of which the Great Western on April 7, 1936, stating first some general reasons why it was desirable for the railroads to participate "to a greater extent in the handling of the existing commerce of the country,"[74] and then urging the propriety of the particular proposal in question, concluded with the assertion that the traffic and revenues which the Great Western would receive "will not be taken from any other railroad." Pelley replied on April 16, 1936, in part as follows:[75]

> "Information has just reached me that that which you are doing in the way of joint tariffs with the Keeshin Company goes far beyond what I had understood, from the discussion in my office, you had in contemplation. I had understood that your arrangement was confined in [sic] traffic between Chicago on the one hand and the Twin Cities on the other. I now understand that you propose to establish joint rates between all points where the Keeshin Motor Company now carries trucking rates to or from Chicago or to or from the Twin Cities, or that if the Keeshin Company is conducting an operation from Detroit, Toledo, Cleveland, Indianapolis or New York that you propose to estab-

[73] S-56, I, 148.

[74] S-56, I, 150, 151. The full paragraph in which this extract appears and which Georgia has stressed in its Final Brief at pp. 120 and 121 was as follows: "The need of the railroads for a greater volume of traffic is apparent. This can be obtained only by participating to a greater extent in the handling of the existing commerce of the country. An arrangement under which the motor carriers perform the service of gathering and assembling goods into concentrated volume to be transported in line haul movement by the railroads to a distributing center from which they will be taken to the place of ultimate delivery by the motor carriers seems to us particularly desirable. It will employ the trucks in the performance of the service for which they are best adapted, and which has been most burdensome to the railroads, and will enable the railroads to render the hauling service in full carloads and employ their facilities in the most efficient manner."

[75] S-56, I, 152, 153.

lish with that company joint rates from those cities to the Twin Cities.

"It was just such situations as this which the Member Lines and the Board of Directors of this Association endeavored to avoid. It is nothing more or less than the invasion of one railroad's territory by another railroad which has no rails into that territory or any investment therein. It is the kind of an arrangement that can be indulged in by other companies, using trucks from your territory to Chicago and then rail service and, in the final analysis, means nothing more than a diversion of a large amount of revenue from the rail industry to the trucking industry. It has the tendency of very greatly decreasing the average length of the rail service, and is surely inimical to the best interests of the rail industry.

"It gave us great pleasure to be able to prevent the establishment of an arrangement of this nature where it was proposed that the trucking was to be performed in your territory, with rail service from Chicago, not under joint through rates but on the basis of the full local rate east of Chicago. I doubt whether we would have been able to have accomplished what we did if such an arrangement as you are now proposing had been in actual operation at the time."

* * * * *

"I very sincerely hope that you will give further consideration to the matter and if you must, as you think necessary, provide joint rates with the Keeshin Company between Chicago and the Twin Cities—two points on your own railroad—I hope at least that you will refrain from being a party to any arrangement that will have the effect of invading the territory of your friendly connections either East of your Eastern gateway—Chicago, or your Western termini. Unless this is done, I apprehend that there cannot be avoided extensive retaliatory developments, the only effect of which will be large losses in revenue to the rail carriers. I therefore very earnestly request that you give this subject further consideration and advise me as to your conclusions."

Georgia argued that the reference to "extensive retaliatory developments" in the next to the last sentence above

constituted a "threat" of action by the A.A.R.,[76] but it is apparent from the context of the letter that the phrase had reference to retaliatory action by competing railroads, and Pelley so tesified.[77]

On April 24, 1936 the Board of the A.A.R. reviewed this correspondence and after discussion voted "to refer the subject to the Executive Committee for further consideration, and recommendation."[78] It appears from the minutes that the Great Western had not yet published the joint rates.[79]

No action was thereafter taken by the Executive Committee and no further action was ever taken by the Board or by the Association.[80]

Some little time after the Board meeting of April 24 just referred to (the exact date does not appear) the Great Western published the joint rates in question, and certain interested railroads then requested the I.C.C. to suspend them.[81] The I.C.C. suspended the rates, held hearings on them, and on July 7, 1936 authorized them to become effective.[82]

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[76] Final Brief, p. 122.

[77] XVI, 5642-5643:

"I had reference to possible retaliatory measures which might be taken by the individual railroads the territories of which might be invaded by the action suggested.

"The Association had no way of retaliating and could take no action in that direction."

[78] S-56, I, 148.

[79] The caption still referred to the original tariff proposal which was under suspension by the I.C.C.

[80] Pelley, XVI, 5639.

[81] Letter from Cleveland to Martindell, Traffic Manager of San Luis Valley Southern Ry. Co., dated May 29, 1936, S-57, Vol. A, 214, which speaks of the "recent" publication of the rates, and of the fact that "the interested railroads have now appealed to the Interstate Commerce Commission."

[82] S-58, I, 155, minutes of a meeting of A.A.R. Executive Committee on June 25, 1936, at which Cleveland reported that the rates had been suspended and hearings had been held, with a note appended stating that approval had been granted on July 7.

Georgia asserted, with regard to the suspension and its consequences, that after the Great Western had published the rates, "*the Association members in pursuance of the common plan* moved before the Interstate Commerce Commission to suspend the rates. The Commission, after hearings, approved the rates, demonstrating conclusively that *the conspirators had delayed for months the publication of rates that were lawful and valid in every respect* from the day they were proposed."[83] (Emphasis added)

In support of the assertion that the motion to suspend had been made by the "Association members in pursuance of the common plan," Georgia cited the minutes of a meeting of the Executive Committee of the Southern Freight Association held on May 12-14, 1936. At that meeting, among other things, there was a recommendation "that the Southern carriers file protest against Keeshin-Chicago Great Western Ry. and Keeshin-B. & O. R. R. tariffs for joint rail-motor carrier rates."[84] Doss of the Atlantic Coast Line, who was a member of a committee appointed at that meeting to survey merchandise rates by railroads and by motor carriers, was asked why the Southern Freight Association was interested in protesting to the Commission, but he could recall nothing about it.[85]

The record does not show (1) whether the motion to suspend had been made before or after the Southern Freight Association meeting in question, or (2) whether any protests were in fact filed by Southern carriers as a result of the recommendation at the meeting or otherwise, or (3) whether the A.A.R. as such had any connection with the recommendation, or (4) whether any similar meetings were held by any of the other territorial associations. All that the record shows is that some time between April 24, 1936[86] and June 25, 1936[87] certain "interested railroads," in

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[83] Final Brief, p. 122; citations omitted.
[84] S-533, XV, 5080.
[85] XV, 5082.
[86] Note 79 supra.
[87] Note 82 supra.

Mr. Cleveland's phrase,[88] "appealed to the Commission," but how many they were, or from what territory or territories,[89] does not appear.

The evidence is not, therefore, sufficient to support Georgia's assertion that the motion for suspension was part of a "common plan" pursued by "the Association members."

Nor does the evidence sustain the implication of impropriety contained in Georgia's statement that "the conspirators had delayed for months the publication of rates that were lawful and valid in every respect from the day they were proposed." Under the Interstate Commerce Act the suspension of a proposed rate by the I.C.C. is discretionary (whether the Commission is proceeding upon complaint or upon its own initiative), and the Commission at the time of suspension must issue a statement in writing of its reasons for the suspension;[90] so that it cannot be assumed from the mere fact of suspension that any request upon which it was founded was wholly wanting in merit.

Georgia contended that "the Chicago & Great Western paid a high price for its rash display of independence," citing in addition to the temporary suspension of the joint rates discussed above, a controversy over divisions of revenues in which the Great Western was involved some two years later.

"Two years later," said Georgia,[91] "testifying before the Senate Interstate Commerce Committee, Joyce of the Great Western disclosed that Mr. Pelley's threats were no idle gesture and that the revenues of his road had been gravely prejudiced by the refusal of defendants and their co-conspirators to grant him a fair division of revenues on

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[88] Note 81 supra.

[89] The Illinois Central, a Southern railroad, and perhaps certain other Southern railroads, as well as particular Eastern and Western carriers, might well have been directly interested.

[90] Interstate Commerce Act, Sections 15(7) and 406(e), 44 Stat. 1447 and 56 Stat. 288.

[91] Final Brief, p. 122.

joint-through traffic. He also testified that he dared not protest to the Interstate Commerce Commission for fear of being routed against and that protesting to the American Association of Railroads would in his case have been utterly futile.

"The Chicago & Great Western paid a high price for its rash display of independence. The results were not such as to encourage other roads to emulate its intrepid example."

The evidence in support of these assertions consisted of certain testimony given by Mr. Joyce of the Great Western and Mr. Sargent of the Chicago & Northwestern Railroad Company before the Senate Interstate Commerce Committee in 1938. The defendants objected to the admission of this evidence, and for reasons stated hereinafter at pp. 593, 594, I have concluded that the objection should be sustained. However, if this Court should regard the evidence as admissible, I find that it bears no relation to the assertions quoted above. Messrs. Joyce and Sargent were complaining to the Committee about the undue share of divisions of revenues received by the Western Transcontinental Lines, as compared with the Western Trunk Lines (including their own two railroads) on joint-through shipments from the Pacific Coast to Chicago and the East.[92] They were asked whether the Association of American Railroads could not help to adjust this question. They responded that the Association was not so constituted as to be able to afford the Western Trunk Lines any relief in such a matter because of the large representation, on the A.A.R. Board, of railroad presidents from the Transcontinental Lines and from the Eastern Trunk Lines, who naturally would not wish to give up any of the shares of joint-through revenues which their roads were receiving. Mr. Joyce stated that a representative of his road had taken the matter up with the directors of the Association on two occasions and "the people who were on the board were directly concerned

[92] The transcript of the hearings is in AD-11, Vol. D, 188 to 206.

about the thing, and they were looking out the window when we were trying to discuss it with them, and they adjourned the meeting in our faces when we wanted them to take it up."[93] At the same time Mr. Joyce stated that "I have no quarrel with the A.A.R.,"[94] and Mr. Sargent, whose views Mr. Joyce supported throughout, testified that:[95]

> "You see, as the Association of American Railroads is organized, it is composed of directors who themselves are presidents of railroads. Naturally it would be difficult for the president of a given railroad to lay aside his own interest, the interest of his individual property, in the common good, we will say, to help balance railroad earnings of all territories that were under-sustained. He would thereby be taking revenue from his own property in order to help support other territories. And the difficulty is not with the man, and they are very fine men, able directors, and it is an able organization, but the difficulty is that the thing cannot set up [sic]. And, naturally, as I see it, the Association of American Railroads is not in a position to take part in these sectional controversies which involve individual railroads within the organization. I do not think we can hope to get any relief through the Association of American Railroads."

There is nothing in this testimony or elsewhere in the record to indicate that the divisions controversy between the Western Trunk Lines and the Western Transcontinental Lines, or the alleged unavailability of the A.A.R. as a forum for its adjustment, had any connection with, or in any way grew out of, the establishment, two years previously, of the Great Western-Keeshin joint rates.

This completes Georgia's evidence regarding the alleged coercion of the Great Western and the alleged penalties meted out to it.

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[93] Ibid. 198.
[94] Ibid. 205.
[95] Ibid. 194, 195.

(ii) *Proposed Absorption by the Western Pacific Railroad of Certain Trucking Charges in 1937; the Substitute Resolution of June 25, 1937.*

As set forth above, Georgia stated that the Chicago Great Western Railroad had paid a high price for its independence and that the results "were not such as to encourage other roads to emulate its intrepid example." Georgia's Final Brief then went on to say: [96]

> "When the Western Pacific Railroad was called on the carpet in June 1937, for a similar offense, involving alleged invasion of Southern Pacific territory, it decided discretion was the better part of valor, particularly as the Southern Pacific enjoyed the prerogative of having a representative on the Board of Directors whereas the Western Pacific did not."

The evidence shows [97] that on June 12, 1937 the Southern Pacific complained to Cleveland, head of the Traffic department of the A.A.R., that the Western Pacific proposed to absorb certain trucking charges on the carriage of freight when delivered to the Western Pacific at certain points to be shipped via the Western Pacific to other points. The Southern Pacific asserted that the business which thus would be deflected to the Western Pacific was business which formerly went exclusively to the Southern Pacific; that the Western Pacific's proposed action would have the same effect as the creation of a joint-through rate with the trucking company; and that, therefore, since the result of the action would be an invasion of the Southern Pacific's territory, the proposal was contrary to the September 20, 1935 resolution. The Western Pacific denied that the territory to be covered by the trucking operations was local to the Southern Pacific and gave reasons why the proposed absorption of the trucking charges would be beneficial to the shippers.

Cleveland, after considering the Western Pacific's con-

[96] Final Brief, p. 122.

[97] All of the evidence on this case is contained in S-60, I, 158-162.

tentions, reached the conclusion, as he informed Mr. Pelley, the president of the A.A.R., in a lengthy memorandum, that the Western Pacific's proposal was "violative of a long line of decisions of the Interstate Commerce Commission which in effect prohibit the absorptions of the local rates of connecting carriers or any portion thereof and which require the establishment of the joint through rate from the original point of origin to the final destination before such an absorption can be made." He had consulted the Law Department of the A.A.R., which agreed with this conclusion. Counsel for the Western Pacific was of a different view. "The Western Pacific," Cleveland said, "has expressed a desire to have this particular feature discussed with me by its Freight Traffic Manager and if I can convince him the method of handling is not in accordance with the rules of the Commission, I believe the tariffs will not be published and this question will become moot." Cleveland concluded by saying that if this could not be accomplished he would recommend for the consideration of the Board the passage of a resolution disapproving the proposed action as violative of many decisions of the Interstate Commerce Commission and of the policy embodied in the September 20, 1935 resolution.

Apparently Cleveland did not succeed in persuading the Western Pacific to his way of thinking for on June 25, 1937 the Board of Directors met, and after hearing the representatives of the Southern Pacific and the Western Pacific (who each thereupon withdrew from the meeting), resolved:

> "That the proposed action of the Western Pacific Railroad has been considered, and, in the opinion of this Board, would constitute a violation of the policy which it has announced."

This completes the evidence. There is nothing to show whether the Western Pacific complied with the resolution or disregarded it,[98] nor have I found anything to indicate

[98] Judge Fletcher, as counsel for the defendants, in his Reply Brief at p. 41 states: "While the record on the subject is meager, it is a fair

that the Southern Pacific "enjoyed the prerogative" of representation on the Board whereas the Western Pacific did not.[99]

The case shows that the carriers in question took seriously the resolution of September 20, 1935 to the extent of trying to persuade the Board of Directors to approve the rightness of their particular positions; but the case does not support a finding of coercion by the A.A.R.

It should here be noted that at the Board meeting under discussion, before the resolution relating to the Western Pacific was adopted, the Board rescinded the resolution of September 20, 1935 on the ground that it had been "the subject of misunderstanding as to its true meaning and proper application" and that the policy announced by the Board "should be clarified and redefined," in accordance with which a substitute resolution was adopted as follows:[1]

> "It is hereby declared to be the policy of the Association that the public interest will be promoted and the integrity and credit of the Railroad Industry improved and maintained if the railroads refrain from establishing with motor carriers through routes or joint rates or fares which invade territory not served by such railroad and which is already served by one or more other railroads."

The form of this resolution of June 25, 1937 differs sharply from that of the September 20, 1935 resolution.

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presumption that the Western Pacific abandoned the idea because of doubt as to the legality of the entire proposition." I cannot, however, find anything in the record to show that the Western Pacific did not go forward with the proposal. If it did fail to go forward, there is nothing to show what its motives were.

[99] Pelley testified that the directors are annually elected by the member lines in their respective groups of South, West and East; that "all the lines have their opportunity in their respective meetings in the same regions to name their representatives"; that it is customary to invite to the meetings of the Board representatives of three railroads that are not actually represented on the Board; and that by thus rotating the invitations to non-Board members, every road ultimately has an opportunity to participate in the Board's deliberations. XVII, 5917, 5919.

[1] S-60, Vol. A, 230.

It is expressed simply as a declaration of what is the desirable policy for the railroads to follow, whereas the September 20, 1935 resolution, as has been noted, directed the president "to issue an order forbidding the establishment of joint rates" except where there had been unanimous agreement by the traffic executives that the proposed rates would not constitute an invasion by one railroad of the territory of another.

(iii) *Proposed Extension of Certain Operations of a Trucking Company Owned by the Gulf, Mobile & Northern Railroad.*

On October 10, 1936 the Board of Directors of the A.A.R. adopted the following resolution:[2]

"It is recommended that the President be directed to advise the Chief Executive of the Gulf, Mobile & North-

[2] 8-72, I, 194, 195. The form of this resolution is worth noting. Although it was adopted under the resolution of September 20, 1935 and before the softer substitute of June 25, 1937, set forth above, had been adopted, it avoided directing the president "to issue an order forbidding the establishment of joint rates" etc.; instead it directed the president "to advise" the Gulf Mobile "that in the judgment of the Board" its proposal constituted an invasion of territory which was harmful to other carriers and not in the general railroad interest and "urging that under the circumstances" the applications be withdrawn. Georgia draws attention to the statement by Justice Brandeis in *American Column and Lumber Co.* v. *United States*, 257 U. S. 377, 414, that "words of advice, seemingly innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to command." It may be that the change in form did not reflect an intention on the part of the Board that the resolution should be taken in only a recommendatory sense and that it was meant as the equivalent of a command. On the other hand, the Board having previously taken no action in April of the same year against the Chicago Great Western when it deliberately disregarded the resolution of September 20, 1935, as previously described, it is perhaps more probable that the Board intentionally altered the form of its resolution in order to be consistent with a policy of non-coercion. Such a motivation would be consistent with the subsequent elimination of the September 20, 1935 resolution and the substitution for it of a version couched only in the form of a policy declaration. In the absence of testimony on this question, however, the point is too speculative to warrant a finding of fact.

> ern that in the judgment of the Board the proposed operations of the Gulf, Mobile & Northern and the Gulf Transport Company constitute an invasion of territory not served by the rails of the Gulf, Mobile & Northern, to the disadvantage of the rail carriers now serving such points, which is not in the general railroad interest and urging that under the circumstances the applications for such certificates should be withdrawn."

The applications referred to in this resolution were applications which had been filed with the Mississippi Public Service Commission by the railroad company and its wholly owned subsidiary, the Gulf Transport Company, for franchises over particular highways.[3] The applications covered truck operations to be conducted by the transport company over highways adjacent to the railroad's line in Mississippi—territory local to the Gulf, Mobile; but the applications also covered certain cross-country short routes which went outside of the railroad's territory.

There was at the time a conflict of policy within the management of the railroad company as to whether the company should confine itself to its own territory, using trucks simply as an auxiliary or substitute service, or whether the company should embark upon the highway transportation business beyond the confines of its own territory. This conflict was under discussion at the time the applications were filed with the Public Service Commission. The conflict was finally resolved in favor of the more limited use of trucks, and the applications were amended accordingly by eliminating the short cross-country routes. Gottschaldt of the Gulf, Mobile could not remember whether or not this action had been influenced by the resolution of the A.A.R.[4] but he testified that the Pub-

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[3] The facts were set forth by Gottschaldt of the Gulf, Mobile in X, 3136-3144 and are here summarized from his testimony.

[4] Mr. Flowers, counsel for the company, was asked whether the applications in their final form had been submitted before or after the resolution of the A.A.R.; he replied: "Well, Mr. Master, we tried to find that out and we couldn't find out when that was done. It happened that a firm of stenographic reporters took the evidence and

lic Service Commission was of the view that the company's applications went beyond the proper limits, and that at the time when the company decided to amend the applications it was apparent to the company that they would not be granted in the form in which they had been submitted.

Gottschaldt was not cross-examined and no other evidence was submitted by either side.[5] The record does not support a finding of coercion.

(iv) *Miscellaneous Allegations*

Georgia asserted in general terms that "the defendants *continued to enforce* the policy embodied in the resolution" until the United States Government brought suit on October 25, 1939 against the A.A.R. and its officers, directors and member railroads to enjoin the effectuation of the resolution.[6] Actually, as has been noted above, the September 20, 1935 resolution had been rescinded on June 25, 1937 (before the suit in question was brought), and a substitute resolution had been adopted containing merely a declaration of policy. After the suit had been brought the substitute resolution was in turn rescinded.[7] The Court held, however, on a motion for summary judgment by the defendants, that the rescission of the two resolutions did not render the cause moot.[8] Thereafter, on July 18, 1941, a consent decree was entered. There is no evidence in the record in support of Georgia's assertion that "the defendants continued to enforce the policy embodied in the resolution" until the commencement of the government's suit.

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there was no appeal, and they never did transcribe the evidence, and they both died—two large fat boys—and . . . we just have to take from memory what there is on it." X, 3143, 3144.

[5] Georgia characterized the Board's resolution as "sheer arrogance" in view of the fact that the Gulf, Mobile was not represented on the Board of Directors (X, 3092) and that the applications were pending before the Public Service Commission. Final Brief, p. 123.

[6] Final Brief, p. 124 (emphasis added).

[7] S-61, I, 162-164.

[8] As stated in the consent decree, AD-10, Vol. D, 184.

The consent decree was entered after the defendants had filed answers denying the allegations of the complaint, and without testimony or findings of fact,[9] so that the decree does not constitute an admission that the A.A.R. had been "enforcing" the resolution.

Georgia next contended that the rescission was a mere change in form, not substance, and that afterwards, as previously, the A.A.R. "successfully imposed" a private "veto" on an Act of Congress.[10] Again, however, the record does not support this charge of coercive restraint. Georgia cited testimony by Oliver of the Southern Railway that his road had "always been opposed to making joint rates with trucking companies," and had made them only "in a few instances where railroad branch lines have been abandoned and we wanted to continue to give the people some service. * * *"[11] Georgia cited similar testimony by Etheridge of the Seaboard,[12] and testimony by Gottschaldt of the Gulf, Mobile that since 1936 the Company had adhered to the policy of using the trucks of its subsidiary for auxiliary and substitute services only, after a conflict within the management, described at p. 442 above, had been resolved in favor of that policy.[13] Georgia also cited testimony by Pelley, president of the A.A.R., on cross-examination to the effect that since the rescission of the resolutions he did not know of any joint rail-truck rates that had been published.[14] He immediately qualified his answer by stating that he had no information on the subject one way or the other;[15] that he had never heard of any gentleman's agreement being substituted for the rescinded resolutions, and didn't "believe anything like that could exist";[16] and that the existence of the resolu-

[9] As shown by the text of the decree, supra note 8.
[10] Final Brief, pp. 124, 125.
[11] IX, 2883, 2884.
[12] X, 3083.
[13] X, 3143.
[14] XVII, 5814.
[15] XVII, 5815.
[16] XVII, 5816.

tions for six years had not had the effect of frustrating experimentation with truck-rail arrangements ("I do not think it had any deterrent effect at all", he said).[17] No evidence of coercion appears from the testimony of Oliver, Etheridge, Gottschaldt and Pelley just summarized.

It can be assumed that the September 20, 1935 resolution and the substitute for it, adopted on June 25, 1937, had some influence upon the policies of some of the carriers, especially in view of the fact that the member roads, with very few exceptions, had approved the September 20, 1935 resolution prior to its unanimous adoption by the Board. Whether the two resolutions in question constituted, as the government charged in its antitrust suit, an unlawful agreement, is a question not relevant to the present case; the only relevant question is whether or not the resolutions in practice interfered with the freedom of action of the individual roads. The evidence does not establish such interference.

Georgia utilized the evidence relating to the September 20, 1935 resolution not only to illustrate the alleged absolute power of the A.A.R. to dictate rates, but also to demonstrate the defendants' "evasion of the regulatory scheme enacted by Congress."[18]

Under this heading Georgia charged that the resolution constituted a "private legislative repeal of an Act of Congress",[19] and that, in addition to adopting the resolution, the defendants acted improperly in other respects—by launching certain attacks designed to exclude the trucks from participation in traffic normally monopolized by the rails,[20] and at the same time conferring with trucking representatives to induce them to raise their rates to the rail level.[21] In this portion of Georgia's case Georgia sought to show that the defendants' actions were tainted

[17] XVII, 5818.
[18] Heading, Final Brief, p. 118; cf. heading, p. 58.
[19] Final Brief, p. 119.
[20] Ibid, p. 125.
[21] Final Brief, p. 128.

with impropriety or actual illegality of a sort other than the coercion and discrimination alleged in this proceeding. This portion of the case included not only the alleged evasion of the regulatory scheme enacted by Congress but also the alleged "elimination of the Coordinator and frustration of his efforts to achieve an efficient and integrated transportation system" [22] and the alleged "insulation of price-fixing machinery from interference by the Interstate Commerce Commission." [23]

These allegations, like the allegation about the evasion of Congressional regulation, were designed to show impropriety or actual illegality, unconnected, however, with the charges of coercion and discrimination in this proceeding. The defendants, while denying all of the allegations, objected to their admission on the principal ground that they were unconnected in any way with the alleged conspiracy in this case.[24] As I have said, none of the evidence relates to the coercion and discrimination charged in this case. Regarding the evidence in the light most favorable to the plaintiff, one might argue that it was designed to show a concerted plan by the defendants to exercise an unhampered domination of the whole field of railroad rates, first by thwarting and getting rid of the Coordinator, next by removing the menace inherent in truck competition, and finally by keeping rate controversies among the railroads from getting out of the defendants' machinery into the forum of the I.C.C.; thus leaving the way clear for the conspirators to concentrate upon the job of frustrating attempts by the South to remove the discriminatory rate

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[22] Final Brief, p. 115.

[23] Final Brief, p. 129. Under this particular heading Georgia included along with other evidence a reference to the A.A.R. resolution of May 17, 1935, which is treated immediately hereinafter in the report under the heading of the alleged "supreme appellate authority" of the A.A.R.—the heading in Georgia's brief to which the resolution in question principally relates. The other evidence regarding the alleged insulation of the price-fixing machinery from interference by the I.C.C. is summarized in Appendix "D".

[24] II, 645-648.

differentials which favored Northern industry. This, in substance, is the argument advanced by Georgia.[25] The difficulty with it is that the evidence is too scanty and too scattered to sustain a finding that any such plan existed or that the acts cited by Georgia had any connection with, or cast any significant light upon, the coercion and discrimination complained of by Georgia.

I therefore conclude that the defendants' objections should be sustained. I have summarized in Appendix "D", at pp. 858-867, the evidence covered by the objections.

2. *Alleged "Supreme Appellate Authority" of the A. A. R. in the "Hierarchy of Rate Mechanisms": the Resolution of May 17, 1935*

Georgia charged that facility of administration dictated that rate matters should largely be disposed of by the territorial associations and that the A. A. R. should intervene only in those which could not be thus settled, the A. A. R. thus constituting "the supreme appellate authority in the hierarchy of rate mechanisms."[26] To effectuate this policy, Georgia said, the Board of Directors of the A. A. R. on May 17, 1935 adopted a resolution providing for conferences with officers of the Association prior to any action by one group of railroads to suspend the tariffs of another group before the I.C.C. The nature and effect of this resolution are discussed below.

(a) *The Nature of the Resolution*

The text of the resolution was as follows:[27]

> "The Board discussed with Vice President Cleveland the unfavorable impression caused by applications of one set of carriers for suspension of the tariffs

[25] Final Brief, pp. 115 to 133, *passim*.
[26] Final Brief, p. 59, last two lines.
[27] S-48, I, 164, 165. (There is another S-48 at I, 140, consisting of a letter from Pelley to Senator Wheeler, which is unconnected with the S-48 here cited).

of another set of carriers, and adopted the following resolution:

"'Resolved, That effective June 1, 1935, no further requests for suspension of tariff publications of one group of lines will be filed with the Interstate Commerce Commission by other lines, unless there has first been a conference of representatives of both parties with the officers of this organization; and, further

"'Resolved, That where one group of lines has knowledge of contemplated publication of tariffs by another group believed to be harmful to it, application for conference with officers of this Association will be made in advance of filing such tariffs.'"

In practice, as will appear, the conferences which the resolution contemplated were held by Vice President Cleveland. The effect of the resolution, therefore, was that one group of lines should not request the I. C. C. to suspend the tariffs of another group until both groups had had a conference with Cleveland, and (under the last paragraph) that wherever possible such conferences should be held in advance of the filing of tariffs.

Pelley, President of the A. A. R., described the general nature and purpose of the resolution as follows:[28]

"It was not the thought of the resolution that officers of the Association of American Railroads would determine the controversy, but, as was stated in the resolution itself, would only insure 'conference of representatives of both parties with the officers of this organization.'

* * * * *

"* * * After conference, the proposed lines were at full liberty to file their proposals, either as originally planned or as modified, while the protesting lines were equally at full liberty to file their protests.

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[28] XVI, 5644-5645.

"In other words: The Association of American Railroads had merely brought them together for discussion in an attempt to avoid litigation."

Tilford of the Louisville & Southern testified as follows regarding the background of the resolution:[29]

"I think this resolution can be better understood if you consider the background a little of the railroad situation at about that time.

"I have tried to show in my evidence in this case the need for cooperation between the railroads in performing joint service, and the need for good feeling in that cooperation.

"During that time that this resolution was passed the railroads had gone through quite an upheaval of their rate adjustment. The Commission prescribed joint rates in many cases where no joint rates had existed before; the rates between Ohio and Illinois and the whole South were based on Ohio River combination. In lieu of that basis they prescribed joint through rates without providing for the apportionment of the revenue. This caused considerable dissatisfaction on the part of different carriers and that particular case, the *Southern Class Rate Adjustment*, was taken to the Commission in a 'division complaint.' It was quite an extended hearing and there was quite a good deal of feeling between the groups of carriers engendered in that proceeding.

* * * * * *

"But, generally, it applied to all your manufactured goods that would move on class rates, and, by the time the case had got to the Commission, the class rate system had extended to a good many commodity subjects.

"There were similar disputes between the eastern lines and the southwestern lines where the Commission had prescribed a system of rates.

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[29] VI, 1772-1774.

"There was similar dispute between the Western Trunk Line territory and the Southwestern territory.

"There were similar disputes between the eastern lines and Western Trunk Lines.

"So that there was an atmosphere that did not lend itself to cooperation between these different railroads that should provide the best joint service they could to the public and that required that they cooperate with each other.

"Now, the railroads had been holding conferences in order to discuss these differences of opinion that might lead to requests for suspension of each other's rate adjustments, but they were not very successful in handling those cases, so this resolution, as I understand it, had behind it the thought that if the Association of American Railroads designated one of its officers to preside at the meeting and act as a neutral in the discussions between the different groups of carriers when there was a difference of opinion with respect to rate adjustments proposed by one or the other, it would be at least helpful.

"I think that that explains it as briefly as I can, and explains the atmosphere that brought about this resolution. It was a desire of the chief executives, the Presidents of these important railroads, to find some means to encourage the cooperation of their officers rather than have them quarreling and bickering and fighting with each other all the time in such way that would lead to litigation before the Interstate Commerce Commission."

Georgia repeatedly referred to the resolution as providing for an "appeal" to the A. A. R. from proposed rate actions in the territories, and the word "appeal" was in fact used in some instances by the defendants. Thus on June 20, 1935, about a month after the passage of the resolution, the Board of the A. A. R. interpreted it as providing that in the Eastern and Western territories the carriers "may appeal to the Association only in cases which cannot be settled by the machinery in the given regions; in the South where no machinery exists, such appeals may be

made direct to the Association." [30] In informing the member roads of this resolution, President Pelley elaborated a little on the text by saying that in the Eastern and Western territories the machinery for settlement mentioned in the resolution had reference to "appeals to Commissioner Taylor in the Western territory and to the Presidents' Traffic Conference in the Eastern territory," whereas in the South, in which (as described at p. 273 above) provision had not yet been made for appeals to the Presidents' Conference, "such appeals may be made direct to this Association by either the Chief Executive or the Chief Traffic Officers." [31]

The defendants contended that the word "appeal" as used in the documents just described did not refer to the kind of appeal provided for in the structure of the territorial associations. In the territorial associations, a rate proposal could be carried from one committee to another, with authority in the higher group to take definite action on the proposal by way of affirming, rejecting or modifying the action taken by the inferior group. Such a procedure had the true characteristics of an appeal. By contrast, the defendants argued, the procedure under the May 17, 1935 resolution amounted merely to a request for a conference with Cleveland and did not provide for any disposition of the controversy except such as might be arrived at by mutual agreement.[32]

It might be argued in answer to this, as Georgia seemed

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[30] S-65, I, 166.

[31] S-64, I, 165, 166.

[32] Kerr of the Southern Freight Association testified: "Now that is all that is contemplated, so far as that resolution was concerned, and while the word 'appeal' has been used occasionally, it is not in the sense, so far as this resolution is concerned, that the Traffic Department of the Association of American Railroads would have any authority other than to call a conference of the interested carriers in the several sections and try to get them to compose their differences so that in the end we might have rate adjustments that would meet the standard laid down in the Interstate Commerce Act." V, 1426.

to suggest,[33] that if Cleveland proved unsuccessful as a mediator, he could always refer the controversy to the Board of Directors for decision. However, the record contains no example of any such reference, and the few examples given of the conferences conducted by Cleveland under this resolution [34] revealed no evidence of any suggestion on his part that the Board might be asked to intervene, nor any evidence of pressure or coercion of any sort on his part.

Hence I conclude that the resolution should properly be regarded as that which it appeared on its face to be, namely, a procedure for assuring, so far as possible, conferences with Cleveland in the hope of settling territorial rate controversies by agreement rather than by litigation before the I. C. C. I am not here considering the propriety of such conferences (which Georgia criticized as an attempt to "immunize" the private price-fixing machinery from interference by the I. C. C.) [35] but only their nature and coercive effects, if any.

After describing the resolution of May 17, 1935 Georgia went on to say that the A. A. R. "lost no time in strengthening its machinery in the South by inducing the creation of Traffic Executive Association-Southern Territory. Thereafter the mode of appeal from the regional mechanisms to the A. A. R. was precisely the same for all the regions." [36] However, as has been previously seen, the Traffic Executive Association-Southern Territory (with accompanying provision for appeals to the Southern Presidents' Conference, in line with the pattern developed in the North) was not established until three years later, and its organization was not connected with the resolution of May 17, 1935 but arose out of the practical problems faced by the railroads in attempting to obtain a general rate increase from the

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[33] E.g.: Final Brief, p. 62, last sentence.
[34] Reviewed infra at pp. 453-459.
[35] Discussed at pp. 861-867.
[36] Final Brief, p. 61.

I. C. C. in *Ex parte No. 123*, initiated in November, 1937.[37]

The resolution, according to Pelley, did not have to do with disputes between individual carriers but with actions or threatened actions on the part of groups of lines in one territory believed to be harmful to the interests of the roads in another territory.[38] Similar testimony was given by Kerr of the Southern Freight Association.[39] However, on June 18, 1935 Cleveland submitted a memorandum to Pelley raising the question as to whether the resolution covered controversies between two lines in a given territory, stating that if it was desired by the Board that such controverises be handled under the resolution, it would be entirely satisfactory to Cleveland. Pelley entered a notation on this memorandum: "Handle anything received."[40] In the light of all the evidence I find that the basic purpose of the resolution was as described by Pelley and Kerr but that in practice room was left for two lines having a rate controversy within a single territory to ask Cleveland for a mediatory conference. No illustrations were given in the record of any such intraterritorial dispute being taken to Cleveland, and the question seems to be of no real importance.

(b) *The Practical Effect of the Resolution*

Georgia cited a docket entry for a meeting of the Traffic Advisory Committee on September 10, 1935 entitled "Suspension Proceedings Before the I. C. C.

"Appeals made pursuant to the resolution of the Board on May 17th, designed to restrict to the fullest extent possible applications for suspension by one railroad or set of railroads of the tariffs of other railroads."[41]

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[37] Pp. 359, 360 above.
[38] XVII, 5827, 5828.
[39] V, 1426-1428.
[40] S-377, Vol. C, 958. The date of this memorandum appears in the exhibit as June 18, 1936 but Judge Fletcher stated for the record that the year should be 1935, and Mr. McGovern accepted the correction; XVII, 5835.
[41] S-505, XVII, 5824.

The defendants objected to this exhibit on the ground that it showed only that somebody made the entry on the docket of action to be taken and that there was no evidence that any action was taken.[42] Pelley, however, when asked if the docket entry indicated that a purpose of the resolution "was to restrict to the fullest extent possible applications for suspension by one railroad or set of railroads of the tariffs of other railroads," answered "I think so. I presume that would be true."[43] He subsequently added that the resolution was merely a recommendation to the membership[44] and that "it does not prohibit them in any way from filing if they want to."[45] I think it reasonable to find that the resolution was adopted with the hope and in the expectation that it would reduce the number of applications filed with the I. C. C. by one set of railroads seeking the suspension of rates of another set.

The question remains whether the resolution in practice exercised any coercive restraint upon the freedom of action of the railroads. In support of the proposition that the resolution amounted to more than a mere recommendation, Georgia cited a letter from Kerr, Chairman of the Southern Freight Association, to Farmar, Chairman of the Western Trunk Line Committee, dated May 27, 1942,[46] in which Kerr protested certain rate actions by the Western lines in connection with shipments of stone, marble and granite from the South to Western Trunk Line territory. Kerr stated in part that "it is hard for our lines to understand why your roads insist on a higher level of rates on Southern stone than on that produced in New England and Eastern territory, and particularly so when Official territory lines had approved the original proposal." He also put the Western lines on notice "that under the circumstances, the Southern carriers will have to ask for suspension of tariff

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[42] Judge Fletcher, XVII, 5826.
[43] XVII, 5826.
[44] XVII, 5828.
[45] XVII, 5831.
[46] S-446, IX, 2790.

when published, and undertake to have a more favorable basis approved by the Commission. For obvious reasons, we very much hope that the WTL" (Western Trunk Lines) "will give further consideration to the matter with a view of modifying the level of the rates and the minimum of 50,000 pounds on the dressed stone which will result from your demands, and thus make it unnecessary for Southern carriers and WTL to engage in a contest before the Interstate Commerce Commission. Please advise.

"In sending copy of this communication to Mr. A. F. Cleveland, it is not for the purpose of asking him to intervene at this particular time, but solely for the reason that all of us are expected to bring such matters to Mr. Cleveland's attention before asking for suspension of the rates of some other group."

Georgia then referred to Cleveland's reply to Kerr, dated June 5, 1942, in which he asked:[47]

> "Is it your desire that I arrange for a joint conference of committees from your territory and the Western Trunk Lines with the object in view of composing the differences in regard to the rates on stone as between the two groups. If this is your wish, I shall of course be glad to arrange such a conference; otherwise, this letter may be considered as authority to file a petition for suspension in the event your lines think their interests so require."

Kerr stated his recollection that the Southern carriers then joined with Southern shippers in protesting to the I. C. C.[48]

Georgia laid stress upon the last sentence of Kerr's letter in which he said that "all of us are expected to bring such matters to Cleveland's attention before asking for suspension of the rates of some other group." Georgia also stressed the statement in Cleveland's reply that if a conference was not desired "this letter may be considered as

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[47] S-445, IX, 2789.
[48] V, 1462.

authority to file a petition for suspension. . . .'' Georgia contended that this exchange of correspondence showed on both sides recognition of the fact that compliance with the May 17, 1935 resolution was a prerequisite to the filing of an application for suspension.

Actually the resolution called for the holding of a conference before an application for suspension was filed, and what happened in this particular instance was that the protesting Southern lines flatly notified the Western lines that the former group would move for suspension, a copy of the letter being sent to Cleveland for his information without asking for a conference. Cleveland then authorized the Southern lines to move for suspension without a conference unless they wished him to call one, which apparently they did not. If one looks to the substance of the transaction it appears that Cleveland was applying the May 17, 1935 resolution in such a way as to dispense with any conference except where the protesting group felt that it might be helpful. Viewed in this light the evidence indicates that the resolution had no coercive effects. Kerr readily conceded on cross-examination that the roads ''were expected to settle their differences through conference wherever possible.'' [49]

He added: [50]

> ''That is the finest tested method. It is what the Commission has more than once told us to do in connection with sensitive rate adjustments, such as this is.
>
> ''If I am not badly mistaken, they used almost these words in their decision in the Sugar cases in 1922 when they said that the carriers had, in the past, been able to compose their differences through conferences and they ought to be given the opportunity to do so in that particular case and without the Commission being forced to issue an order.''

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[49] V, 1463, and to the same effect, 1464.
[50] V, 1463.

Kerr declined to admit that the resolution of May 17, 1935 "required" the railroads to obtain Cleveland's authorization before protesting to the I. C. C. He testified:[51]

> "We were—I cannot answer that 'Yes' or 'No.' I wish I could.
>
> "We were expected to go to Mr. Cleveland and suggest to him that he call a conference of the interested lines in an effort to have them compose their views.
>
> "Now, that is clearly contemplated by the 1935 resolution and, so far as the carriers in our territory are concerned, they endeavored to carry it out in good faith, but it did not deprive them of their right of independent action.
>
> "I have shown you in connection with the iron and steel[52] that they proceeded independently, and there are numerous other cases.
>
> "Mr. Cleveland usually called those conferences and, after he had the conferences and the views were not composed, why, he generally washed his hands of the matter in one way or the other."

He conceded that Cleveland's choice of language in the letter to Kerr giving "authority" to file a petition "was poor," adding:[53]

> "All it meant to me was that Mr. Cleveland had washed his hands of it; that if our lines, through me, did not think a conference necessary, keeping in mind the last paragraph of the letter to which he replied, I was not asking him to call a conference at that time, but if I did not want a conference he washed his hands of it.
>
> "That is the way I interpret it.
>
> "We had carried out all our obligations under the 1935 resolution."

The evidence cited by Georgia included an incident relating to *composition roofing*, which may be sum-

[51] V, 1464.
[52] This case is discussed infra at pp. 752-776.
[53] V, 1465.

marized as follows.[54] On November 20, 1939 Kerr, for the Southern Freight Association, wired Cleveland that certain rate reductions proposed by the Southwestern roads on composition roofing were a "definite threat against rates within South and from Official to South", and he therefore appealed to Cleveland to arrange for a conference, which was held very shortly thereafter on Cleveland's call. Following the conference the Southwestern lines proceeded to put the objectionable reductions into effect, forcing the Southern lines to do likewise. This incident, according to the defendants, bore out their contention that Cleveland's conferences were no more than the name implied, and were not coercive in character. Georgia, on the other hand, noted the fact that when Cleveland sent out his call for the conference the Chairman of the Southwestern Bureau wired him that publication of the proposed reductions was being withheld "in view your assumption jurisdiction as result Kerr's appeal"; and Georgia argued that this wire constituted a recognition of the "authority" of the A.A.R. under the May 17, 1935 resolution to "take jurisdiction" and stop rate actions pending a conference.

The defendants denied the "authority", while conceding, as Kerr put it above, that the roads were "expected" to settle their controversies through conference "wherever possible." In support of their contention that the roads were at all times free to dispense with a conference if they chose to do so, the defendants offered the following testimony.

Tilford of the Louisville & Nashville described seven cases beginning with 1939, in which his railroad had applied to the I. C. C. for the suspension of rates of other railroads. These cases, he said, "were handled without a conference through an Association of American Railroads official; in other words, the carriers looked on this resolution as recommendatory and, in the cases I mention, the means of holding a conference and discussing the different viewpoints and of ascertaining the reasons for the adjustments proposed,

[54] It appears in Kerr's cross-examination, V, 1431-1434.

were held, but not under the auspices of an official of the Association of American Railroads." [55]

Tilford testified that in two of the cases which he referred to, the applications for suspension were filed by Kerr "because all the southern railroads were in accord and it was convenient for the railroads and the Commission to act on one petition; the others were filed by one of the other lines and, in each case, the Louisville & Nashville Railroad Company was one of the lines that asked for suspension." [56]

Other testimony was given by Oliver of the Southern Railway, who said that his road had never been deterred from protesting a rate because of any action or suggestion on the part of the A.A.R.; [57] by Etheridge of the Seaboard, who said that any such resolutions "would be regarded with respect", but not as binding, and that the Seaboard had never been coerced by the A.A.R. into failing to protest a rate where it felt that it should do so; [58] and by Doss of the Atlantic Coast Line, who said that he knew of no cases where the action of his railroad was affected by the resolution and that at meetings presided over by Cleveland, which he had attended, Mr. Cleveland had been neutral and had taken no sides upon controversial questions.[59]

On the basis of all the evidence I find that the resolution of May 17, 1935 called upon the railroads to arrange for conferences with Cleveland before moving to suspend each other's rates before the I. C. C.; that the railroads generally lived up to the action which was thus expected of them; that they felt free, however, in particular instances to proceed, and did proceed, before the I. C. C. without a prior conference with officers of the A.A.R.; that in such instances no coercion, restraint or penalty was visited upon them; and that the conferences when held were of a mediatory

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[55] VI, 1775. The cases which he referred to are set forth at 1775 to 1778.
[56] VI, 1778.
[57] IX, 2627.
[58] X, 2971.
[59] XV, 4875, 4876.

nature only, without any attempt on the part of officers of the A.A.R. to dictate or direct the action which should be taken.

C. *Allegedly Coercive Activities of the A. A. R. in the General Rate Increase Cases of 1934-1937 (Ex Parte 115 and Ex Parte 123)*

In Part One of this Volume, at pp. 346-373, I described the series of attempts made by the railroads, beginning in 1934, to obtain rate increases from the I. C. C., and the relationship of these rate proceedings to the establishment in 1938 of the Traffic Executive Association-Southern Territory, and the strengthening of the rate procedures in the Southern Freight Association. Now it becomes necessary to return to those rate proceedings *(Ex Parte 115* and *Ex Parte 123)* and to consider certain actions taken by the defendants in connection therewith which, according to Georgia, well illustrated "the manner in which the Association has occasionally found it convenient *to arrogate to itself the right arbitrarily to fix rates for the country as a whole* without regard to the views of individual members . . ."[60]

Georgia made three principal allegations in connection with these proceedings, which are discussed below.

1. *Georgia's Allegation that the A. A. R. Compelled the Member Roads to Put Into Effect the Full Increase Authorized by the I. C. C. in Ex Parte 115.*

As previously described at p. 346 above, the railroads petitioned the Commission in 1934 for authority to make certain increases of a general nature in their freight rates and charges. In the first of a series of decisions in *Ex Parte 115* which were thereafter handed down, the I. C. C. on March 26, 1935 denied the railroads' petition.[61] The denial was on the principal ground that in view of the railroads' loss of traffic to competing forms of transportation, general

[60] Final Brief, p. 134. Emphasis added.

[61] *Emergency Freight Charges, 1935, Ex Parte 115,* 208 I.C.C. 4.

rate increases would simply drive more traffic away from the railroads. The Commission, however, granted certain temporary emergency increases for the immediate alleviation of the acute financial distress of the railroads. The charges were authorized to run from April 18, 1935 to June 30, 1936 (this period being later extended to December 31, 1936).[62] In its decision the Commission said:[63]

> "We are of opinion, therefore, that the emergency confronting the railroads is of such gravity that they should be permitted to add a system of emergency charges to most of the existing freight rates and charges . . ."
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> * * * * * * *
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> "It should be clearly understood that the plan of emergency charges here provided is permissive in character. Where the carriers find it necessary to make exceptions in the application of the charges, avoidance of undue prejudice and preference should always be kept in mind. No exceptions should be made primarily to influence the routing of traffic, to attract traffic from one carrier or route to another, or to favor an industry on one line at the expense of industries on other lines."

Having regard to the fact that the emergency charges were thus made permissive and not mandatory, Georgia charged that:[64]

> "In accordance with the Congressional scheme of regulation and Commission practice thereunder, it was contemplated that the roads would make such increases within the general authorization as in their individual discretion conditions on their lines warranted.
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> "However, defendants *immediately supplied the compulsion lacking in the Commission's order.* In pursuit of the conspiratorial objectives described above, defendants *delegated to a General Rate Committee exclusive control over the Ex Parte 115 increases.* This Com-

[62] *Emergency Freight Charges*, 215 I.C.C. 439, 467.
[63] 208 I.C.C. 4, 59, 60.
[64] Final Brief, p. 135 (Emphasis added; citations omitted).

mittee with the approval of the A. A. R. Executive Committee issued the following statement:[65]

"'It is definitely understood that all interstate rates will be increased effective April 18, 1935 in accordance with authority granted by the I. C. C. and that the matter of like increases in intrastate traffic will be progressed as rapidly as possible.'"

Georgia contended that "the membership of the Association supinely acquiesced in this illicit usurpation of their obligation under the law to make their own rates . . ."[66]

The defendants replied, in the first place, that the General Rate Committee to which "exclusive control over the Ex Parte 115 increases" had been delegated, as alleged by Georgia, was not a committee of the A.A.R., but, according to Tilford of the Louisville & Nashville, was composed of "traffic officers of the individual lines" appointed by the railroads themselves prior to the organization of the A.A.R., and "each railroad involved in the Commission's decision had the privilege of representation on the committee."[67]

The defendants cited cases to show that since World War I practically all applications to the I.C.C. for general rate increases have been made on behalf of the railroads in all rate territories;[68] and Franklin of the Pennsylvania

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[65] S-82, I, 202. This exhibit consists of an extract from minutes of the meeting of the Executive Committee of the A.A.R. held on April 11, 1935 at which, among other things, there appeared before the Executive Committee a number of representatives of the General Rate Committee which, as will be shown in the text above, was a committee appointed by the member roads and not by the A.A.R. The Chairman of the General Rate Committee reported that the members of the Committee had unanimously agreed upon the statement quoted above by Georgia. The minutes then set forth a resolution by the Executive Committee of the A.A.R. to the effect that "the action taken by the General Rate Committee be, and the same is hereby, approved."

[66] Final Brief, p. 136.

[67] VI, 1699-1700.

[68] *Ex Parte 74, Increased Rates, 1920*, 58 I.C.C. 220 (1920); No. 13293, *Reduced Rates, 1922*, 68 I.C.C. 676 (1922); *Ex Parte*

testified that it was the normal and usual practice in such cases to have the cases handled by a committee on behalf of all the railroads; "that has been the practice as long as I have had any knowledge of general increase cases." [69] He further testified that these committees operated in the same way and had the same functions and authority prior to the formation of the A.A.R. as afterwards.[70]

"The only real difference," he said, "was that the Vice President of the Association of American Railroads acted as Chairman of the General Committee after the formation of the Association of American Railroads and all the mechanical work, such as the paper work and other things of that kind was done through the Association of American Railroads organization." [71]

The record further showed that in connection with the institution of *Ex Parte 123*, which followed upon the heels of *Ex Parte 115*, the A.A.R., being then in existence, took a considerable part: the Board of Directors made certain recommendations for general freight rate increases, which President Pelley forwarded to the member roads on October 22, 1937; the member roads then met on October 29, 1937, pursuant to the A.A.R.'s call; and at that meeting certain changes in the recommendations were discussed and approved, and the roads voted to initiate the general rate increase proceedings and to adopt the plan of commit-

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103, Fifteen Per Cent Case, 1931, 178 I.C.C. 539 (1931); No. 26000, *General Rate Level Investigation, 1933*, 195 I.C.C. 5 (1933); *Ex Parte 115, Emergency Freight Charges, 1935*, 208 I.C.C. 4 (1935), 215 I.C.C. 439 (1936), 219 I.C.C. 565 (1936); *Ex Parte 115, General Commodity Rate Increases, 1937*, 223 I.C.C. 657 (1937), 229 I.C.C. 435 (1938); *Ex Parte 123, Fifteen Percent Case, 1937-1938*, 226 I.C.C. 41 (1938); *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I.C.C. 545 (1942), 255 I.C.C. 357 (1943), 259 I.C.C. 159 (1944); *Ex Parte 162 and 148, Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695 (1946), 266 I.C.C. 537 (Dec. 5, 1946).

[69] X, 3247.

[70] XI, 3515.

[71] XI, 3274.

tee organization for handling the proceedings which the Board of Directors had worked out.[72]

The evidence shows, therefore, that since the formation of the A.A.R. it has assumed a certain initiative in calling (and in formulating recommendations for action by) meetings of the member roads at which the latter have appointed general rate committees in connection with general rate increase cases.[73]

Granted this degree of connection between the A.A.R and the general rate committees, the real question is whether, since the establishment of the A.A.R., these committees, or the A.A.R. in supporting them, have exercised "compulsion" as charged by Georgia. This brings me to the nature and effect of the resolution adopted by the General Rate Committee in *Ex Parte 115*, cited above by Georgia, which declared, with the approval of the A.A.R. Executive Committee:

> "It is definitely understood that all interstate rates will be increased effective April 18, 1935 in accordance with authority granted by the I.C.C. and that the matter of like increases on intrastate traffic will be progressed as rapidly as possible."

As has been noted, Georgia contended in effect that this resolution compelled the railroads to adopt the emergency charges whether they wished to do so or not.

Franklin testified that the resolution was adopted because "it was necessary for the committee, in carrying out the functions which the Commission expected of it, to arrange for the day on which the rates were to go into effect, so that all shippers and shipping points would have the bene-

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[72] All this appears from the minutes in ND-12, Vol. G.

[73] It may be noted that in *Ex Parte 115* the General Rate Committee had been appointed by the railroads pursuant to certain action taken by the old Association of Railway Executives, which was merged into the A.A.R. upon the latter's formation. This appears from S-84, Vol. A.

fit of the same rates and there would be no inequality in the treatment throughout the country.

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"As I have already said, there are so many railroads that, in dealing with the Commission, they necessarily have to deal through a committee, and the Commission, in issuing its orders in general terms, looks to that committee to work out such details, as the matter to which you have just referred."

Upon cross-examination Franklin testified:[74]

> "That resolution was simply, the Interstate Commerce Commission having given the railroads authority to go ahead with the rate increase, then it became necessary to fix a date on which the rates would become effective, and that is all that that resolution does, and it is as simple as it can be."

In order to show that the railroads could act freely and independently in relation to the authorized increases, Tilford presented a list of forty-one cases in which Southern roads filed tariffs in 1935 and 1936, eliminating or reducing the *Ex Parte 115* increases.[75] The Commission itself, in a subsequent report in *Ex Parte 115*, noted numerous exceptions to the permitted increases as follows:[76]

> ". . . The charges were published in a master tariff having countrywide application in connection with individual tariffs making reference to the master tariff. In supplements to the latter tariff some of the charges originally authorized were later eliminated or reduced. . . .
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> "In addition to these changes in the master tariff, many cancellations have been effected by individual

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[74] XI, 3517. His direct testimony above was in X, 3249, 3250.
[75] SD-21, Vol. O.
[76] 215 I.C.C. 439, 445-446.

carriers or groups of carriers on specified commodities moving within or between particular rate territories or subterritories. *In official territory the carriers did not avail themselves of the authorization to add emergency charges to their handling charges at lake ports on lake-cargo coal and iron ore.* In the same territory the charges were removed from brass, bronze, copper and certain other metals in less than carloads and carloads, from magazines, newspaper supplements, bakery goods, grape juice, crude rubber, cigarettes, rayon, and confectionery, in carloads, and from dairy products in carloads and less than carloads. For the same reason the charges were removed from dairy products . . . and canned goods . . . from southern, southwestern, and western trunk-line territories to official territory. . . . In southern territory, on sand, gravel, and crushed stone, the carriers substituted a flat increase of 5 cents per ton in lieu of the emergency charge of 7 percent. . . . In western trunk-line territory the charges have been eliminated from automobiles and canned goods. There have been innumerable other removals of the emergency charges having more limited application." (Emphasis added)

The sentence italicized in the above passage shows that at least in one instance certain carriers refrained at the outset from putting the emergency charges into effect with respect to the handling of a particular type of traffic. It may be fairly assumed that such instances were extremely rare. The defendants mentioned none in the testimony; they referred only to removals of charges after their effectuation—removals which the evidence shows were frequent. It is natural enough that the charges should have been effectuated at the outset with but rare exceptions. As previously stated, the railroads were at the time in acute financial difficulty; they had banded together on a nation-wide basis to seek general rate increases from the I.C.C.; and the temporary emergency charges which the I.C.C. allowed them fell very far short of their expectations and desires, with the consequence that for the next three years the railroads were before the Commission in a series

of proceedings which culminated in *Ex Parte 123* (March, 1938) in a general rate increase of ten percent.[77] Under these circumstances it would be unnatural to infer from the resolution criticized by Georgia that it was intended to compel the adoption of the emergency charges as of April 18, 1935 irrespective of the desires of particular member roads. It would be difficult to suppose that while the railroads apparently felt free to remove the emergency charges in particular instances when it suited them to do so, they nevertheless felt compelled against their will to put them into effect at the start.[78] There is nothing in the record

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[77] Supra, p. 363.

[78] In a footnote at p. 135 of the Final Brief Georgia, recognizing that exceptions had been made to the emergency charges, criticized the resolution as "illicit," contending in substance that a committee could not lawfully require all the increased charges to be effected in the first instance, even though individual roads were permitted thereafter to decide which charges to remove. To show that this was the Committee's purpose Georgia cited a portion of a resolution of the A.A.R. Board on June 20, 1935 (S-65, I, 203), the full text of which was as follows: "On motion, the Board approved the recommendation of the General Committee which was in charge of Ex Parte 115 and directed that the Traffic Department should call attention to the resolution passed by the General Committee in charge of this case and endorsed by the Executive Committee of this Association, that great caution should be exercised in the removal of the emergency charges and that they should only be removed after thorough consideration and then only to the extent that competition requires." This resolution substantially speaks the language of the I.C.C.'s decision in *Ex Parte 115*, quoted in the text above at p. 347, in which the Commission said that: "Where the carriers find it necessary to make exceptions in the application of the charges, avoidance of undue prejudice and preference should always be kept in mind. No exceptions should be made primarily to influence the routing of traffic, to attract traffic from one carrier or route to another, or to favor an industry on one line at the expense of industries on other lines." Similarly, in its several decisions in *Ex Parte 115* and *Ex Parte 123*, the I.C.C. repeatedly cautioned the railroads against frittering away, in an effort to take traffic from each other, the increases which it was granting (see pp. 363-367). It seems reasonably clear that the General Rate Committee's objectives were substantially the same as the I.C.C.'s. Whether or not these were "illicit," as charged by Georgia, because they ran counter

to suggest that the railroads were coerced at the beginning; they clearly were not coerced thereafter; and under the circumstances I accept the testimony of the defendants that the purpose of the resolution was to fix the date of inauguration of emergency charges rather than to compel the universal adoption of them against the will of particular roads.

2. *Georgia's Allegation that the A.A.R. Took Action to "Circumvent" the Commission in Ex Parte 115 and Made the Railroads Go Along with This Action.*

Georgia's next allegation was that the A.A.R. sought to "circumvent" the I.C.C.'s refusal to extend the temporary emergency charges beyond December 31, 1936. To accomplish this circumvention, Georgia said, the A.A.R. asked the member roads to agree that the General Rate Committee be authorized and instructed "to revise the freight rates in any way which in their judgment will produce the greatest increase in revenues consistent with present conditions."

It is clear that allegations with respect to the relations between the railroads and the I.C.C. are irrelevant to this case, except as they may have some specific bearing upon Georgia's charges of coercion and discrimination. In this particular instance, however, Georgia sought to show that the particular scheme of "circumvention" was forced upon at least one protesting railroad (the Elgin, Joliet & Eastern) and that the incident was therefore illustrative of the "coercive and discriminatory price fixing" practiced by the A.A.R. For this reason the facts surrounding the incident must be examined.

These facts begin with certain statements made by the I.C.C. in its decision permitting the extension of the emer-

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to the requirements of the Interstate Commerce Act that individual carriers should establish reasonable rates, is a question which I conclude to be irrelevant to the charges of coercion and discrimination in the present proceeding.

gency charges only until December 31, 1936. The Commission said:[79]

> "Applicants should bear in mind that these charges cannot be regarded as a permanent remedy for their situation and they should explore diligently every possible avenue of improving their situation, not only individually but collectively, through coordination of services and facilities, through revision of the rate structure to meet changed conditions and in such other ways as are open to them. It does not, of course, follow from what has been said that applicants are debarred from attempting to translate any of the present charges into what may be termed permanent rates. That is a matter which we shall leave initially to their judgment, but any rates filed by them incorporating the emergency charges on a permanent basis will be subject to suspension and investigation by us if need therefor appears."

This pronouncement was handed down on June 9, 1936. On June 17, 1936, according to a memorandum to Pelley from Cleveland,[80] which Georgia introduced, a meeting of Cleveland's Traffic Advisory Committee, composed, as previously noted, of representatives of Western, Northern and Southern roads, met to consider the consequences of the decision. According to Cleveland, the Committee thought that the Commission's statement set forth above "would rather appear to be an invitation on the part of the commission to translate the increases into the permanent tariffs" However, there was a real stumbling-block. In the case of the "great bulk of the rates," maximum rate orders previously issued by the I.C.C. were outstanding. Therefore, if new tariffs were filed translating the emer-

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[79] *Emergency Freight Charges, 1935, Ex Parte No. 115*, 215 I.C.C. 439, 464.

[80] S-84, Vol. A, 307; "unsigned but presumably from Mr. Cleveland" as the Southern defendants stated in their Final Brief at p. 277. The caption to Docket No. 3 in S-84, Vol. A, at 305, and the comparison of the resolution there adopted with that recommended in the memorandum, makes this presumption sufficiently conclusive to be taken as a fact.

gency increases into the permanent tariffs, the new tariffs "would automatically be illegal and thrown out by the Tariff Division without even giving consideration to the necessity for their suspension."

Faced with this obstacle, the Traffic Advisory Committee took the matter up informally with the Commission. The subject was "discussed individually with nine members of the Commission and various suggestions were received as to how this difficulty could be taken care of, some advising that such tariffs should be accompanied by a petition seeking relief from outstanding maximum rate orders conflicting therewith and others that instead of doing this that an application should be filed to get relief from these orders and then have the tariffs filed. This is a matter that will have to be determined by the lawyers in charge of the case and will be brought to their attention seasonably."

In order to make progress, the Traffic Advisory Committee recommended that the General Committee which had been handling *Ex Parte 115* be authorized to arrange for the translation of the increases into permanent tariffs "to the extent and in the manner deemed advisable," and "to file for and in behalf of the Member Roads such petitions for modification of outstanding maximum rate orders . . . or relief from provisions of the Commission's Tariff Circular as in its judgment may be necessary in order that these increases may be worked into the permanent tariffs or otherwise continued after December 31, 1936. . . ."

This proposal appears to have followed logically from the discussions which the Traffic Advisory Committee members had had with members of the I.C.C. as described above.

To clothe the General Committee with the requisite authority to carry out the steps proposed, the Traffic Advisory Committee recommended that the A.A.R. Board's assistance be asked in securing the authority from the member roads. On June 26, 1936, nine days after these recommendations had been made by the Traffic Advisory Committee, the A.A.R. Board directed President Pelley "to

canvass and secure from the member-roads authority for the General Committee" to do what had thus been recommended.[81]

On August 7, 1936 the General Committee (presumably having been given the proposed authority) met and recommended that this authority be further broadened so as to permit the Committee "to revise the freight rates in any way which in their judgment will produce the greatest increase in revenues consistent with present conditions."[82]

This was the specific action which Georgia charged was an attempt to "circumvent" the Commission's denial of the extension of the emergency increases. The defendants pointed to certain other provisions of the resolution adopted by the General Committee, as follows:

> "3. That to the extent practicable the commodities should be dealt with from a nationwide standpoint.
>
> "4. That in making such studies only the greatest good to the railroads as a whole shall be the determining factor.
>
> "5. That as soon as the revisions on any commodity are determined they shall be translated into tariffs and immediately tendered for filing with the Commission with petition for modification of any outstanding orders that may interfere with the revisions."

The defendants pointed particularly to the last paragraph as showing that a plan to submit certain rates to the Commission for approval could not be considered as a plan to "circumvent" Commission action;[83] and I so find. It may be noted further that, while the record is silent as to what the General Committee thereafter did, the Class I railroads themselves, some two months later, petitioned

[81] S-84, Vol. A, 305, 306.

[82] S-85, Vol. A, 309.

[83] Tilford of the Louisville & Nashville, when asked if the defendants had sought to circumvent the Commission, replied: "Certainly not. And the Commission always had full control of the matter through the suspension power of suspending our tariff. We could not circumvent the Commission's will if we choose to do so." VI, 1712.

the Commission for permanent increases in rates on certain basic commodities, and that the Commission on October 19, 1937 granted these increases with some exceptions and modifications.[84]

The General Committee's recommendation for increased authority, as described above, was submitted for approval to the member roads in a letter by President Pelley of the A.A.R. on August 8, 1936, the day after the Committee had met.[85] There ensued some correspondence between Pelley and Rogers of the Elgin, Joliet & Eastern Railroad. Rogers objected to giving the proposed authority to the General Rate Committee unless his road could have an opportunity to discuss in advance any proposals for rate changes affecting his road.[86] Pelley sought to allay his fears. In the next to the last of his letters Rogers asked:[87]

> "Will you kindly advise me as to how we will have an opportunity to confer with the Committee unless it is understood that no changes will be made in any rates which might affect us until the matter has been presented to us. If you will advise me further in regard to this, will be pleased to give you our decision."

Pelley replied:[88]

> "Regardless of how the original resolution may have been worded, the General Committee in charge of this proposition intends to call a meeting of the Traffic Executives of the three territories to discuss the program which they will have tentatively adopted and such meeting will be held in Chicago during the week of September 21st. Your Vice-President in charge of traffic will be advised, and I particularly request that he arrange to attend this conference when called.

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[84] As described supra, at p. 358.

[85] S-85, Vol. A, 308.

[86] S-86 to S-89 inclusive, Vol. A, 310-316; and S-90 to S-92, notes 87 to 89 below.

[87] S-90, Vol. A, 317, 318.

[88] S-91, Vol. A, 319.

"I sincerely trust that under the circumstances this will satisfy your apprehension that there is no disposition to handle this matter in any irregular way or in a way that will be reprehensible to your line. We have no doubt but what Mr. Bond will be heartily in sympathy with the program that will be presented and we say this because from past experience we have always found him on the constructive side. That additional revenues must be obtained to take the place of revenues lost on December 31st is apparent. We have no fear of any difficulties as between the General Committee on the one hand and the individual lines on the other, and I do believe, in the face of the position that has been taken by the roads generally, East, North, South and West, that you should not withhold the cooperation of your Company."

Rogers closed the correspondence as follows:[89]

"Of course, if the original resolution is not to be followed out as it reads and the Railroads are going to have an opportunity to discuss any proposed changes in freight rates, prior to their being made effective, it would eliminate the objections which we had to the original proposition, and if the matter is to be handled as outlined in your letter of September 4th, we will be very glad, indeed, to cooperate with the Committee in their efforts to secure additional revenue."

I cannot draw from this correspondence the inference of coercion by the A.A.R. which Georgia suggests.

3. *Georgia's Allegations of Coercive Action in Connection with the Proceedings in Ex Parte 123.*

As stated at page 353 above, before the emergency charges temporarily authorized in ***Ex Parte 115*** had expired, the railroads petitioned the I.C.C. for permanent increases in rates on certain basic commodities; and on October 19, 1937 the I.C.C. granted these increases with some exceptions and modifications.

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[89] S-92, Vol. A, 320.

Immediately thereafter, on October 29, 1937, a meeting of the member roads of the A.A.R. voted to petition the I.C.C. for a general 15 per cent permanent increase in freight rates and for certain increases in passenger fares in Eastern Territory. Such a petition was filed on November 7, 1937, and became known as *Ex Parte 123*. On November 19, 1937 the member roads, at their annual meeting, adopted a resolution, the substance of which was that, in order to keep to the fullest possible extent whatever general increases the Commission might grant in *Ex Parte 123* and thus to check the previous steady decline in revenues per ton mile, no reductions in rates should be made by any railroad without the personal approval of its traffic executive.

Both the origins and the effects of this resolution have been discussed in detail in Part One of this Volume, at pp. 360-394 above, in connection with Georgia's allegations regarding the steps taken to "integrate the territorial associations into the A.A.R." Now it becomes necessary to view the resolution again from a slightly different standpoint, since Georgia has cited it as a part of her attempt to show "coercive and discriminatory price-fixing" on the part of the defendants and particularly of the A.A.R.[90] In considering the resolution from this standpoint, some repetition of what has been already set forth in Part One will be unavoidable.

The text of the resolution, as recommended to the meeting by the Board of Directors, was as follows:[91]

> "In order that there may be no embarrassment caused by any of the representatives of the railroads during the pendency of the Ex Parte 123 proceeding and in order further that whatever the Commission allows in those proceedings should be kept to the fullest extent consistently possible in the future rate structure, to the end that there may be avoided to the fullest

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[90] Final Brief, pp. 137, 138.

[91] Pp. 361, 362.

extent possible the heretofore rapidly downward trend in the average return per ton mile, which has most seriously affected railroad revenues, it is

"Recommended, That the Executives of the member-roads at once instruct their traffic organizations to make no promises with regard to the reestablishment of relationships or reductions in rates which may be authorized in Ex Parte 123 and that the traffic department of each line shall be instructed further to so handle its rate adjustments as to retain to the fullest extent possible such increases as may be authorized in Ex Parte 123.

"It is not the intention of this recommendation to attempt to freeze the rate structure; all proposals are to be handled in accordance with regular procedure, such changes made as may be justified after proper investigation; but it is believed that the traffic executives should keep control of the situation and no reductions in the rates that may result from Ex Parte 123 authorized unless approved by the traffic executives."

The recommendation was unanimously adopted in principle and was referred to counsel and to Cleveland, to be put into final form and issued. As issued it followed the substance of the original, with two additions. One of these affirmed the right of each railroad "to take individual action in any case." The other recommended that rates in existence during the progress of the case, as well as any rates which might be increased as a result of it, should not be reduced except with the approval of the chief traffic executive of the line involved.

Georgia did not expressly charge that the recommendations thus issued were coercive, but the charge was implicit in Georgia's presentation. The defendants, denying any such implications, pointed out (1) that the recommendations were in accord with the unanimous desires of all the member railroads; (2) that the right of independent action by any individual road was expressly affirmed; and (3) that the recommendations had been prompted by admonitions of the Commission and simply represented an at-

tempt by the member roads to conform themselves to these admonitions, the nature of which were as follows:[92]

In granting temporary emergency increases in 1935 the I.C.C. cautioned the railroads against permitting reductions to be made therein for the purpose merely of attracting traffic from one carrier or route to another or of favoring an industry on one line at the expense of industries on other lines. In the 1936 case (*Ex Parte 115*), which extended temporary emergency increases to the end of that year, Commissioner Aitchison criticized the railroads for having made many reductions in these emergency charges in favor of powerful shippers who were in a position to threaten diversion of tonnage—a policy prejudicial to the less powerful shippers. Later in 1936 (in the last of the *Ex Parte 115* decisions), in finally denying any further extensions of the emergency increases, the Commission stated that many reductions in the emergency charges had apparently been made primarily to give one carrier or group of carriers a temporary advantage—prejudicial in the Commission's eyes—over other carriers in the solicitation of traffic. On October 19, 1937, in granting permanent increases in certain commodity rates, the Commission expressed its impatience with the railroads' lack of progress in following the Commission's admonitions, particularly with regard to the revision of the rate structure and the determination of what high spots or low spots ought to be corrected by appropriate adjustments.

In the subsequent proceedings before the Commission in *Ex Parte 123* the railroads' representatives repeatedly assured the Commission that they would resist any efforts to fritter away such increases as the Commission might grant by improvident reductions for casual or competitive purposes, or because of the pressure of shippers threatening to divert traffic. They also promised to take concerted action to restore so far as possible the rates which they had previously reduced below the authorized maximum

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[92] Pp. 347-355, 363-367 above.

reasonable levels; and the Commission, in its decision on March 8, 1938, granted less than the railroads were demanding in the way of general increases, partly on the express ground that the railroads had it in their power to augment their revenues by thus restoring depressed rates to the previously authorized maxima.

In the light of all the evidence I find that the resolution of November 19, 1937 represented a voluntary step unanimously taken by the member roads to conform to certain admonitions by the Interstate Commerce Commission; that the action was likewise in accordance with their own desires to check rate erosion at a time when the roads were in acute financial distress; that the resolution was temporary in nature and was rescinded in January, 1939;[93] and that in formulating and recommending it to the member roads the A.A.R. did not threaten or exercise any coercion.

Georgia, however, seemed to suggest that after the resolution was adopted some form of coercion was exercised to effectuate it. Thus Georgia said that:[94]

> "In the North this resolution was *effectuated by requiring* unanimous recommendation by the Trunk Line Freight Traffic Managers' Committee of all proposed reductions in rates in an effort, as Mr. Franklin said, 'to bring about a stoppage, at least temporarily, of reduction in rates.' In the South, Mr. Kerr recommended that proposed reductions in rates should be approved not only by the chief traffic officer of the proponent line but should also have the concurrence of the chief traffic officers of all initial lines serving the origins covered by the proposal."

With regard, first, to the action taken in the North as described above by Georgia, the record contains the following facts. On October 14, 1937, over a month prior to the adoption of the resolution formulated by the A.A.R., the Traffic Executive Association-Eastern Territory acted on its own account (according to its former Chairman, Bur-

[93] P. 397 above.

[94] Final Brief, p. 138. Emphasis added and citations omitted.

gess) "to meet the Commission's criticism of wasteful eroding of the rate levels. . . ."[95] The substance of the action was that for the time being, and subject to the right of independent action, the Traffic Executive Committees of the sub-territorial association should pass upon all proposed rate reductions. Shortly afterwards (the date does not appear in the record) this provision was relaxed, according to Burgess, by providing that if a subordinate committee, such as the Freight Traffic Managers' Committee, unanimously approved a proposed reduction, "the traffic executives would not require such cases to be submitted to them for their personal consideration."[96] The rule as thus relaxed was the one to which Georgia referred.

It is immaterial whether this modification of the rule occurred before or after the passage of the A.A.R.'s resolution, since the modification was a watering down, and not a tightening up, of the original rule adopted prior to the A.A.R.'s resolution. Consequently the action taken by the Northern roads cannot be regarded as an illustration of coercive activity *by the A.A.R.* Such bearing as the action may have on Georgia's charge of coercive activity *by the territorial associations* will be discussed hereinafter at pp. 604-608.

In the case of the action taken in the South by Kerr, Chairman of the Southern Freight Association, it appears from the evidence that the Southern roads, months prior to Kerr's memorandum to them (which was dated March 12, 1938) had put into effect the recommendations of the A.A.R. for which they had voted at the November 19, 1937 meeting.[97] They had done this individually and without ever ratifying the recommendation.[98] There is no evidence to indicate that their action was anything but voluntary.

Kerr testified that in his memorandum of March 12, 1938, he had added the recommendation (not appearing in the

[95] P. 398 above.
[96] Ibid.
[97] Kerr, V, 1475.
[98] V, 1485.

A.A.R.'s recommendations) that disposition advices covering proposed rate reductions, even after approval by the chief traffic officer of the proponent line, should be released only "with the concurrence of the chief traffic officers of all initial lines serving the origins covered by the proposal." [99]

This was the provision to which Georgia drew particular attention. Kerr testified that, though he had "put it out as my recommendation, nevertheless it originated with the individual lines, and it represented the view of the great majority of the original lines." [1] Apparently there had been complaints about the issuance and publication of rate reductions by particular roads, affecting particular origin points, without opportunity for action by other roads serving the same points, and "the only idea was that they have a chance to get in with publication of the same rates." [2] "The whole object, as I understood it, was merely to give these chief traffic officers of the other lines serving the origin points an opportunity to say what they wanted done, if anything, for their account. The proponent chief traffic officer could still go ahead if he so desired." [3]

Counsel for Georgia drew Kerr's attention to a letter from Koontz, Chief Traffic Officer of the Frisco Lines, stating, with regard to Kerr's recommendation: [4]

> "Recommendation on page 5, considering that possibly the rule as adopted will become a permanent one,[5] brings into issue very prominently the right of an individual line. Am heartily in accord with the recommendation that proposals which stand approved should be released only upon the request of the chief traffic officer of the proponent line, but when you add thereto 'with the concurrence of the chief traffic officers of all

[99] V, 1474, 1480.
[1] V, 1486.
[2] V, 1486.
[3] V, 1613.
[4] V, 1484.
[5] As will appear below, the rule was rescinded in May, 1939.

> initial lines serving the origins covered by the proposal,' are we not going a little farther than we really should go?"

And he then proceeded to characterize this recommendation as "a complete one hundred per cent throttling of the action which an individual line might seek to take after all proper efforts had been put forth to have the matter handled through all interested channels."

He concluded:

> "Just don't like the feature referred to, and for the moment do not feel that I should subscribe thereto."

There is nothing in the record to show whether or not Koontz thereafter went along with the recommendation. Kerr, who thought Koontz's characterization of the recommendation was "absolutely wrong,"[6] stressed the Frisco's right of independent action;[7] and Georgia herself read into the record a letter from the Nashville, Chattanooga & St. Louis Railway approving the recommendation and adding:[8]

> "Of course whatever here is done will not in the last analysis affect the legal right of any line to proceed independently should circumstances arise of such importance that its chief traffic officer feels compelled to take such action.
>
> "I imagine, however, such occasions will now be rare indeed."

The Southern roads rescinded all the rules regarding approval of rate reductions by Chief Traffic Officers in May, 1939.[9]

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[6] V, 1487.

[7] V, 1485.

[8] V, 1481, 1482. Georgia stated in her Final Brief at p. 138 that "two Southern lines" objected to Mr. Kerr's recommendation, but the citation in support of this statement gave as the other objecting line the Nashville, Chattanooga & St. Louis which, as the record above shows, approved it.

[9] Supra, p. 397.

I find (a) that the A.A.R. was not responsible for Mr. Kerr's recommendation to which Georgia objected; (b) that the recommendation was put forward not in furtherance of the A.A.R.'s own recommendations but because of the desires of certain Southern roads; (c) that the recommendation was not shown to have coerced or impaired the right of independent action of any of the lines to which it related. This third finding logically belongs in the portion of the report hereinafter set forth relating to the alleged coerciveness of the territorial associations, but it seems convenient to dispose of it at this point.

This completes the analysis of the evidence relating to the proceedings in *Ex Parte 115* and *Ex Parte 123*.

D. *Action by the Board of Directors of the A.A.R. in Controversies About Specific Rates*

1. *Copper Bullion.*

The record discloses only two instances in which the Board of Directors of the A.A.R. took action to determine or affect the level of particular rates. One instance consisted of a resolution of December 18, 1936 relating to rates on *copper bullion* from the West; the resolution merely requested the President of the A.A.R. "to direct Agent Farmar to call a conference . . . for the purpose of reviewing this situation generally and accomplishing a constructive upward revision in the rates . . . and that when conclusions have been reached that a report thereof be sent to the President of the Association." [10]

This resolution was passed at a time when the railroads were before the I. C. C. in *Ex Parte 115* seeking general rate increases as a way out of their acute revenue difficulties. The resolution was passed, in fact, on the same day that the I. C. C. handed down its Second Supplementary Decision in that case, denying the railroads' petition for a further extension of the emergency charges previously granted.

[10] S-71, Vol. A, 269, 270.

In the course of that decision, as has been noted,[11] the I. C. C., in explaining its reasons for denying the petition, repeated its belief, first expressed in 1931, "that a considerable number of rates could reasonably be advanced substantially," and that railroads should "subject the rate structure to the most detailed analysis," for the purpose of discovering where reductions could be made which might augment aggregate revenues, "and where increases are possible which industry and traffic can bear without harm."

Such was the general setting in which the resolution regarding rates on copper bullion from the West was passed. The record does not indicate the precise considerations which led to its passage. In any event, the projected conference of Western roads was held, but no upward revision of the rates occurred, because, according to Franklin of the Pennsylvania, "the Denver & Rio Grande railroad served notice that it would not concur in any increases in the rates."[12] The matter was subsequently placed on the docket of the A.A.R. Board, with the result that the Western Pacific as well as the Rio Grande announced that it would not concur. The matter was then dropped, and nothing further was done about it, nor was any penalty visited upon the two roads.[13]

The only other instance disclosed by the record in which the A.A.R. Board took action with respect to particular rates was the *citrus fruit* case of 1936, in which the Board advised three Southern roads against making a further reduction in the rates. As noted hereinafter, Etheridge of the Seaboard testified that this was the only instance he knew of in which the Board "recommended against a proposed reduction in rates." A summary of the evidence regarding this case here follows.

2. *Citrus Fruits—The 1936 Case.*

This case involved a resolution of the Board of the

[11] P. 354 supra.
[12] XII, 3626.
[13] Ibid.

A.A.R., dated October 30, 1936,[14] expressing opposition to a further reduction of 10 cents in the rates on citrus fruits from Florida to St. Louis, Chicago and other interior points in Official Territory. Georgia cited this resolution as coercive and discriminatory. The events leading up to the resolution were briefly as follows.

In June, 1936 the Atlantic Coast Line Railroad, the Florida East Coast Railway, and the Seaboard Air Line Railway proposed that the rates on citrus fruits from Florida to all points in Official Territory exclusive of the North Atlantic ports be reduced by 18 cents per hundred pounds. The reason for this action was that prior thereto, because of truck-boat competition, the rates to the North Atlantic ports had been drastically reduced (by even more than 18 cents); this reduction had glutted the Eastern seaboard markets and had also depressed the prices received by the shippers at interior markets; and the shippers, by the proposed reduction to the interior points, hoped to induce a larger movement to those points, and to strengthen the markets on the seaboard.[15]

The majority of the roads in Official Territory, and the Texas and California railroads serving their own respective citrus territories, objected to the proposed 18-cent reduction.[16]

There was then pending before the Official Territory roads a proposal from the Texas and California roads that the rates from California be reduced 8 cents per 100 pounds—a reduction satisfactory to the California shippers. The destination roads in Official Territory were willing to join in a reduction of 8 cents per 100 pounds in the rates from all three origin points. In September, 1936, they joined with the Southern roads in applying to the I. C. C. for relief from the Fourth Section of the Interstate

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[14] S-73, I, 195. The date there given is incorrectly stated as October 20, 1936. The correct date, as shown in Vol. A, 274, was October 30, 1936.

[15] Doss of the Atlantic Coast Line, XV, 4894-4900.

[16] Ibid, 4897.

Commerce Act,[17] which was necessary to permit the 8-cent reduction to be made. On October 25, 1936, five days before the date of the A.A.R. resolution attacked by Georgia, the I. C. C. granted the necessary permission.[18]

The Western railroads were apparently apprehensive lest the Southern roads, having direct access to St. Louis and Chicago, and being able therefore to control the rates to those points without the concurence of Official Territory carriers, would proceed to make an additional 10 cent reduction effective to those points.[19] The Western roads accordingly addressed themselves to the A.A.R., whose Board on October 30, 1936, "after thoroughly considering the proposal of the three Florida lines that they should be authorized to make a further reduction of 10 cents in the rates on citrus fruits from Florida to St. Louis, Chicago, and so-called interior territory . . . and taking into account the objections of the Texas and California originating carriers and particularly having in mind the effect on railroad revenues should a further reduction of 10 cents be made in the rates from Florida," resolved that the President be "directed to advise" the three Southern roads that a further reduction of 10 cents "is not justified and should not be made."[20] And a copy of the resolution was directed

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[17] The long-and-short haul clause, supra, p. 229. The reduction of 8 cents meant that the interterritorial through rates would be less than the sum of the aggregate of the intermediate rates, and this was prohibited by Section 4 in the absence of express authority by the I.C.C. Regarding the application to the I.C.C. in this instance, Franklin of the Pennsylvania testified (at XI, 3348, 3349) that the rates on citrus fruit from Florida "were so low that Fourth Section relief had to be obtained from the Interstate Commerce Commission to maintain them, and that repeated applications had to be made to the Commission in connection with this relief. The granting of this relief by the Commission was constantly opposed by the water lines from Florida, with which the railroads were in competition. The water lines claimed that the railroad rates were too low and they were attempting to get the Commission to refuse Fourth Section relief."

[18] Doss, XV, 4887.

[19] Ibid, 4905; Franklin, XI, 3346-47.

[20] S-73, supra, note 14.

to be sent "to the Chief Executives of all Member-Roads, as the great majority of such roads are directly concerned in connection with this proposal."

The defendants' testimony regarding the nature and effect of this resolution may be summarized as follows:

In the first place, they said, no such further reduction of 10 cents to St. Louis and Chicago alone, to the exclusion of other interior points, which the Western roads apparently were fearing, had been contemplated by the Southern railroads, and no such reduction so limited in area would have been practical. Doss of the Atlantic Coast Line testified:[21]

> "No such rate reduction had ever been favored by the Atlantic Coast Line Railroad, and we were not willing at any time to publish the proposed reductions if made applicable to a restricted area, such as St. Louis, Chicago, and Illinois territory, and I have no basis for believing that either of the two, either of the other two Florida lines would have been willing to make the reductions on any basis other than as stated in the joint proposal of June 23, 1936.
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> * * * * *
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> "Application of the additional 10 cent reduction in the rates to the St. Louis and Chicago areas, without applying the reduction to other Official Territory points, would have created an area of depressed rates on the Atlantic Seaboard and another along the eastern valley of the Mississippi river, with a hump of higher rates in the region between, to the obvious disadvantage and prejudice of the important markets of Detroit, Michigan; Cleveland, Ohio; Pittsburgh, Pennsylvania; Buffalo and Rochester, New York; Columbus, Ohio; and so forth, and of shippers desiring to reach those markets.
>
> "The situation was one which made it impracticable for the Atlantic Coast Line Railroad and the other two Florida lines to initiate and publish reductions in the rates on citrus fruits to some few points in Official

[21] Doss, XV, 4901, 4902.

Territory unless they could be applied to all sections of that territory."

Secondly, the defendants denied that the A.A.R.'s resolution was coercive in effect. Doss pointed out that the I. C. C.'s Fourth Section order referred to above, permitting the 8-cent reduction, had been handed down five days before the adoption of the resolution, and he commented that:[22]

"We, therefore, were not particularly interested in the proposal when the Board of Directors of the Association of American Railroads adopted the resolution, but considered it as already defeated by the failure of the northern lines to concur" (in the further 10-cent reduction).

Doss further testified that:[23]

"We considered the resolution of October 30, 1936 as an expression of opinion by the railroad presidents on the Board of Directors that the additional 10 cents reduction was not justified and would adversely affect the railroads as a whole. . . .

"In such a case I can see no reason why the members of the Association of American Railroads' Board of Directors should not have and express an opinion, but, so far as we are concerned, no one except the State of Georgia has ever suggested to me that the Atlantic Coast Line Railroad or any other railroad is bound to give effect to or follow such an expression of opinion in rate matters."

Similar disclaimers of coerciveness were made by Pelley, President of the A.A.R.,[24] and by Franklin of the Pennsylvania,[25] who also noted that:[26]

"At that time the proceeding known as Ex Parte 115 was still pending,[27] and I have already testified earlier

[22] XV, 4888.
[23] XV, 4908, 4909.
[24] On cross-examination, XVII, 5846-5851.
[25] XI, 3347, and, on cross-examination, 3556-3560.
[26] XI, 3348.
[27] As shown at p. 353 above, at the time of the passage of the October 30, 1936 resolution of the A.A.R., certain emergency in-

that it was in that proceeding that the Commission several times told the railroads not to reduce the rates improvidently."

Etheridge of the Seaboard testified[28] that the resolution was the only instance he knew of "in which the Board of Directors of the Association of American Railroads recommended against a proposed reduction in rates"; that with regard to A.A.R. resolutions generally, they "would be regarded with respect due the action by railroad officers of broad experience and would be given careful consideration," but "I do not think we would regard them as binding"; that the Seaboard had never been coerced by the A.A.R. with respect to any proposed rate action; and that two years later, notwithstanding the resolution, the three Florida lines revived the proposal of an additional 10-cent reduction to all interior points in Official Territory.[29] The proposal failed because the Official Territory roads were again unwilling to concur.[30]

Georgia argued, in support of its allegations of coercion, (1) that the Eastern and Western lines enjoyed "a substantial interest in refrigerator car lines transporting citrus fruits from the West Coast to the East"; (2) that this interest was "substantially represented on the Board of Directors of A.A.R."; (3) that, therefore, the additional reduction in citrus rates proposed by the Southern roads ran counter to the "very strong mutual self-interests of the Eastern and Western lines dominating the Board of Di-

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creased rates, previously authorized by the I.C.C., were in effect. They were due to expire on December 31, 1936. In granting them the I.C.C. had admonished the railroads not to make reductions "primarily to influence the routing of traffic, to attract traffic from one carrier or route to another, or to favor an industry on one line at the expense of industries on other lines." (p. 347 above). The railroads were at that time in grave financial distress, and in the subsequent relief which the I.C.C. granted additional admonishments of the sort just described were made by the I.C.C.

[28] X, 2971.

[29] X, 2972.

[30] Ibid.

rectors"; (4) that, in the absence of concurrence by the Nothern lines, the only area to which the Southern lines could independently effectuate the reductions was the St. Louis-Chicago area; and (5) that "controlling more votes on the Board of Directors than the three-fourths necessary for a decision, the large Northern and Western roads were in a position to force their will upon the South" and to "prohibit the Southern lines making any such reduction." [31]

The defendants objected to the admissibility in evidence of the document from which the statement about the Eastern and Western railroads' interests in refrigerator lines was derived, and I have concluded that the objection should be sustained.[32] Even if the document should be held admis-

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[31] Final Brief, pp. 145, 146.

[32] The document consisted of an extract from testimony by Mr. Sargent of the Chicago & Northwestern before a Senate Committee in 1938 which was engaged in investigating "interstate railroads and affiliates with respect to financing, reorganizations, mergers, and certain other matters" (S-532, XV, 5070, being an additional portion of the hearings of which previous portions appear in AD-11, Vol. D, 188-206). At p. 593 infra, where the testimony at these hearings assumes a larger importance, I have set forth my conclusion that Mr. Sargent's statements, even if he could be regarded as a co-conspirator, were not made in furtherance of the alleged conspiracy and did not relate to any acts or declarations that were in furtherance thereof, and were therefore inadmissible. If the Court should disagree with this conclusion and admit the statements, they consisted in substance of the following. (1) *Many railroads own refrigerator cars:* the Southern Pacific and the Union Pacific own the Pacific Fruit Express. The Santa Fe has "a large ownership of refrigerator cars"; the Pennsylvania, and a number of other Eastern railroads, own the Fruit Growers Express. (Mr. Sargent cited no other roads; neither did he assert that the list was complete.) (2) *Some of the A.A.R. directors have connections with the refrigerator companies:* Mr. Holden of the Southern Pacific is "interested" in the Pacific Fruit Express, supra, and Mr. Gray of the Union Pacific is a director of it; Mr. Clement of the Pennsylvania "is a director" (presumably of the Fruit Growers Express, supra); Mr. Bledsoe (presumably of the Santa Fe) is a director (presumably of a company which owns the Santa Fe cars referred to above). (3) *There should be a national corporation owning all refrigerator cars.* The I.C.C., on the representation of the A.A.R., permitted the existing companies

sible, there is nothing in the record to show that at the time of the resolution in question the lines so interested were represented on the A.A.R. Board; or that, if they were so represented, they had any greater interest in refrigeration profits than the Southern lines represented on the Board; or that profit considerations of this sort played any part in the passage of the resolution; or that the Southern representatives on the Board voted against the resolution; or that, if they voted for it, they did so out of fear, or because they thought it would be useless to resist, on the theory that the decision might be declared "controversial" and be passed by a three-fourths vote and thereby become binding unless submitted to arbitration.[33]

Considering all the evidence, I find no ground for rejecting the testimony of the defendants that the Southern roads in this case had no intention of effectuating the 10-cent reduction into the limited St. Louis-Chicago area, but sought only to effectuate it into *all* interior points in Official territory; that they were defeated in this object, not by the A.A.R. resolution, but by the previously announced refusal of the Official territory roads to join with them in the reduction—a refusal which was repeated when the Southern roads renewed their proposal, contrary to the resolution, two years later.

While no coercion was established, the October 30, 1936 resolution does show that the Board's understanding of its authority extended to a situation in which roads in one territory were proposing to effectuate reductions in rates on a basic commodity which, if made, would compel similar reductions in other territories. The resolution has further significance in that it involved a proposed reduction by Southern railroads.

Georgia argues that what has happened in the past might

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to charge 2 cents a mile. The railroads who do not own these companies do not participate in the profits believed to be derived from this charge. This is unfair. Mr. Sargent, while on the A.A.R. Board, protested in vain against this situation.

[33] In accordance with the A.A.R. Articles, p. 402 supra.

happen again in the future, and that the resolution indicates the power of the A. A. R. to protect the interterritorial rate structure against changes desired by the South for the purpose of moving Southern products northward.

Examined more closely, however, the bearing of the incident on Georgia's case appears to be less direct. In the first place, so far as the evidence discloses, the incident was an isolated one. Secondly, it had no implications of sectional discrimination. This was not a case in which Southern producers were competing with Northern producers in Northern markets and the Northern railroads were opposing rate reductions from the South to the North on the same mile for mile level as those within the North. This was a case in which the Florida, Texas and California producers were at odds as to the amount of a rate reduction into interior points in Official Territory, the purpose of which was to relieve the Eastern seaboard's markets of a glut that had been produced by previous reductions to the Eastern ports caused by truck and water competition. The railroads were interested in the proposed reduction only from a revenue standpoint; they were at that time in acute financial distress and were seeking general rate increases from the Commission, and the Commission was urging them to make greater efforts to conserve and increase revenues.

Under all the circumstances I do not believe that this case could fairly be cited as showing that Georgia runs the risk of action by the Board of Directors of the A. A. R. designed to discourage rate reductions desired by Southern shippers to enable them to compete on an equal mile for mile basis with Northern producers in the Northern markets. Action of this sort, which would align the Board on the side of Northern manufacturers in a competitive struggle against Southern manufacturers, could theoretically take place, but there is no instance in the record of its having taken place, and on the basis of the evidence before me it cannot be regarded as a risk which has any substance or which could be presumed to influence producers in the choice of a locality.

E. *Action by Cleveland, as Vice-President in Charge of the Traffic Department of the A.A.R., in Particular Rate Matters*

1. *The Furniture Case.*

The history of this case is simple; the facts are undisputed; and only the inferences to be drawn from the facts are in issue. Georgia points to a memorandum sent by Cleveland to Pelley, President of the A.A.R., as demonstrating the power of the Board of the A.A.R. to dictate rate adjustments. Georgia also charges in effect that the Southern railroads were restrained, by Cleveland or by other rate association influences, from seeking certain relief from the I. C. C. to which they were entitled.

(a) *The Facts Leading Up To Cleveland's Memorandum to Pelley*

In 1931 the I. C. C. established reasonable classification bases of rates on furniture in the several rate territories and at the same time admonished the carriers "to exercise sedulous care, so far as within or between the territories they may go below the maximum reasonable bases, to avoid creation of undue prejudice and preference as between competing articles and their producers or distributors in reaching common markets. If this is not done, and if any interest shall deem itself placed at an unlawful disadvantage by reason of any special concession to a competitor, the matter may be brought to our further attention with a view to corrective action." [34]

Shortly after this, when it appeared that the maximum rates thus prescribed were too high to meet truck competition, the railroads in Official, Southern, Southwestern and Western territories made generally uniform reductions in the rates, which were published as exceptions to the classi-

[34] *Furniture Case*, 177 I.C.C. 5, 105-106; Dervin of the New York Central, XV, 5213-4.

fications.[35] In 1933, because of continued truck competition, the Western Trunk Line railroads revived certain lower commodity rates which had been in effect prior to the establishment of the exception rates just referred to. This led to demands by furniture manufacturers for reductions in rates from Official territory to Western Trunk Line territory. The Central Freight Association lines thereupon asked the Western lines to restore their low commodity rates to the exception basis, and a joint conference of representatives of the two groups, held in January, 1935, so recommended. The Western lines, however, would not go along with the recommendation, partly on the ground that too much tonnage would then go to the trucks and partly on the ground that the Southwestern lines, which reached important points in Western Trunk Line territory, also maintained some low commodity rates below the exception basis and that the Western lines could not increase their rates unless the Southwestern lines did also.[36]

Thereafter the Southern Railway, in its capacity as a Central Freight Association railroad in Southern Illinois, announced its intention to make certain reductions by way of the establishment of commodity rates, from producing points in Southern Indiana to East St. Louis on traffic destined beyond. The Louisville & Nashville and the Illinois Central announced their intention of meeting the action of the Southern Railway, and in addition the Illinois Central announced its intention of reducing the rate from a point in Indiana to a point in Iowa.[37]

The Central Freight Association lines were very concerned with the situation. If they were to reduce their rates to Western territory, other rate reductions between the different territories, and perhaps within the different territories, would inevitably follow.[38] Some inconclusive dis-

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[35] Dervin, XV, 5214-5.
[36] Ibid, 5219, 5220.
[37] Ibid, 5221-2.
[38] Ibid, 5219, 5220.

cussions were held between the traffic executives of the Central and Western lines in July, 1935, but nothing further took place until March, 1936, when a special committee consisting of a representative of the Southern Railway, a representative of the Norfolk & Western Railway, and a representative of the Central Freight Association suggested to the Traffic Executive Association-Eastern Territory that the whole matter be brought to the attention of Cleveland's Traffic Advisory Committee.[39] The Traffic Executive Association-Eastern Territory went a little further and decided to ask Cleveland to arrange a conference of the traffic executives of the Eastern, Southern, Southwestern and Western lines. Cleveland arranged such a conference, which was held in June, 1936.[40] At that conference the Southwestern lines agreed to study the situation further with a view to seeing whether or not they could go back to the exception basis, and the Western lines also agreed to study the situation further.[41]

On December 9, 1936, nothing further having happened, the Southern-Norfolk-Central Freight Committee of three previously referred to met with Cleveland and told him that unless the Southwestern and Western rate situation could be corrected, the Eastern and Southern railroads would be forced to reduce their rates and would be required to purchase a greatly increased supply of fifty-foot cars, because the minimum weight provisions which accompanied the Western rates were such as to create an unnatural demand for this longer type of freight car.[42]

Following this meeting, on February 17, 1937, Cleveland sent a memorandum to Pelley, President of the A.A.R., recommending that the Board take jurisdiction of the case.

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[39] Ibid, 5222.

[40] Ibid, 5223.

[41] ND-53, Vol. M.

[42] XV, 5224 to 5228; ND-54, Vol. M. The Southwestern lines submitted a memorandum to Cleveland, ND-55, Vol. M, explaining their position.

(b) *Cleveland's Memorandum to Pelley, and Georgia's Allegations Regarding It*

In his memorandum Cleveland recited the history of the furniture rate controversy and stated that "the above situation was properly brought to the attention of this Association by complaints filed under authorization of the Eastern and Southern Traffic Executive Associations with our Traffic Department."[43] After reciting the inconclusive conferences which had been held, Cleveland went on to say (in a passage which for some reason none of the parties discussed in the proceedings before me but which seems to me to be of particular importance, as indicating Cleveland's intention and the meaning of the subsequent passages relied upon by Georgia):[44]

> "I was then requested to obtain an *adjudication of this controversy* by the Board of Directors of this Association. The subject was considered by the Board at its meeting on December 18th, at which time it was recommended that the Board *declare the situation to be a controversial one and take jurisdiction thereof*, and it was further suggested that the facts and arguments of the two contending groups should be received and that the lines be given an *opportunity to be heard* orally, if desired, by the Board at its next meeting on January 29th, and the further suggestion was made that the matter, including the arguments of several groups, be circularized to the Board members well in advance of the meeting, to the end that they might have an opportunity to have the subject thoroughly investigated in advance of having to *determine the question*. The reports were not received from the several groups in time to distribute them in advance of the meeting and, therefore, at the January meeting the subject was postponed until the next meeting of the Board." (Emphasis added)

Cleveland then went on to request that the recommended action be promptly taken by the Board. I shall consider that

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[43] S-74, I, 209, 210.
[44] Ibid at 211.

request in a moment. Before doing so, I think it important to note the language italicized above, which shows that Cleveland had recommended to the Board [45] that it declare the question of the furniture rates to be "controversial". This recommendation clearly had reference to the procedure authorized by Article Four of the A.A.R.'s Articles of Association. Previously, in analyzing the nature and effect of the authority conferred upon the A.A.R. by its Articles, I pointed out that Article Nineteen contained an agreement that in any case declared to be "controversial" under Article Four and decided by a three-fourths vote of the Board after the parties had had an opportunty to be heard, the parties would abide by the decision or go to arbitration and abide by the award.[46] I noted that, according to the record, arbitration had never been resorted to in practice; that the record contained only one example (the *Chicago Great Western Case*) of a dispute declared by the Board to be "controversial"; and that in that case, after a hearing had been held, no decision was ever made. I also noted Cleveland's recommendation that the Board declare the dispute in the *Furniture Case* to be "controversial", and that (as will be seen below) the Board did nothing about it. There can be no doubt, from the language used by Cleveland, which I have italicized above, that he desired the Board to assume jurisdiction under Article Four and to make an authoritative adjudication of the controversy. This finding clarifies the meaning of the following passages at the conclusion of Cleveland's memorandum: [47]

> "1. I recommend and urge that the Board *take jurisdiction of this situation*, for the reason that there has been a *proper appeal* to this Association and for the Association to refuse to handle the subject under such

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[45] Cleveland's memorandum uses the phrase "it was recommended," but it seems clear from the context that the recommendation was his own, and Dervin in his testimony so construed the passage (XV, 5228).

[46] See pp. 402-408 above.

[47] S-74, I, 212.

> conditions would, in my opinion, establish an unfortunate precedent and would lead to the inevitable conclusion by the traffic executives of member roads that they could expect no assistance in having their controversies *adjudicated* by this organization." (Emphasis added)

Here again the italicized language, taken in conjunction with that which has previously been quoted, clearly has reference to the invocation of the procedure for "controversial" cases under Article Four. The use of the word "appeal" obviously means no more than that the Board had been requested to act under Article Four, because, as has been previously pointed out, there was no provision in the Articles for an "appeal" in the ordinary sense—i. e., from the action of a territorial association to the A.A.R., comparable to the appeals within the territorial associations.

Cleveland recognized the difficulty which the Board would have in attempting to "adjudicate" the controversy, saying in this connection:[48]

> "2. A definite recommendation as to what the conclusion to the controversy should be is much more difficult and involves the following questions:
>
> "Shall this Association *endeavor to compel, against their wishes*, a readjustment of rates by a few of the carriers in Southwestern and Western Trunk Line territory notwithstanding the fact that the traffic departments of those railroads immediately concerned are, based upon experience persuaded such readjustment will deprive them of traffic that they are now handling, whereas, on the other hand, there is no question of doubt in my mind but what, taken in the aggregate, the readjustment requested will for the carriers as a whole produce more revenue than should it become necessary for the Eastern and Southern lines to have to reduce their rates and minima to a competitive basis with that maintained by the Southwestern and Western Trunk Line carriers and which in turn would ultimately result in not only a lower basis of rates to

[48] Ibid at 212, 213.

competitive territory than is now in effect but in addition thereto a readjustment of the rate structure within Eastern and Southern territories.

"Considering the nature of the Association and the fact that it is expected to operate in the interest of the railroad industry, and without taking into account the interest of an individual carrier or one group of carriers as against others, I very reluctantly recommend that the Board pass a resolution *requiring* the Southwestern and the Western Trunk Line carriers to make the revision in the rates recommended by the Eastern and Southern carriers." (Emphasis added)

Again, I conclude that Cleveland, in the passages above containing italicized language, had reference to a proceeding under Article Four. These passages were the ones which were particularly singled out by Georgia as demonstrating Cleveland's understanding of the generally coercive nature of the power of the A.A.R. The defendants were at pains, by argument and through the testimony of Pelley, President of the A.A.R., and Dervin of the New York Central, to assert that all the Board of the A.A.R. could do was to make a "recommendation" as to what it thought should be done, which would not, however, be binding upon the railroads.[49] I have previously found that resolutions of the Board in rate matters, as distinguished from decisions under Article Four, were in fact only recommendations, and not binding under the Articles of the A.A.R. Cleveland's language above about an "endeavor to compel, against their wishes," and about "requiring" the Southwestern lines to revise their rates upward, would have been consistent with, and seems to me clearly to be referring back to his request for, a decision under Article Four, which would become binding under Article Nineteen. (It should be noted that even in the event of such a decision the Association had no compulsory powers to carry it out, for the Articles contained no provisions for penalties

[49] Pelley, XVII, 5850; Dervin, XV, 5240-5242.

or other sanctions and no provision for expulsion from membership.)[50]

In short, I find that Cleveland's memorandum cannot be given weight as evidence of the possession of a generally coercive power by the A.A.R. The memorandum is significant only as one of the two instances in the record of a suggested use of the Article Four machinery for disposing of a rate controversy by an authoritative adjudication. The other instance was the *Chicago Great Western Case*, (pp. 428-438), in which the Board, after declaring the question to be "controversial", and after hearing the parties, refrained from making a decision. I have previously stated my conclusion that the mere existence of the Article Four provisions did not, in the light of this record, constitute an overhanging threat which would give to the ordinary resolutions of the Board a force they otherwise would not have possessed (p. 412 above).

(c) *The Inaction by the Board of Directors in This Case*

It has been stated above that Cleveland requested the Board at its meeting of December 18, 1936 to declare the furniture rate question "controversial" and to take jurisdiction thereof for the purpose of adjudicating it; that the necessary data had not been assembled in time for a hearing at the January meeting; and that at that meeting the subject was postponed. Cleveland's memorandum of February 17, 1937 was delivered to Pelley in order to impress upon the Board Cleveland's feeling of the urgent need of the Board's taking jurisdiction of the case. The minutes of the February meeting held on the 26th of that month, however, after noting the receipt of the memorandum, stated that "at the request of Vice President Cleveland, this subject was continued on the docket for consideration at the next meeting."[51] The record discloses nothing more except that at

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[50] Pp. 402-412, 416 above.

[51] S-74, I, 209.

the meeting of April 29, 1937 the Board struck the matter from its docket [52] at Cleveland's suggestion,[53] without ever having taken jurisdiction of the controversy.

(d) *The Subsequent History of the Controversy*

After the Board of Directors of the A.A.R. had stricken the subject from its docket, the Southwestern lines made some sort of a proposal which met with the approval of the Eastern and Southern roads in July, 1937.[54] However, for some reason not stated in the record, no action was taken by the Southwestern lines. Dervin testified that "here the matter stood for almost two years, until finally at a joint conference held on April 11, 1939 by the Western Trunk Lines and Southwestern lines, they concluded that they could not make any increase in their ratings or minimum weights on furniture." [55] This decision of the Western and Southwestern lines was reported at a meeting of the Traffic Advisory Committee on May 17, 1939 at which, according to the minutes: [56]

> "After discussion, the representatives of the Southern and Eastern lines stated that it was not their desire that this matter be pressed further at this time. It was understood the subject will be redocketed if and when requested by the Eastern and Southern lines."

And that was the end of the matter.

(e) *Georgia's Charge that the Southern Roads Were Coerced Into Not Seeking Relief from the I.C.C.*

Georgia pointed out that under the I.C.C.'s decision prescribing the maximum rates on furniture, outlined at p. 491 above, the Commission invited any parties who

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[52] Dervin, XV, 5228, 5229.
[53] Pelley, XVI, 5675.
[54] Dervin, XV, 5229.
[55] Ibid, 5230.
[56] Ibid, 5231.

believed themselves injured by any reductions which might be made in the maximum rates, to bring the matter back to the Commission "with a view to corrective action." Georgia then suggested that while Cleveland ultimately failed in his effort to persuade the Southwestern and Western lines to raise their rates, he did succeed in "persuading the Southern lines not to reduce their rates to eliminate a discrimination of which they had originally complained six years earlier."[57] And Georgia concludes by alleging that:[58]

> "In this instance the coercive and discriminatory rate mechanisms of which the State of Georgia complains operated to perpetuate for six years, at least, a discriminatory situation readily acknowledged as such by the defendants themselves."

The record does not explain why the Southern lines did not elect to reduce their rates or to apply to the I.C.C. for appropriate relief when the Southwestern and Western lines refused to eliminate the reductions made by them. However, there is nothing in the evidence which would justify an inference that the Southern roads refrained from taking action because of pressure or coercion, or even because of mere persuasion by Cleveland or by any rate association. The fact of the matter is that after the Western and Southwestern roads had precipitated the controversy in 1933, three years elapsed before Cleveland's assistance was requested, and during all that time the Southern roads made no move to take their complaint to the I.C.C. There is certainly no basis for suggesting that during that period they were affirmatively restrained from seeking relief, and there is nothing in the record to indicate that any restraint was exercised during the succeeding three years.

I find, therefore, that no coercion has been established in this case.

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[57] Final Brief, p. 141.
[58] Ibid. 142.

2. *Miscellaneous Cases*

(a) *Section 22 Quotations*

The following summary is taken from a detailed analysis of the evidence in Appendix "E" at pp. 876-881 infra.

Under Section 22 of the Interstate Commerce Act railroads may charge reduced rates for carrying government property. They may establish these rates without notice or publication. In 1939 the practice of making them in secret gave rise to a particular complaint of discrimination which reached Cleveland. He wrote about it to the territorial rate association Chairmen in the East, South and West, requesting a discussion of the subject and asking that carriers make no further quotations under Section 22 that would involve other lines and territories without prior conference with one another. Subsequently the rate associations agreed that that should be the policy.

Since this Court has held that Section 22 rates may give rise to unlawful discriminations, like any other rates (*Nashville, C. & St. L. Ry.* v. *State of Tennessee*, 262 U. S. 318), there was nothing improper about Cleveland's request and there was no evidence that in acting affirmatively upon it the territorial associations, and the railroads composing them, were coerced.

Georgia, in the course of cross-examination, also sought to show that a particular resolution of the Traffic Executive Association-Southern Territory, unrelated to Cleveland's action above, further restrained the railroads by providing that Section 22 quotations should not be used to equalize land-grant rates with non-land-grant rates. (Land-grant rates are special rates for government traffic on particular railroads, under Acts of Congress which have since been repealed.) The evidence, summarized in Appendix "E", indicated that the resolution was in accord with a long-established practice of the railroads, and no coercion was shown.

(b) *Soda Products Agreement*

The evidence, summarized in Appendix "E" at pp. 881-887, was to the following effect. Rates on soda products were sensitive to any adjustment, due to keen competition between various producing areas in the North, South, Southwest and Pacific Coast. A series of interterritorial controversies occurred in 1935 and 1936, resulting from adjustments at particular points in Official and Southwestern territory which had repercussions elsewhere. Cleveland called a conference of special committees selected by each territory, to consider the whole problem. At the conference the committees arrived at an agreement, the substance of which was that soda rate proposals would be interchanged, and that proposals in one territory objected to by another would be held in abeyance pending a conference between representatives of the carriers involved. The agreement broke down in practice. Independent action was freely taken, and there was no evidence of coercion by Cleveland or by the associations.

(c) *Citrus Fruits—The 1938 Case*

In this case, Secretary Wallace in a speech on October 24, 1938 referred to an expected large surplus of citrus fruit, and indicated his intention of asking the railroads for rate reductions to aid in the marketing process.[59] Cleveland, taking note of the speech, on October 25 wrote to the traffic executives of the major carriers of citrus fruit in the producing areas of Florida, Texas, Arizona and California, urging that "no commitments should be made by any single origin group but that when requests are received they should be handled collectively by the lines in the origin territories so that there may be avoided the possibility of one territory taking action which automatically is going to force another territory to do the

[59] S-93, I, 213.

same."[60] Cleveland also stated that he would put the matter down for discussion at the November meeting of the Traffic Advisory Committee.

Four days later Secretary Wallace, in a letter to the Chairmen of each of the territorial rate associations in the producing areas,[61] suggested a basis of rate reductions. He recognized that the reductions "could not well be accomplished by separate and differing measures of reduction from the different producing areas.

"It could best be accomplished, it is believed, through a uniform basis of reductions set out in a uniform manner."

There was no conflict, therefore, between Cleveland and Secretary Wallace with regard to the need of interterritorial group consideration and joint action, whatever that action might be.

On November 16, 1938 the scheduled meeting of the Traffic Advisory Committee was held in New York. At that meeting the origin lines from all producing territories were represented by their Chief Traffic Officers, and there was a substantial representation of intermediate and destination carriers.[62] After hearing the views of two representatives of the Department of Agriculture and the President of the Federal Surplus Commodities Corporation,[63]

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[60] Ibid at 214.

[61] S-94, I, 214, extracts from letter to Kerr of the Southern Freight Association. The full text appearing in Vol. A, 322 shows at 325 that Secretary Wallace said that "this same letter and the same [rate] basis is also being submitted to the chairmen of all other associations in whose territories are located orange and grapefruit producing areas in the interest of expediting consideration of the subject, a copy of the proposal is also being sent to all associations whose members are being asked to concur therein."

[62] As reported by Cleveland in his reply to Secretary Wallace, S-99, I, 218.

[63] Georgia charged that "when the Wallace request was received by the interested carriers they advised the Department of Agriculture to contact Mr. Cleveland. . . ." (Final Brief, p. 147). What actually happened was that Tapp, the President of the Federal Surplus Commodities Corporation, had talked to some members of the

the meeting unanimously directed Cleveland to write to Secretary Wallace explaining the reasons why the railroads felt that they could not make the requested reductions.[64] Cleveland sent such a letter to Secretary Wallace

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Traffic Advisory Committee about Secretary Wallace's request and had received the suggestion from them that it might be desirable for him to explain the situation to the Traffic Advisory Committee at its next meeting. Tapp then asked Cleveland if Cleveland could arrange to let him talk to the Committee. Cleveland, after reciting these facts in a letter to the Committee on November 3rd, stated that: "I told him I would be very glad to and I knew you would be interested in hearing what he desired to put before you. . . . I might state that Mr. Tapp thoroughly understands that no conclusions can be reached and that he is simply there to place before you the information which he believes you should have before reaching any conclusions with reference to the request you have received. I fully appreciate that it is not desirable or practical ordinarily to have shippers attend meetings of this Committee. I am sure, however, under the circumstances that you will agree with me that we must extend Mr. Tapp an opportunity to meet with us as he has requested." (ND-16, Vol. C)

[64] S-96, I, 217. The full text in Vol. A, 330 shows that Tapp and two representatives of the Department of Agriculture were present. Georgia charged that: "At the conference the individual railroads placed their rubber stamp of approval upon Mr. Cleveland's draft of refusal of Secretary Wallace's request, on the condition that Mr. Cleveland could exact a gentleman's agreement from competitive water carriers that they too would refuse a reduction, should one be solicited." (Final Brief, p. 148) There was no evidence that Cleveland had drafted a reply to Secretary Wallace in advance of the meeting, and the minutes of the meeting, which instructed Cleveland to reply to the Secretary's letter, implied that no draft had been presented. Two days after the meeting Cleveland sent the members of the Committee "copy of my proposed answer" and asked for telegraphic approval or telegraphic suggestions or changes. (S-97, Vol. A, 331; I, 217) The record does show that Cleveland wrote the interested railroads in advance of the Committee meeting on November 16th that he would prepare "a suggested final reply" to Mr. Wilcox of the Department of Agriculture "which will be distributed at the meeting in New York, providing your conclusions are such as I anticipate may be reached." (S-95, I, 216) It appears from the defendants' evidence that Wilcox had written to Cleveland enclosing a copy of Secretary Wallace's letter to the territorial rate association chairmen and asking for an opportunity to discuss the possibility of advancing consideration of the subject by the lines concerned. (AD-13, Vol. D, 211) Cleveland had replied to this

on November 25, 1938, after clearing its text with the members of the Committee (representative as they were of the lines in each of the territories) and with the Florida East Coast Railway and the Western Pacific Railroad.[65] In this letter Cleveland referred to the financial plight of the railroads, which he described as "the most critical that has existed in the century of their operation." He stated that the existing citrus fruit rates had been abnormally depressed below the reasonable maxima authorized by the I.C.C., and that still lower land-grant rates would have to be charged on a substantial portion of the crop which would be moved by the Federal Surplus Commodities Corporation on government bills of lading. He also expressed the railroads' fear that, if reductions were made on citrus fruits, they would be confronted with "demands for reductions on many other commodities, in connection with which arguments of the same general nature would be advanced as that presented in respect to citrus fruit."

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letter expressing his willingness to meet with Wilcox and saying that he had docketed the subject for consideration at the November 16th meeting of the Traffic Advisory Committee. (Ibid at 212) The record does not indicate the nature of Cleveland's "suggested final reply" to Wilcox, nor does the record show whether such a letter was ever prepared or, if prepared, whether it was considered at the Traffic Advisory Committee meeting. The minutes of the meeting do not mention it. With regard to the alleged exaction of a "gentleman's agreement" from competitive water carriers to refuse a reduction if one were solicited, the minutes of the November 16th meeting show that the railroads instructed Cleveland to ascertain what the position of the United Fruit Company would be if it received a request for a reduction. The day after the meeting Cleveland discussed the subject with an officer of the United Fruit Company and was advised that he would decline such a request if it were received. (S-97, I, 217, 218). The exhibits contained no evidence of any gentleman's agreement, and Doss of the Atlantic Coast Line testified that the railroads needed the information about the intentions of competitive water carriers because outstanding Fourth Section orders of the I.C.C. made the rail rates dependent on the truck-water rates. (XV, 4918-4921; *Citrus Fruit From Florida to North Atlantic Ports*, 211 I.C.C. 535)

[65] S-99, I, 218-220.

There was some evidence that Cleveland from the outset viewed Secretary Wallace's request with disfavor,[66] but there was no evidence that his views were not fully shared by the railroads, or that the reply which he sent to Secretary Wallace on their behalf, after unanimous approval by them, represented anything but their own freely arrived at conclusions.[67]

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[66] In his first letter to the origin railroads, dated October 25, 1938 (S-93, supra, Vol. A, at 321), Cleveland, after referring to Secretary Wallace's speech, and to information previously furnished by the Department indicating that overproduction was likely to be chronic for a long time, expressed his opinion "that if emergency rates should be made this year that you will have the same demand for many years to come." In his second letter to the railroads, dated November 2, 1938, Cleveland, as previously stated in note 64 supra, said that he would prepare a suggested final reply to Wilcox which would be distributed to the November 16th meeting, "providing your conclusions are such as I anticipate may be reached." The implication was that Cleveland expected a negative answer to be given to Secretary Wallace's request.

[67] Georgia implied that Oliver of the Southern Railway had indicated to the Growers' and Shippers' League of Florida the willingness of his road to consider Secretary Wallace's request. (Final Brief, p. 148; proposed Finding 250 at p. 256) However, Oliver participated in the November 16th meeting in New York and joined in the unanimous conclusion to decline the Secretary's request. (S-101, I, 220) Georgia relied on a letter from Kerr, Chairman of the Southern Freight Association, to Cameron of the Illinois Central, dated December 5, 1938 (S-101, I, 220), in which Kerr stated that what Oliver had said to the Florida shippers was that the Southern Railway was willing "to concur in the *restoration of the former proposal to reduce rates to CFA* [Central Freight Association] *and IFA* [Illinois Freight Association] *territories.*" (Emphasis added) The "former proposal to reduce rates to CFA and IFA territories" evidently meant the proposal made in 1936 by the Seaboard, the Atlantic Coast Line and the Florida East Coast Railroad to reduce citrus fruit rates into the territories in question by 18 cents—a proposal covered at pp. 482-491 above, "Citrus Fruits—the 1936 Case." As there described, the Official territory lines were willing to concur only in a 10-cent reduction, which was duly effected. Etheridge of the Seaboard testified that "the three Florida originating lines revived the proposal [i.e., for an additional 8 cents] two years later, but, being unable to secure the concurrence of carriers in Official territory, they could not proceed with publication." X, 2972. I conclude that Kerr's letter, reciting Oliver's expression

I find no coercion in this case.

(d) *The Paper Case; and Iron and Steel Articles*

These two cases are fully analyzed in Volume Three, which deals with discrimination. They are significant chiefly because they deal with rate controversies between Southern and Northern roads, and Georgia relies upon them to support the charge of discrimination.

In each of them Cleveland played an incidental part. In each of them he called and presided over several conferences. In each of them, after reviewing the evidence, I found in the *Paper Case* at p. 721, and in the *Iron and Steel Case* at p. 767) that there was no showing that he had acted otherwise than as a mediator, or had attempted directly or indirectly to exert any pressure on the Southern roads to yield to Northern proposals.

II. *The Alleged Coerciveness of the Territorial Rate Association Procedure*

The larger part of Georgia's case on coercion related to the procedure of the territorial associations, and had no direct connection with the Association of American Railroads. It was presented under a number of headings which here follow.

As is true throughout the Report, all statements about rate association procedures relate to the agreements in effect at the time of the hearings before me, and do not include changes made in the agreements later submitted to

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in 1938 of the Southern's willingness "to concur in the restoration of the former proposal," had reference to this attempted revival of the 1936 proposal by the three originating lines. It is true that on cross-examination at IX. 2703-2709 regarding the 1938 case and the meaning of Kerr's letter above, Oliver seemed to think that the "proposal" mentioned in Kerr's letter had reference to Secretary Wallace's proposal. His testimony on this point, however, was uncertain; he had not seen Kerr's letter before; and the construction which I have given to the letter above seems to me to be the only one which makes sense in the light of the whole record.

the I.C.C. for approval under Section 5(a) of the Interstate Commerce Act.

A. *Delays*

Georgia argued that the record was "replete with instances of rate proposals which were held in abeyance for years by opposition in the hierarchy of rate bureaus."[68] In support of this statement Georgia cited seven instances,[69] six of which (gums and resins; logs from Alabama to Alta Vista, Virginia; tin plate decoration-in-transit; wine from Atlanta to Official Territory; agricultural implements; and paper and paper products) are among the detailed case histories presented by Georgia to illustrate "coercive and discriminatory price fixing."

These case histories are analyzed in Part Two of Volume Three of this Report. It is impossible to consider the time periods involved in them without a full statement of the peculiar facts of each case. The real question is whether under the given circumstances the proponent of a rate, because of delays ascribable to association procedure, felt constrained to acquiesce in unfavorable committee action. It is sufficient to state here that the evidence in the six case-histories mentioned above does not warrant a finding of delay in the coercive sense just described.

The seventh instance cited by Georgia (not covered in this Report) related to cotton linters. This involved intermittent attempts, from 1940 to 1946, by a dealer in cotton linters in Atlanta, Georgia, to obtain from Southern carriers storage-in-transit privileges at points in Southern

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[68] Final Brief, p. 66, under the heading of "Coercion."

[69] In proposed Finding No. 123, Final Brief p. 235. One citation in this Finding appears to have no connection with the quoted statement: IV, 1226 (a passage relating to the National Industrial Traffic League agreement). Another citation (XII, 3732) contains some general references by Tannehill of the Central Freight Association to certain appeals in a statistical exhibit offered by him (ND-20, offered at XII, 3708), the references being insufficient to indicate the nature or extent of the time periods involved.

territory.[70] (Such privileges consisted of permission to break a through route shipment at a particular point for purposes of temporary storage of the commodity without losing the benefit of the through rate, the through rate normally being lower than the combination of local rates.) The Southern carriers repeatedly, both individually [71] and through the Southern Freight Association,[72] declined to grant the request. The shipper at the outset complained informally to the I.C.C. but never followed this up with a formal complaint.[73] In the record of this incident I can find no evidence that the outcome would have been any different had the Southern Freight Association never been in the picture. Nor is there any evidence that procedural delays affected the outcome.

The defendants introduced exhibits which showed that during a three-months period in 1945, 960 proposals were acted upon by the Trunk Line Association; that 92.40% of these were approved; that the average number of days from receipt of the proposal to the date of approval was 42.45; and that in the case of the small fraction disapproved the

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[70] The evidence was developed solely in the cross-examination of Oliver of the Southern Railway, IX, 2749-2788.

[71] The evidence begins chronologically at IX, 2754 with a letter from the I.C.C. on May 25, 1940 to four individuals, two of them being identified in the record (at IX, 2753 and 2764) as representatives of the Southern Railway and of the Western Railway of Alabama and the Georgia Railroad respectively, against which roads the shipper was informally complaining because of refusal to grant the privilege. One of the last communications in the record was a letter to the shipper, written by a Southern Railway representative on March 1, 1946 (IX, 2766) saying that: "Please see your letter February 9 relative to application for storage in transit on cotton linters at Atlanta and other Southeastern points. I have made some investigation and find this question has been coming up periodically for the past several years. . . . I am afraid unless additional information supporting your application is filed with the Association the member lines will not agree to reconsider the subject if it is again brought before the Association."

[72] IX, 2764-2767 (1941 and again in 1944).

[73] IX, 2758.

handling averaged 71.92 days.[74] Corresponding time periods in Central Freight Asociation for the same period were 43.79 days up to date of approval and 67.65 days up to date of disapproval.[75]

It appeared from these exhibits that after *approval* of a rate, some three months on an average elapsed before the *effective date* of the rate change. Georgia laid much stress upon this lapse of time. The defendants, however, introduced evidence which was not controverted, to show that this lapse of time was due not to rate association procedure but to a number of other factors including the necessity of making various technical calculations and computations incident to the translation of proposals framed in general terms into the form necessary for tariff publication; the fact that the Interstate Commerce Act requires the giving of thirty days notice of each change in published tariffs; and the necessity, in some cases, of obtaining Fourth Section relief from the Interstate Commerce Commission before publishing the rates.[76]

The exhibits showed that, taking into account all elements of delay of every sort, the average number of days from receipt of a proposal to the *effective date* of the rate adjustment for the period studied was 138.40 in the Trunk Line Association, and 148.22 in the Central Freight Association.[77]

Franklin of the Pennsylvania contended that "the conference procedure expedites handling for the benefit of the shippers"; and that such delay as exists in that procedure "is necessary for the protection of other shippers: frequently a competing shipper whose interests would be affected or whose markets may be jeopardized asks for an opportunity to appear before one of the conference com-

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[74] ND-22, Vol. J.

[75] XII, 3709.

[76] Hodkinson, XII, 3779 to 3781.

[77] Page 63 of ND-22, supra; XII, 3734.

mittees and asks that the matter be postponed to provide him with this opportunity."[78]

He testified that it was possible through the conference method to operate expeditiously in emergencies and gave as an illustration the establishment during World War II of all-rail rates on coal from the southern West Virginia fields to New York piers for water shipments in New York and New England. The traditional route had been by rail to Hampton Roads and thence by water to New York and New England. The submarine menace made it necessary to adopt the substitute route. A large number of railroads were involved; "the committee procedure made it possible for all these railroads to make arrangements for the establishment of joint all-rail rates on the same day that the request was submitted. This would have been simply impossible except for the committee procedure."[79]

Finally, with regard to shippers, Franklin asserted that they were free at any time to go to the Interstate Commerce Commission with complaints about rates but that normally they would first file their requests with the appropriate Association for committee action. By doing this, he said, "they have everything to gain and nothing to lose."[80] He added:[81]

> "An indication that the shippers are apparently able to get what they want from the conference method without having to go to the Interstate Commerce Commission is the fact that the number of formal complaints filed before the Interstate Commerce Commission, involving rail rates throughout the entire United States, has been declining from 1021 in 1931 to only 291 in 1938 and 238 in 1945. To my mind, that can only mean that the shippers are better satisfied with what the carriers are doing and we are not finding so much reason to indulge in the expense and trouble of litigation."

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[78] XI, 3294, 3295.
[79] XI, 3296.
[80] Ibid.
[81] XI, 3297.

Similar testimony lauding the general efficiency of the rate bureau procedure was given by several representatives of Southern carriers.[82] Other testimony by the defendants to the effect that delays before the I.C.C. are avoided by the rate bureaus, has been reviewed in Part One at pp. 226, 227 above.

No shippers were called as witnesses by either the plaintiff or the defendants in this case.

Without attempting to pass upon the question of whether the rate association procedures might not be expedited by changes in methods or structure or both, I find on the basis of the foregoing evidence that the delays, such as they are, are not coercive.

B. *The Allegedly Binding Requirements of the Territorial Rate Association Rules.*

The defendants, said Georgia, "deny the compulsive character of rate bureau procedure and point to the specific provision in each bureau reserving to the individual carrier the right to take independent action. Analysis discloses, however, that the asserted retention by each carrier of 'liberty of individual action' is, for a number of reasons, a shadow devoid of substance."[83]

In support of this contention Georgia made a number of charges, having to do partly with the procedural requirements, and partly with certain economic factors. With regard to the procedural requirements, which I shall consider under this heading "B", Georgia made three principal contentions: (1) that the defendants had agreed to submit all their rate proposals to their respective associations before filing the proposals with the I.C.C.; (2) that having so submitted their proposals they agreed to obtain the associations' approval before filing the proposals with

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[82] By Sheppard of the Illinois Central, VII, 2135; by Oliver of the Southern Railway, IX, 2585; and by Doss of the Atlantic Coast Line, XV, 4839-4842.

[83] Final Brief, p. 67.

the I.C.C.; and (3) that in the course of seeking such approval they agreed to follow certain appellate requirements laid down by the associations' rules.[84]

I shall consider these charges in order.

1. *Georgia's Charge that the Defendants Agree to Submit Rate Proposals to the Associations Before Filing Them with the I. C. C.*

(a) *In Official Territory.*

The rules provide that:[85]

> "While it is, of course, understood that each carrier retains its full liberty of individual action, it is expected that changes in rates, rules and regulations that are subject to tariff publication will not be made until the carriers have had the proposal passed upon by the proper Trunk Line Association Committee."

While the rules in Official Territory (and in the South also) are not embodied in formal agreements, they were adopted by the members and may fairly be treated as agreements among the members as to the procedures to be followed.

With regard to the phrase "it is expected that" in the foregoing quotation, Franklin of the Pennsylvania testified on cross-examination that the word "expected" meant "hoped", "hoped for".[86] He conceded that "generally speaking the railroads submit all changes to the conferences" and that he did not know of a single case in which the Pennsylvania Railroad had taken independent action without first having filed its proposal with the appropriate Committee.[87] His attention was further directed to a rule

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[84] These charges appear at pp. 41-51 of the Final Brief; I have paraphrased the headings and reduced them from four to three in the process.

[85] ND-31, Vol. L, 156; S-109, I, 229; being rules issued by the Trunk Line Association General Freight Committee to all carriers in Trunk Line Territory on January 2, 1935.

[86] XI, 3421.

[87] XI, 3421, 3422.

covering appeals to the Traffic Executive Association which states that:[88]

> "The foregoing provision for consideration of questions on appeal is not to be construed as authorizing any departure from the present procedure whereby any and all changes in fares, rates, rules and regulations shall first be presented by proposals to the Traffic Association having jurisdiction."

Franklin was asked whether this rule did not make the "expectation" into a certainty but he replied in the negative:[89]

> "These rules and regulations are what we expect and hope the railroads will follow, but in each instance, as I have shown you, they are departed from where it is found necessary or desirable in the judgment of the railroads to do so."

Franklin gave one illustration of a case in which the New York Central changed certain rates without submitting the matter at all to the appropriate Committee.[90] Burford of the Erie, who become Freight Traffic Manager of his road in 1931 and Assistant Vice President in 1939,[91] could recall only one instance in which the Erie filed a proposal with the I. C. C. without first submitting it to the Trunk Line Association.[92]

Burgess of the B. & O. testified generally as follows:[93]

> "It is true that the customary procedure contemplates that a carrier will, before filing a tariff initiating a rate change, present the proposed change to the appropriate committee so that it must be considered by other interested lines and the shippers, but the right of a member to decline to follow that procedure in any

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[88] Vol. L, ND-31, p. 143; S-108, I, 228.
[89] XI, 3431.
[90] XI, 3422
[91] XII, 3666.
[92] XII, 3682, 3683. Georgia pointed out that the instance in question involved a transit privilege, a matter ordinarily treated as local to the railroad on which the transit point is situated. Cf. *Central R. R. Co. of N. J.* v. *U. S.*, 257 U.S. 247, at 255.
[93] XIII, 4104.

case, and to by-pass all committees and the association entirely by directly filing its tariff containing the desired change with the Commission without any prior committee action at all, is clearly and definitely recognized. This recognition is found not only in the rules of procedure themselves, but it is found in the actual practice followed by the members."

(b) *In Southern Territory*

The Articles of the Southern Freight Association provide that:[94]

"All proposals for changes in rates, rules and regulations made by member or other lines shall be addressed to the Chairman, and copies in sufficient number furnished for distribution to member lines. . . ."

Another rule, adopted in January, 1934, and described by Kerr, Chairman of the Southern Freight Association, provided in substance that if a carrier declared a rate proposal to be of an emergency character, it would by-pass the regular committee procedure and go direct to the Executive Committee (the topmost Committee of the Association) for action.[95] Prior to the adoption of this new procedure, Kerr said, many proposals were independently announced because of the necessity for speedy action. This necessity arose as the result of the pressure from truck competition, accentuated by the fact that the motor carriers were then unregulated and were not required to publish their rates so that the railroads, in Kerr's language, "were facing a rather difficult problem in trying to find out what rates these motor carriers were charging. The carriers, the individual carriers, would get the best information they could on that point and endeavor to establish such rates as might be necessary to meet the motor carrier competition."[96] Whenever the information could be obtained, quick action was

[94] Art. IX(a), SD-2, Part XI, p. 6 of Vol. N; S-160, I, 275.
[95] Art. X of SD-2, note 94 supra; Kerr, IV, 1215,1314.
[96] IV, 1216. Kerr pointed out that the Motor Carrier Act was not passed until 1935 and that the motor carriers were not required to file their rates with the I.C.C. until May 11, 1936.

required, and until the adoption of the new procedure this quick action was obtained by filing independent announcements.[97]

The new procedure, according to Kerr, "enabled the carriers to effect publication just about as quick as the independent announcement had done, but, at the same time, it resulted in a very orderly distribution of the information."[98] While the emergency proposal procedure was adopted primarily to meet motor competition, the procedure was not limited to any particular class of rates but could be used whenever for any reason a carrier felt that speedy action was essential.[99]

In spite of this procedure, Kerr testified that "it is quite frequently the case that our member lines will file notice of independent action without any proposal being filed and, therefore, there is no opportunity for any consideration or disapproval by the Committee."[1]

On the other hand, Etheridge of the Seaboard testified that it was only "rarely" that this was done,[2] and Oliver, under cross-examination, stated:[3]

> "There is nothing to prevent me from making a rate without any reference at all to the Southern Freight Association, but, in the general interest, in order to see that everybody may be advised of what we are doing, and what we propose to do, we put up proposals through the Southern Freight Association. . . ."

It seems clear that in Southern, as in Official Territory, it is exceptional for a road to publish a rate without first filing it with the Association. Curiously enough, the testimony indicates that the exceptions are more frequent in

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[97] IV, 1216.
[98] IV, 1217.
[99] Ibid.
[1] IV, 1237. To the same effect, 1238. ("Q. Now, my question is whether, in view of the working out of these emergency proposals you have, since that time, in fact had many independent actions without filing? A. Yes, sir. . . .")
[2] X, 2956.
[3] IX, 2687, 2688.

the South, where the language of the rules do not expressly give the right to dispense with filing,[4] than in the North, where one of the two applicable rules set forth above expresses such a right. The differences in the degree of independent non-filing, however, as between South and North, such as they may be, do not seem to be important. In both territories it is not the precise wording of the rules which count, but the understanding of the carriers that the regular filing of rate proposals with the associations is in the general interest of carriers and shippers, and that such filing is called for under the railroads' agreement with the National Industrial Traffic League.[5]

2. *Georgia's Charge that the Defendants, Having Submitted their Proposals to their Respective Associations, Agree to Obtain Association Approval of the Proposals Before Filing Them with the I. C. C.*

After pointing to the committee structure and procedure in the associations, Georgia contended that "it is beyond cavil that the rules of Trunk Line and Southern Freight Associations contemplate that member lines before filing rate proposals with the I. C. C. shall not only file the proposals with their respective Associations but shall also obtain the approval of those Associations, particularly if the proposal involves a reduction."[6]

The defendants laid great stress upon the provisions

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[4] In addition to the filing rule set forth above (note 94, p. 515), and the provision for emergency handling after filing, which contain no exceptions, the over-all provision for independent action in the Southern Freight Association Articles states that "each member line . . . reserves the right to take separate and independent action with respect to any rate, rule or regulation *considered by member lines or committees thereof, or submitted by the Chairman in a mail proposal. . . .*" (Emphasis added). SD-2, Part XI, p. 7, Vol. N.

[5] The agreement between the National Industrial Traffic League and the railroads, described at pp. 248-252 above, provides that "proposals for all changes in rates, rules or regulations will be placed on the Public Docket."

[6] Final Brief, pp. 45, 46.

in the rules for independent action, and upon the extent of the action so taken. The evidence is summarized below.

(a) *Evidence of Independent Action in Official Territory*

The *Presidents Traffic Conference*, which stands at the apex of the several rate associations in Official Territory, provides in its rules of procedure "that no carrier surrenders anything of its individual liberty of action," and that "the filing of appeals shall not deprive any carrier of its right of individual action. . . ."[7] I have previously referred to Burgess's testimony in which he said that the Presidents Traffic Conference met only once during the four years in which he was Chairman of the Traffic Executive Association-Eastern Territory and "its meeting then was futile because the line whose action was up for review went ahead and did as it had announced it was going to do"—in other words, it took independent action.[8]

In the *Traffic Executive Association-Eastern Territory* the provisions for independent action are as follows (emphasis supplied):[9]

> "The action of a majority of the members present at a meeting of the Association shall be recognized as the action of the Association, it being understood, however, that *no carrier surrenders anything of its individual liberty of action.*"
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> • • • • • • •
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> "*If the Traffic Executive Officer decides that his line will not observe the Association action*, but must take individual action, either with respect to a subject directly docketed by a member or upon appeal from the recommendation of a subordinate committee, *notice shall be given to the Traffic Executive Association at a regular meeting in person by the Traffic Executive of such line* (unless the Chairman has received notice from the President of any line that for reasons such as extended absence or illness the Traffic Executive of such

[7] S-107, Vol. A, p. 346; Burgess, XIII, 4147, 4148.
[8] Supra, p. 264.
[9] Vol. L, ND-31, p. 143.

line is to be represented by another officer of the Company as designated by its President), *that tariff is to be filed not less than ten days thereafter* and will be made effective on not less than statutory notice."

These provisions for independent action did not appear in the original Articles of Association, which were adopted immediately following the termination of Federal control in World War I. Soon after the adoption of the Articles, one of the members indicated his view that the action of the majority of the Association was final and binding. Thereupon, on May 5, 1922, Ingalls, Traffic Vice-President of the New York Central Lines, wrote the Chairman of the Traffic Executive Association-Eastern Territory saying:[10]

"It has never been my understanding that such action had any such effect, or was in fact, anything more than advisory, leaving it to each individual carrier to take such action as it might see fit to take.

"I have always been governed by this understanding and expect to continue to be so governed in the future. I do not think there can be any doubt of the correctness of this position, but if any members of the Association have any different understanding relating to the matter, it seems to me it would be highly desirable that this matter be taken up at the next meeting so that it may be understood by all that in participating in those conferences no carrier surrenders anything of its individual liberty of action."

As a result of Ingalls's request the Traffic Executive Association-Eastern Territory at its next meeting adopted express provisions authorizing independent action, substantially in the present form reproduced above.[11]

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[10] The letter is reproduced in Vol. L, ND-31, p. 128.

[11] With regard to these provisions, counsel for Georgia contended (see the colloquies at XIII, 4217-4226) that the requirement of giving personal notice to the Association, and refraining from publication for not less than ten days, before taking independent action, was comparable to the provisions for independent action in the Joint Traffic Association agreement which this Court condemned in *United States* v. *Joint Traffic Association*, 171 U.S. 505, discussed supra at p. 236. Under that agreement a railroad

With regard to independent action at the level of the Traffic Executives, Burgess of the B. & O. testified that:[12]

> "Lines also do not hesitate to take independent action contrary to the views of the Traffic Executives, after their proposal has gone that high.
> "The Association's records for the last six years show that there were approximately 45 instances in which a proponent road announced independent action contrary to the views expressed at the meeting of the Traffic Executives. These notices of independent action have been given by practically every road in Eastern territory that is a member of our Traffic Executive Association."

Burgess further testified that the figures he had just given were an under-statement because:[13]

> "The views expressed in the proceedings of the Committees, which on their face do not indicate any independent action, are, in fact, in a great many more

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desiring to take independent action had to file a resolution of its Board of Directors, calling for such action, with the managers of the Association, and the resolution could not become effective until thirty days thereafter. Upon receipt of the resolution the managers were to "act promptly for the protection of the parties hereto." This Court, considering the case upon demurrer, deduced from these provisions that the right of independent action was illusory and that in practice it could be expected that "an open, rigorous and relentless war of competition" would be conducted against the maverick railroad "on the part of the whole association." (171 U.S. 505, 563) Commenting on the same provisions, Burgess of the B. & O. said, at XIII, 4258:

"You could not take independent action under the Joint Traffic agreement except through a formal resolution of the Board of Directors of the individual railroads and, of course, anybody knows the difficulty of getting such a resolution from a corporation's board. When that resolution was adopted, it was not effective for thirty days. It had to be sent into this group of nine managers, and then they were enjoined by the terms of that traffic agreement to take action, as it says, 'to protect the members.' That meant to organize an opposition to the resolution and an opposition, an affirmative, direct, opposition to the road that was seeking to take independent action."

[12] XIII, 4106.

[13] XIII, 4107, 4108.

instances the result of independent action. The reason is that when in the course of a meeting a line announces, as it often does, that it is unwilling to go along with the consensus of views expressed, the remaining lines find themselves forced to take the same action.

"The result in such instances is that what was originally stated as an independent action in the meeting, is adopted or accepted by the other lines, and the action reflected in the minutes, therefore, in fact, is the result of the announcing line's independent statement."

Franklin testified to the same effect.[14]

In the *Trunk Line Association*, the Traffic Executive Committee meets very rarely, has no formal rules of procedure, but follows those adopted by the larger body of Traffic Executives, namely, the Traffic Executive Association-Eastern Territory.[15] The rules of the Freight Traffic Managers Committee contain no express provision for independent action,[16] but the General Freight Committee rules contain two provisions (one of which I have quoted previously) as follows:[17]

"While it is, of course, understood that each carrier retains its full liberty of individual action, it is expected that changes in rates, rules and regulations that are subject to tariff publication will not be made until the carriers have had the proposal passed upon by the proper Trunk Line Association Committee."

* * * * * * *

"Changes in rates, rules or regulations published as the result of individual action, the member giving notice of intention to take such action, will also advise as to the effective date to be shown in the tariff of his company."

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[14] XI, 3290.

[15] See Vol. L, ND-31, p. 145, in which the chairman of the committee stated to the I.C.C. that in practice the same procedure was observed as in the Traffic Executive Association-Eastern Territory.

[16] The rules are set forth in ND-31, 150-152, Vol. L.

[17] Vol. L, ND-31, pp. 156 and 159.

Unlike the Southern defendants (whose evidence will be considered presently), the Northern defendants did not furnish detailed statistical tables showing the extent of independent action. Counsel explained this omission by stating, first, that the Southern roads rather than the Northern roads were the ones which were charged with being coerced; and, secondly, that in Official Territory, the records of independent action could not be given in complete form because of the practice in that Territory, already described above in the testimony of Burgess and Franklin, to list as an approved recommendation in the Committee minutes a proposal which in fact had been adopted only after some carrier had stated that unless the other roads went along independent action would be taken. However, in the testimony of witnesses for the Northern defendants, various examples of independent action were given; they appear in the record as follows:

Northern Defendants

Baltimore & Ohio, XI, 3286; XIII, 4106; XIV, 4606, 4608, 4610, 4612 and 4676.

Chesapeake & Ohio, XIV, 4741, 4755, 4759, 4770, 4777; XVI, 5325; and Exhibit ND-35, Vol. L.

Chicago & Eastern Illinois, XVI, 5369.

Erie Railroad, XII, 3665, 3669, 3674 and 3678.

Monon, XI, 3291; XVI, 5373.

Nickel Plate, XII, 3808, 3809; XIV, 4809.

New York Central, XI, 3287, 3288; XV, 5103, 5109, 5111, 5112 and 5114.

Norfolk & Western, XVI, 5320, 5321, 5324, 5325, 5326.

Pennsylvania, XI, 3282, 3298, 3304, 3305; XIII, 4107.

Richmond, Fredericksburg & Potomac, XVI, 5327.

Wabash, XIV, 4435; XVI, 5365.

Other Northern Railroads

Akron, Canton & Youngstown, XVI, 5377.

Boston & Maine, XIII, 4406; XIV, 4437, 4515.

Central R. R. of New Jersey, XIV, 4431, 4810.
Chicago, South Shore and West Bend, XVI, 5378.
Delaware & Hudson, XIV, 4810.
Delaware, Lackawanna & Western, XVI, 5315, 5316, 5318, 5320.
Detroit, Toledo & Ironton, XIV, 4810.
Lehigh Valley, XVI, 5320.
New York, Ontario & Western, XIII, 4107; XVI, 5327.
Pittsburgh & West Virginia, XI, 3288.
Reading, XIV, 4431.

The Chesapeake and Ohio presented a table showing that in the year 1944 it had submitted 134 proposals to the Committees in Central Freight and Trunk Line Territories; that only four of these had been disapproved; that in three of these four the Chesapeake and Ohio had taken independent action; and that in the fourth instance the proposal had been cancelled on the advice of the interested shipper.[18]

(b) *Evidence of Independent Action in Southern Territory*

Tilford of the Louisville & Nashville testified that the right of independent action in Southern Territory was "so well accepted and known that it never occurs to a railroad traffic officer every time he makes a recommendation to write down again that he is reserving his right of individual action—it is just fundamental in our practice." [19]

Kerr, Chairman of the Southern Freight Association, testified to the same effect as follows: [20]

> "The right of independent action on the part of our members has always been regarded as a prerogative wholly theirs, and it is very frequently recognized, and, as I stated, often without any proposal being filed at all and, more often, without the usual procedure

[18] Vol. L, ND-35.
[19] VI, 1700.
[20] IV, 1237, 1238.

being followed; that is to say, to have it considered by the members of the General Freight Committee and, on appeal, by the members of the Executive Committee."

As previously noted, the Articles of the Southern Freight Association and its predecessors have contained affirmative provisions for independent action ever since the *Trans-Missouri* and *Joint-Traffic Association* cases, the present provision reading as follows:[21]

> "Each member line through its Chief Traffic Officer reserves the right to take separate and independent action with respect to any rate, rule or regulation considered by member lines or committees thereof, or submitted by the Chairman in a mail proposal. . . ."

The Traffic Executive Association-Southern Territory has a similar provision hereinafter noted. The Southeastern Presidents Conference has no stated meetings or rules of organization.

The Southern carriers introduced extensive statistical evidence dealing with independent action. These statistics may be briefly summarized as follows:

The Illinois Central submitted figures for 1939 and 1945.[22] In 1939, 45 proposals were adversely recommended in the committee procedure, and in 10 of these independent action was taken. In 1945, the corresponding figures were 30 and 16.[23]

The Southern Railway submitted figures covering a five year period, 1935 through 1939.[24] During this period, 4250 proposals were submitted to the Association; 605 were disapproved; and in 210 of these the Southern announced the rates independently.[25]

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[21] Vol. N, SD-2, Part XI, p. 7.

[22] Vol. O, SD-31.

[23] Sheppard testified regarding these figures at VII, 2183, 2184.

[24] Vol. O, SD-43.

[25] Oliver testified regarding these figures at IX, 2613, 2614.

The Atlantic Coast Line presented figures for the same five year period, during which 1667 proposals were approved and 235 disapproved. Of the latter 47 were effected by independent action.[26]

During the same five year period 84 proposals made by the Seaboard Air Line were "disapproved and not further progressed";[27] 38 others were effected by independent announcement.[28]

In the case of the Gulf, Mobile and Northern Railroad, during the period 1935 to 1940, 1201 proposals were filed; 320 were not recommended, 42 of which were independently announced.[29] During the period 1940 to 1945, 1349 proposals were filed; 268 were disapproved, of which 39 were independently announced.[30]

In the presentation of the foregoing statistics, the several witnesses testified generally as to the freedom felt by their railroads in taking individual action contrary to committee recommendations. The testimony of Gottschaldt of the Gulf, Mobile and Northern, which is set forth below, may be taken as typical of the others:[31]

> "Q. Has your company, or the Gulf, Mobile and Northern Railroad at any time since you have been in a position requiring you to deal at first hand in such matters declined to take independent action with regard such rate adjustment where, after hearing of the parties interested in it you were convinced your proposal was sound and that the adjustment in question should be made?
>
> "A. No. In no instance.
>
> Of course, in some cases we have obtained information that convinced us we were wrong and in those

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[26] Doss testified regarding these figures at XV, 4852.
[27] Vol. O, SD-46, Sheet 3.
[28] Etheridge testified regarding these 38 cases and submitted a special memorandum describing them, at X, 3010-3025.
[29] Vol. O, SD-48. The figure 320 is the sum of the 278 not recommended and the 42 which were independently announced. See Gottschaldt, X, 3130.
[30] Vol. O, SD-49; and Gottschaldt, X, 3132.
[31] X, 3134-3136.

instances there have been modifications and in some instances the conditions that first suggested the proposals had changed and the adjustment was found to be no longer of importance.

"Q. In any instances where you were proposing to make an independent announcement contrary to the recommendations of conference committees, has your company been subjected to any pressure or coercion by threats or otherwise to keep you from taking independent action?

"A. No, in no instance.

Our right to take independent action has always been recognized; has never been questioned.

"Q. Has it ever happened in an instance where you took independent action alone or in concurrence with other lines that you have been subjected to any criticism or complaint from any organization of which your company was a member, or from other members of any such organizations?

"A. No. No such thing ever happened.

"Q. Have you, in any instance of the kind described, been boycotted or made to suffer loss or embarrassment, or been threatened loss?

"A. No. No such thing was ever hinted to us or expected, or feared, or considered by us.

"Q. Have you ever been deterred or prevented by the Southern Freight Association or any of the various conference committees from taking any action with respect to actions you proposed to take?

"A. No.

"Q. Have you ever been deterred or prevented by the Association of American Railroads or any of the various committees from taking any action with respect to actions you proposed to take?

"A. No. We have, really, had little dealing with the Association of American Railroads. That organization has never undertaken to exert any powers to prevent us from doing whatever we decided to do and we have never considered that that Association had any power to direct or control or even to influence our action with respect to rates."

Kerr submitted, in the form of Exhibit SD-6, statistics showing the number of instances in which the Southern

carriers filed notices of independent action during the twelve year period 1933-1944 inclusive.[32] The number of separate rate adjustments (including changes in "rules or regulations" affecting freight charges)[33] with respect to which

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[32] SD-6 is in Vol. N. Kerr's testimony regarding the exhibit is in IV, 1239 to 1251, with cross-examination in V, 1530 to 1534. Kerr stated that the statistics from which SD-6 was compiled were extracted from some forty volumes containing all the notices of independent action and labelled "Announcement Notices" (IV, 1241, 1242); that when representatives of the Department of Justice were going through the files of Southern Freight Association they were offered access to these volumes; but that "I never could persuade any of them to examine any of those particular records." (IV, 1243). The following colloquy then occurred (IV, 1244): "Q. Did you request them to investigate your files to determine the number of independent actions taken? A. Yes, sir, I did. Q. So far as you know, then, when this suit was filed, the representatives of the State of Georgia had no information with respect to what your files show on this point—that is, the independent announcements? A. So far as I know they had no information."

[33] The "rules or regulations" which were included in the compilation of independent actions were not procedural in their nature but were in substance tariff provisions directly affecting the charges to be paid by shippers, in this respect being tantamount to rate adjustments. An example would be the establishment of a transit privilege at a particular point X (intermediate between A and B) for which a shipper would pay a small charge, thereby obtaining the benefit of the through rate from A to B, which would be lower than the combination of the local rates from A to X and X to B which he had previously been paying. This would be the equivalent to him of a rate reduction. Another example would be a change in minimum weights from, say, 50,000 pounds to 40,000 pounds, also equivalent to a rate reduction. Kerr, IV, 1248-1250. Kerr estimated that over 95% of all independent adjustments would on an average consist of actual changes in rates as distinguished from "rules or regulations" (IV, 1247). Exhibit SD-6A showed that during 1940 (agreed upon, at V, 1531-1533, as a representative period to take for the purpose of checking Kerr's estimate) 307 proposals had been independently announced. 13 of these were cancelled prior to publication and 3 were duplications. In the remaining 291 cases, the proposals were embodied in published tariffs. Of these 291, 254, or 87%, provided for changes in rates, and 37, or 13%, for changes in "rules or regulations". (SD-6A is in Vol. N, and Kerr's testimony regarding it is in X, 3147-3156, with cross-examination at 3160-3163).

independent action was taken, aggregated 4,522.[34] However, since most of these changes required concurring action by connecting carriers, the total of independent actions by carriers was over four times as many as the number of separate adjustments involved, the total being 19,309.[35]

(c) *Extent and Significance of Independent Action.*

Georgia, belittling the importance of independent action, asserted that out of "the thousands of proposals" acted on by the Traffic Executive Association-Eastern Territory in the six-year period from 1940, the defendants mentioned only 45 as having been independently announced.[36] This fact, Georgia stated, "seems arrestingly to indicate the punctiliousness with which the roads conformed to the pattern ordained by their bureaus." [37]

Georgia then stated in substance that, while the record did not show how many of these 45 had been set aside as a result of appeals by the Chairman to the Presidents' Conference, even if all of them had ultimately been effectuated by independent action, "such isolated instances, out of the thousands of proposals in the period involved, at best only

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[34] For 1933 the number of adjustments independently announced totalled 1,665. In 1934 it dropped to 299, and for the succeeding years averaged around 300 a year until 1941 when a second drop occurred, the total for the four years 1941 to 1944 inclusive averaging about 140 a year. The first drop resulted from the adoption in January, 1934 of the expedited procedure for handling so-called "emergency proposals" which has been described in the text above at pp. 515, 516. The second drop was due to the fact that the total number of proposals for rate changes filed with the Southern Freight Association during the war period dropped off very sharply, Kerr observing: "That is always the case when business gets right good, that the number of proposals will decrease." (IV, 1256. The figures covering total proposals filed were in SD-3, Vol. N).

[35] Kerr, IV, 1245, 1246.

[36] The reference was to Burgess's testimony, XIII, 4106.

[37] Final Brief, p. 73.

constitute the exceptions that demonstrate the rigor of the rule." [38]

Georgia's statement that "thousands" of rate proposals were acted on by the Association during the six years in question does not have clear statistical support in the record.[39] That the Association did have a "sizable" monthly docket was conceded.[40] In any event, the important question in weighing the number of independent announcements is not how many proposals the Association acted on, but the way in which it acted on them. Obviously, if most rate proposals (the great bulk of which, as has been seen, consist of

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[38] Ibid, pp. 73, 74. In foot-note 27 on p. 73 it is stated that, although Burgess did not indicate how many of the 45 instances had been appealed by the Chairman, "the Record shows that Mr. Burgess's predecessor took 5 such appeals in a period of less than 4 months and Mr. Burgess admitted he, himself, had taken four such appeals during his tenure of office." Actually, the evidence showed that in the case of the 5 appeals by Burgess's predecessor, 2 were taken in 1937, 1 in 1938, and 2 in 1939 (pp. 553, 554 infra). The 4 appeals taken by Burgess were in turn spread over 4 years (XIII, 4400). Thus it appears that Chairman-appeals to the Presidents from the Traffic Executive Association only amounted to one or two a year on an average.

[39] Georgia's estimate that "thousands" of rate proposals were acted upon during the 6 years in question was derived from portions of minutes of five meetings in 1941 and 1942. S-169, I, 316; S-488, XIII, 4307; S-130, I, 248; S-138, I, 257; S-139, I, 251. These portions indicated that some 50 to 60 items of business were on the docket at each of the five meetings in question; applying these figures to a dozen monthly meetings a year over 6 years, Georgia came out in proposed finding 130, Final Brief, p. 236, with a total of at least 3500 proposals. (Burgess testified that the Association "generally meets monthly", XIII, 4050). However, there is nothing to show that all of these items of business, only 12 of which were reproduced in the record, had to do with rate proposals, nor is it certain that as many as 50 to 60 items would constitute an average range per meeting throughout the years. While it is probable from the descriptions of the work of the Association that most of its business has consisted of appeals from actions on rate proposals by lower committees (e.g., Burgess, XIII, 4050), some of it may consist of policy actions and recommendations not dealing with specific rate adjustments.

[40] Burgess, XIV, 4440.

rate reductions) [41] are favorably recommended, the occasion for independent action is to that extent limited.

While there is no evidence as to the handling of rate proposals by the Traffic Executive Association-Eastern Territory, there is evidence indicating the way in which rate proposals are disposed of by other Associations. This evidence may be tabulated as follows:

Source and Period	Number of Proposals Acted on[42]	Number Approved (Including Approved as Amended)	Percent Approved
Tables:			
1. All Official Territory[43]			
3 months, 1943.....	2813	2550	90%
2. Three Southern Carriers:[44]			
Southern Ry. 1935–39.....	4250	3645	86%
Atl. Coast Line 1935–39.....	1667	1432	86%
Gulf, Mobile 1935–45.....	2550	1962	77%
3. Central Freight Ass'n.[45]			
3 months, 1945.....	840	753	90%
4. Trunk Line Ass'n.[46]			
3 months, 1945.....	960	887	92%

The high percentage of approvals in these tables shows that the area in which independent action might operate is not very large. Further data on this point will appear presently.

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[41] See pp. 278, 279, 531.

[42] In this and the following tables I have excluded cases withdrawn and those on which no action was taken. This may tend slightly to understate the degree of negative action, because a withdrawal may be occasioned by a sense of hopelessness, and non-action may constitute a form of defeat. However, other explanations may be possible; e.g., many of the no-action cases consist of transit privileges effectuated without committee action, Kerr, IV, 1265.

[43] From Burgess, XIII, 4171. The approvals given are of reductions only. There may also have been some increases which were approved.

[44] Supra, pp. 524, 525.

[45] From ND-20, Vol. H, Book 1, p. 2, presented by Tannehill of the Central Freight Association, XII, 3708. The months were April, May and June.

[46] ND-22, Vol. J, p. 63, introduced by Hodkinson of the Trunk Line Association at XII, 3777. The months were April, May and June.

Meanwhile certain breakdowns of Tables 3 and 4 above are worth stopping to examine, since they enable a comparison to be made of the treatment accorded to Southern proposals and to proposals from other territories. And while properly this is material which should be treated in Volume Three of this Report in the consideration of alleged discrimination against the South, it will save time to take up the figures at this point, referring to them again in summary form in Volume Three.

A breakdown of Table 3 shows that the Central Freight Association received 218 proposals from the Southern Freight Association and approved 203, or 93% of them. 144 of these proposals were for *reductions in rates from South to North* and 132, or 92%, were approved.[47] These percentages of 93 and 92 slightly exceed the over-all percentage of 90, covering proposals from all territories, shown in Table 3. The conclusion to be drawn from Table 3 is that the Southern railroads' proposals were treated at least as favorably as those from other territories.

A breakdown of Table 4, limited to proposals for rate *reductions*, showed the Trunk Line Association treating the proposals from the different territories as follows:[48]

4-A Trunk Line Association Action, 3 months of 1945, on:	Number of Proposals Acted on	Number Approved (Including Approved as Amended)	Percent Approved
Reductions proposed by shippers and lines in Trunk Line Territory	240	229	95%
Reductions proposed by shippers and lines in Central Freight Territory	108	105	97%
Reductions proposed by shippers and lines in New England Territory	37	33	89%
Reductions proposed by shippers and lines in Canadian Territory	18	16	89%

[47] ND-20, *supra*, p. 6. The 144 reductions from South to North consisted of 60 proposed by shippers and 84 proposed by carriers. In addition, there were 5 increases (all of which were approved), proposed by carriers.

[48] ND-22, Vol. J, pp. 1-54.

4–A Trunk Line Association Action, 3 months of 1945, on:	Number of Proposals Acted on	Number Approved (Including Approved as Amended)	Percent Approved
Reductions proposed by shippers and lines in Southwestern Territory	51	44	86%
Reductions proposed by shippers and lines in Transcontinental Territory	53	45	85%
Reductions proposed by shippers and lines in Western Territory	50	44	88%
Reductions proposed by shippers and lines in Southern Territory	170	147	87%
	727	663	91%

While the proposals from Central Freight Association and within Trunk Line Territory in the above Table show a higher per cent of approval than the proposals from the other territories, the proposals from the other territories show as between themselves no significant differences. And since the proposals from New England, which is a part of Official Territory, were treated substantially like those from the South, it would be difficult on the basis of these figures to make out a deliberate case of discrimination in the handling of rate proposals against the South.

The following Tables 5 and 6, covering interterritorial proposals acted on in 1939, show a substantially lower percentage of approvals in that year, both in the North and the South, than obtained in the case of the interterritorial proposals analyzed above under Tables 3 and 4 (covering a three-months period in 1945). The reason why proportionately more proposals were approved in 1945 than in 1939 is not explained in the record, but it is likely that at least part of the difference was due to the fact that in the earlier period there were many more controversies over the divisions of revenues.[49] In any event, Tables 5 and 6 show that proposals from the South to the North

[49] As appears from inspection of the detailed case items in the two exhibits. And see pp. 631-634 for the story of divisions controversies.

(Table 5) fared about as well as proposals from the North to the South (Table 6):

5. Source and Period[50]	Number of Proposals Acted on	Number Approved		Per Cent Approved
Proposals from Southern Freight Association to Official Territory in 1939 Acted On By:				
(a) Central Freight.....	601	As Amended by the Northern lines	33	5%
		As Presented	438	72%
(b) New England.....	580	As Amended by the Northern lines	28	5%
		As Presented	388	66%
(c) Trunk Line.....	579	As Amended by the Northern lines	30	5%
		As Presented	383	66%
(d) Total of all Three.....	1760	As Amended by the Northern lines	91	5%
		As Presented	1209	69%

The next table is the converse of the above table:

6. Proposals from Official Territory to Southern Freight Association in 1939[51]				
Total from Central Freight Association, New England Freight Association and Trunk Line Association	238	As Amended by the Southern lines	37	16%
		As Presented	160	67%

As will be noted from Table 6, the South approved "as amended by the Southern lines" a higher percentage of proposals (16%) than the North approved in the case of proposals "as amended by the Northern lines" (5%). However, the fact that the proponent of a rate had to amend it before approval could be obtained may mean that the approval represented something of a defeat for the proponent. Consequently the higher percentage of approvals

[50] SD-7, Vol. N. Corresponding percentages of actions by Western Trunk Lines were 3 and 85, and by Illinois Freight Association 4 and 76.

[51] SD-8, Vol. N.

of amended proposals granted by the Southern lines, as compared with those granted by the Northern lines, might actually indicate a stiffer attitude on the part of the Southern lines toward Northern proposals than on the part of the Northern lines toward Southern proposals. No definite conclusions, however, can be drawn from the record on this point. Under the circumstances the only finding that can be made is that Tables 5 and 6 do not show that Official Territory Associations treat Southern proposals with greater severity than the Southern Freight Association treats Northern proposals.

Up to this point in the statistical analysis it has been established that the great majority of rate proposals are approved by the Associations, and that there is no significant difference in treatment based on geographical origins.

The next question is: with what frequency is independent action taken in the small minority of disapproved proposals?

The statistics covering five leading Southern carriers, at pp. 524, 525 above, showed that on an average they independently announced about one-fourth of the rates disapproved, acquiescing in the remaining three-fourths of the disapprovals. Thus:

7. Carrier	Period	Number of Proposals Disapproved At One Stage Or Another	Number of These Which Were Independently Announced
Illinois Central	1939	45	10
Illinois Central	1945	30	16
Southern	1935–39	605	210
Atlantic Coast Line	1935–39	235	47
Seaboard	1935–39	122	38
Gulf, Mobile	1935–40	320	42
Gulf, Mobile	1940–45	268	39
		1625	402

In the above cases about three-fourths of the disapprovals were acquiesced in, the remainder being independently announced. A much higher degree of acquiescence in disapprovals appears from table 8 below, dealing chiefly with interterritorial rate proposals. The

significance of Table 7 above is diminished to some extent by the fact that it includes a large proportion of intra-territorial changes, with which this case is not primarily concerned,[52] and also by the fact that the statistics included a certain number of proposals for changes in "rules or regulations" (chiefly transit privileges). While changes of this latter type affect the charges paid by shippers (normally by reducing them) and are therefore like rate changes,[53] their independent effectuation generally has fewer repercussions on other roads than rate changes. On the other hand, the vast majority of all proposals are for rate changes.[54]

In the following Table only proposals for rate changes are covered.

8. Source and Period	No. of Proposals Acted On	No. and Percent Disapproved	No. Independently Announced	Percent, Independent Announcements of Disapprovals
(a) Trunk Line Association, all proposals acted on in 3 months of 1945 (from Table 4 above)	960	73 (8%)	1[55]	1%
(b) Southern Freight Association proposals acted on in Official Territory from 1938 to 1942 inclusive.[56]	2906	705 (24%)	70*	10%

[52] E.g., some two-thirds of the Southern Railway proposals in the five-year period covered were intraterritorial. SD-43, Vol. O.

[53] Oliver, IX, 2666; Kerr, X, 3149.

[54] SD-6A, Vol. N (explained by Kerr at X, 3148-3156) showed that for the year 1940 only 12.6% of the number of proposals were for changes in rules or regulations; all the rest were for rates. Oliver of the Southern testified generally, with respect to the above statistics offered by his line, that "the vast majority of these proposals were changes in rates or the establishment of new rates."

[55] ND-22, *supra* note 48, p. 7, line 32, involving a Trunk Line member. The tabulation also shows under the *"approved"* heading 5 instances of carriers publishing the rates before final Trunk Line action, and these may have represented independent action in substance (line 15 p. 23, line 35 p. 28, line 36 p. 36, line 13 p. 37, line 20 p. 37). Four of these five, however, represented merely transit arrangements.

[56] ND-21, Vol. H, Book 2, p. 1; Tannehill, XII, 3738. This was stated to be the "most nearly representative" pre-war period, XII,

8. Source and Period	No. of Proposals Acted On	No. and Percent Disapproved	No. Independently Announced	Percent, Independent Announcements of Disapprovals
(c) Southern Freight Association proposals to Official Territory Associations, and to Illinois and Western Trunk Lines, in 1939 (covered partly in Table 5 above).[57] And the substantial reverse of Table 5:	2425	571 (23.5%)	32	6%
(d) Official Territory proposals to Southern Freight Association in 1939 (Table 6 above).[58]	238	41 (18%)	2	5%

* As indicated in the text at p. 537, not more than 6 of these were of real significance for the purposes of this case.

The relative paucity of independent action appears clearly from the foregoing Table.

It may be interesting to note also that in part (a) of the above Table, in only two of the 73 proposals disapproved did the proponents take the trouble to appeal from the initial disapprovals.[59] (There were seven other appeals, two

3745. By contrast with the 10% figure of independent action on rates, in the same period the Official Territory carriers acted on 729 proposals by the Southern roads for establishment or extension of transit rules, charges and regulations, and while 477 of these were disapproved the Southern carriers effectuated 367, or 81% of those disapproved, by independent action. Concurrences of other lines are not necessary where the transit privileges are to be exercised only in Southern territory, and therefore there is a greater practical degree of freedom than in the case of joint through rates. Kerr, IV, 1266.

[57] SD-7, Vol. N. The total of cases acted on is the same as the total of Table 5, plus the totals for Western Trunk Lines (242) and Illinois Freight Association (423) which were not covered in Table 5.

[58] SD-8, Vol. N. In this exhibit the figure of 116 under "Approval Recommended By" is a typographical error; it should be 160. The figure for "Independently Announced" should be added to the total of the proposals disapproved.

[59] The first case was in ND-22, Vol. J, p. 31, line 43 (Import rates on bananas from 2 Florida ports to Canadian points. The unsuccessful appeal was by the Southern proponents from the Trunk

of them involving Southern carriers, which succeeded; they are noted under the approved proposals).[60] Also, in part (d) of the above Table, out of the proposals disapproved, the exhibit shows that in the case of 39 there were no appeals following the initial disapprovals,[61] while in the remaining 2 which were independently announced the exhibit does not show the history.

With regard to part (b) of the above Table, showing 70 independent announcements by Southern carriers out of 705 rate proposals disapproved in the Official Territory associations, Georgia made the following comment:[62]

> "Information in the work sheets on which the summaries in ND 21 [the exhibit in Vol. H, Book 2, from which the Table was constructed] are constructed do not contain adequate data to permit an accurate breakdown of the rates disapproved by the Northern associations and effectuated by Southern Freight. Analysis does reveal, however, that almost all of such proposals were intra-south, to gateways, rail-water in con-

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Line Southern & Southwestern Committee and the Central Freight Association General Committee to the Buffalo Conference. Hodkinson, XII, 3799). The other case, of an unsuccessful appeal from the Trunk Line General Freight Committee to the Freight Traffic Managers Committee, did not involve a Southern appeal (ND-22, p. 14, line 1; XII, 3795).

[60] These were in ND-22, p. 7, line 5; p. 8, line 1; p. 8, line 29; p. 14, line 42; p. 18, line 25; p. 28, line 8; p. 31, line 43; p. 50, line 22; Hodkinson, XII, 3792-3800. The third and seventh of these instances show that Southern carriers were successful. One involved a reduction on meats from Richmond to Indianapolis; the Trunk Line Association approved but Central Freight did not; the Buffalo Conference disapproved; but the Traffic Executive Association-Eastern Territory approved. XII, 3794. In the other Southern case, involving reduced rates on peanuts from Elizabethtown, North Carolina to Philadelphia, the Trunk Lines Southern & Southwestern Committee disapproved but the Freight Traffic Managers Committee approved. XII, 3798.

[61] SD-8, Vol. N. 38 of the proposals are listed as having been disapproved by the General Freight Committee and 1 by the Joint Textile Committee; these are not appellate committees (except in the sense that objections in the mail vote brought the cases before them).

[62] Final Brief, p. 238, foot-note 1; to the same effect, McGovern in final argument, XXII, 7871-7873.

trol of Southern Freight, or to Northern areas such as Chicago served by Southern rails and outside Official Territory. Not more than six, at the outside, appear the result of concurring independent announcement of Official carriers contrary to the action of the Official Bureaus."

I have examined the work sheets referred to by Georgia in the foregoing comment and find the facts to be as stated by Georgia. These facts tend to show that when Southern interterritorial rate proposals (most of which, like all rate proposals North and South, are for rate reductions) are disapproved by the Northern associations, the Southern roads find extreme difficulty in obtaining the necessary concurrences from Northern roads without which the proposals cannot be effectuated. It does not follow from this, however, that the unwillingness of the Northern roads in most instances to concur in Southern proposals after they have been adversely recommended is due either to coercion by the Northern associations or to a determination by the Northern roads to discriminate against Southern shippers. The explanation may be that the general acquiescence by the Northern roads in the action taken by the Northern associations on proposals which are not of their own making but emanate from another territory is due simply to satisfaction with the decisions thus made. Whatever the explanation may be, it will not be found in the statistics themselves.

Similarly we do not know why, as part (d) of Table 8 above shows, the Northern roads announced independently only two out of the forty-one rate proposals of theirs which were disapproved in the Southern Freight Association in 1939.[63] Presumably the Northern roads have difficulty in finding Southern roads that would concur independently in the proposed rates; but the evidence does not show why this was.

Considering the evidence up to this point, I find that:

(1) The provisions permitting independent action in the

[63] No work sheets were provided with these statistics comparable to those which accompanied ND-21.

rules of the Territorial Associations represent the actual understandings of the member roads and are not mere window-dressing;

(2) The occasions for independent action are limited by the fact that the great bulk of rate proposals are approved by the Associations;

(3) When rate proposals are disapproved, independent action is taken in only a small fraction of the cases;

(4) This fraction is particularly small in the case of interterritorial proposals;

(5) The statistical data (as distinguished from the case examples upon which I have yet to pass) indicate that interterritorial proposals from the South to the North are treated in about the same way, with about the same degree of acceptance, as interterritorial proposals from the North to the South, and that Southern proposals are not treated by Official Territory Associations in a manner significantly different from the manner in which Northern proposals are treated by Official Territory Associations or by the Associations in Southern Territory;

(6) That the general acquiescence of all roads, both North and South, in Association recommendations disapproving rate proposals, as illustrated by the relative paucity of independent action in such cases, is further illustrated by the relative paucity of appeals in such cases.

Further appraisal of the nature and significance of the right of independent action must be withheld pending the analysis of alleged clogs upon the exercise of that right which in Georgia's view effectively nullify it. Among these alleged clogs are the appeals provisions, an examination of which now follows.

3. *Georgia's Charge that in the Course of Seeking Approval of their Rate Proposals the Defendants Agree to Follow Certain Hampering Appellate Requirements Laid Down by the Rate Associations' Rules.*

Georgia asserted that "by and large the rules of both Associations" (Trunk Line and Southern Freight) "con-

template that no railroad shall effectuate a rate proposal until all appellate procedures have been exhausted."[64]

These procedures are of two sorts. There are rules which permit a dissatisfied member railroad to appeal from the majority recommendation of a lower Committee to a higher one. And there are rules which permit the Chairman to appeal to a higher Committee action by a lower Committee which he deems to be "inimical to the best interests of the railroads as a whole." These two types of rules obtain in both Official and Southern Territory. Since there are some differences between the types, I shall consider them separately.

(a) *Member-Appeals in Official Territory*

(i) In the Trunk Line Association, the first appellate step is from the General Freight Committee to the Freight Traffic Managers Committee. The rules provide that in case of such an appeal "*it is expected that no company will exercise its right of individual action* . . . until it has presented the matter to and has obtained the recommendation of the Freight Traffic Managers Committee."[65]

Thus at the General Freight Committee level the rules state an "expectation" that a dissatisfied member road will appeal instead of taking independent action. Such action, however, is not prohibited, and the rules previously quoted expressly recognize the right of such action.

(ii) The second appellate step is from the Freight Traffic Managers Committee to the Traffic Executive Association-Eastern Territory. The rules contain no mention of independent action[66]—it is neither expressly affirmed, nor is it expressly discouraged pending appeal.

(iii) The third appellate step is from the Traffic Executive Association-Eastern Territory to the Presidents' Traf-

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[64] Final Brief, p. 47.
[65] S-110, I, 234. Emphasis added.
[66] The applicable rules are in S-110, I, 232.

fic Conference-Eastern Territory.[67] In the Traffic Executive Association-Eastern Territory, as noted at p. 518 above, there is a broad rule that "no carrier surrenders anything of its individual liberty of action," provided that the particular Traffic Executive shall personally notify the Association at a regular meeting that the tariff "is to be filed not less than ten days thereafter and will be made effective on not less than statutory notice."[68]

The purpose of the ten-day delay, as stated in a letter to Cleveland of the A.A.R. from Chairman Lawrence of the Traffic Executive Association-Eastern Territory, was "to enable the completion of appeal to the Presidents' Traffic Conference-Eastern Territory, if such action is to be taken by any member line."[69] However, the rules contain no express provision that the taking of such an appeal would operate to stay the right of independent action beyond the specified ten days. The rules of the Presidents' Traffic Conference-Eastern Territory, as already noted, provide that in that Conference "no carrier surrenders anything of its individual liberty of action," and that "the filing of appeals shall not deprive any carrier of its right of individual action. . . ."

Considering these rules as a whole, I find that on the one hand they contemplated or "expected" that carriers

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[67] It is possible also for an appeal to go from the Trunk Line Association Traffic Executive Committee (in the rare instances when that Committee receives from the Freight Traffic Managers an appeal of purely Trunk Line significance) to the Presidents Conference. That body, like the Trunk Line Executive Committee, has no rules. It meets very seldom; as previously noted, Burgess testified that during his four years as Chairman of the Trunk Line Association (May 1, 1942 to May 1, 1946 (XIII, 4028)) it never met. XIII, 4279.

[68] S-108, I, 228.

[69] S-489, XI, 3433. Letter dated November 30, 1937, in response to Cleveland's request for information from the different Chairmen for the purposes of a survey of the Territorial Rate Association procedures which the A.A.R. was then making (as described at p. 368 *supra*). In Georgia's Final Brief, at p. 50, an extract from this letter describing the rule, rather than the text of the rule itself, is set forth.

would normally exhaust the appellate procedures before taking independent action, but that on the other hand they recognized the right to take such action at every stage.

Burgess of the B. & O., former Chairman of the Trunk Line Association and Traffic Executive Association-Eastern Territory, referring to the "expectation" provision in the General Freight Committee rules, testified that "while there is a rule in the procedure that does contemplate, or express the hope, that a proponent line will be willing to defer its independent action until after the appeal has been considered by a higher committee, there is, at the same time, in the same rules of procedure, a companion rule which preserves, and it is understood and applied by all lines as preserving, the right of independent action in all cases, at all times, and in all circumstances." [70]

He also testified that: [71]

> "When the rule is complied with, it only postpones action for the short time required for the appellate committee to meet, and since the meetings of . . . the General Freight Committee, and Freight Traffic Managers Committee, and the Traffic Executive Association-Eastern Territory, all occur on regularly specified days each month, it follows that generally any appeal may be considered by the appellate committee not less than a month after the appeal is taken."

Franklin of the Pennsylvania testified that: [72]

> "It is well understood that the chief traffic officer of any of the members of the Trunk Line Association can lift a proposal out from the regular course of procedure at any time in the course of its consideration and announce the independent action of his railroad with respect thereto, and this is frequently done. Of course, where matters are of no outstanding importance or significance, they are permitted to travel along through the ordinary procedure. . . ."

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[70] XIII, 4145, 4146.
[71] XIII, 4144, 4145.
[72] XI, 3279.

The defendants introduced extensive statistical evidence to illustrate the actual workings of the appellate process.

During the months of April, May and June, 1945 the member lines of the Trunk Line Association acted upon 960 rate proposals.[73] Out of these there were only 9 appeals to a higher committee. Each of these 9 involved only a one-step appeal. Each was an appeal from the disapproval of a proposal. Seven of the appeals resulted in the approval of the proposal, one in its modification, and one in disapproval.

During the same period the member lines of the Central Freight Association acted on 840 proposals.[74] Eleven appeals were taken from its General Committee to the Traffic Executives (there is no Freight Traffic Managers Committee in that Association),[75] all from unfavorable decisions. Four appeals were sustained, three were not sustained. One was still pending; one was referred back to the General Committee; one resulted in a modification; and one was suspended because the shipper ceased operation.

During April, May and June, 1942, the Pennsylvania Railroad[76] initiated 87 proposals, of which 70, or 80% of the total, were disposed of by correspondence without ever reaching any of the Committees; 13, or 15% of the total, were finally disposed of in the General Freight Committee; and 4, or 5% of the total, by the Freight Traffic Managers Committee. The corresponding percentages for the same three months in 1945 were 82%, 14%, and 4%. No proposals in either period reached the Traffic Executives.

Thus it appears that only a small percentage of rate

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[73] The data in this paragraph appear in the testimony of Hodkinson, of the Trunk Line Association Auxiliary Committee, at XII, 3792-3800. He testified that the period in question was "fully representative and typical." XII, 3801. He took his data, indicating the page numbers, from ND-22, Vol. J.

[74] Data taken from testimony of Tannehill, of the Central Freight Association Auxiliary Committee, at XII, 3731, 3732, commenting on ND-20, Vol. H, Book 1.

[75] Burgess, XIII, 4033; ND-60, Vol. M.

[76] Data per Franklin, XI, 3282, 3283.

proposals become the subject of appeals; that appeals normally do not go beyond one stage; that normally they consist of an appeal by the proponent from an adverse recommendation; and that the majority of appeals result in favorable recommendations.

(b) *Member-Appeals in Southern Territory*

The rules of the Southern Freight Association are simple. They provide that:[77]

> "A recommendation of the General Freight Committee for or against any proposal may be appealed to the Executive Committee by any line member of the Association. . . ."

There is no provision for a stay against independent action by a member pending appeal. On the contrary, while it is provided that "notice of purpose to appeal . . . shall act as a stay of further proceedings on the part of the Association," this stay shall expire "if and when notice of independent action is given as provided in Article X."[78] Article X contains the general provision, previously noted, that "each member line through its Chief Traffic Officer reserves the right to take separate and independent action with respect to any rate, rule or regulation considered by member lines or committees thereof, or submitted by the Chairman in a mail proposal . . ."[79]

Thus it is clear that under the rules a member dissatisfied with the Committee's recommendation may appeal or take

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[77] SD-2, Vol. N, Part XI, Art. IX(g), p. 6.

[78] The rule also provides that the stay shall automatically expire in 10 days unless prior thereto the Chief Traffic Officer of the appellant line gives written notice of the appeal to the Chairman. Kerr explained that the reason for this stay provision was that General Freight Agents do not themselves have authority to commit their roads to an appeal; they can only give a notice of intention to appeal and then they must go to their Chief Traffic Officers who make the decision. The stay provision is intended to hold matters in status quo pending action by the Chief Traffic Officer. V, 1554, 1555.

[79] *Ibid*, Art. X(b), p. 7.

independent action as he sees fit. There is only this one-step appeal within the framework of the Southern Freight Association.

However, the Association's Articles were modified in 1938 to provide that any member may appeal from "the action of the Executive Committee to the *Traffic Executive Association-Southern Territory,*" and that "*pending consideration by the latter no action shall be taken towards publication.*" [80]

Thus at this second stage of the appellate process, from the Southern Freight Association to the Traffic Executive Association-Southern Territory, a stay provision against publication pending appeal was inserted.

And an even more explicit stay provision was inserted in the third stage of the appellate process, from the Traffic Executive Association-Southern Territory to the Southeastern Presidents' Conference. The applicable rule of the Traffic Executive Association-Southern Territory provided that "a member may give notice of his intention to publish" his rate proposal, "if it should be adversely recommended by the majority, but in such cases *no action shall be taken by the line in question for ten (10) days,* to enable the completion of appeal to the Southeastern Presidents' Conference, if such action is to be taken by any member line. . . . *Pending action by the Southeastern Presidents' Conference, no action shall be taken towards publication.*" [81]

However, the Articles of the Traffic Executive Association-Southern Territory contain, like those in the Southern Freight Association, a separate provision regarding independent action, which reads as follows: [82]

> "Nothing in these Articles shall be construed as a limitation upon the final right of any member of this

[80] S-160, I, 274; SD-2, Vol. N, Part XI, Art. III(h); emphasis added.

[81] S-160, I, 280; SD-2, Vol. N, Part XII, Art. IX; emphasis added.

[82] *Ibid,* Art. XII.

> Association, or any member of the Southern Freight Association, Southern Passenger Association, or Southern Classification Committee, to take separate and independent action."

The question is whether the declared right of independent action in both Associations qualifies and rises superior to the stay provisions pending appeal.

As tending to emphasize the significance of the stay provisions in the appellate rules is the fact that they were all adopted in 1938, avowedly as part of an effort to check the downward movement of rates and to retain to the fullest extent possible the increases granted in *Ex Parte 123*.[83] It is difficult not to suppose that the defendants intended by the adoption of these new provisions to effect some change in the prior practices.

On the other hand, Kerr, Chairman of the Southern Freight Association and of the Traffic Executive Association-Southern Territory, testified that the right of independent action was always understood to be unqualified; he said:[84]

> "All any committee can do is recommend approval or disapproval, and it is then up to the individual members to decide for themselves whether or not they will proceed independently. They freely exercise this right, often after such an appeal has been made and before it can be considered by the Committee to which the appeal has been made."

He further testified[85] that during the eight years of its existence the Traffic Executive Association had considered 149 appeals. Of these, "37 were struck from the docket for various reasons, but chiefly because the appeal was withdrawn or the proposal itself was withdrawn by the proponent. . . ." Of the remaining 112, 33 were disapproved; and in 13 out of these 33 the "proponents independently announced their purpose to proceed with publication."

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[83] As described at pp. 368-375 above.
[84] IV, 1292.
[85] IV, 1347-1349.

Only 5 cases were appealed in this eight-year period to the Southeastern Presidents' Conference. In one of these cases, the proponent carrier proceeded with publication independently, prior to final consideration by the Conference.[86] In another, the Conference approved the proposed adjustment. In two cases, disapproval was recommended, but one of these involved an increase in rates.

In the fifth case, which had to do with proposed reductions in certain coal rates, "it appeared that, if made effective, it would result in upsetting a long established rate adjustment which had, in very large part, been fixed or approved by the Commission."[87] The Conference suggested that the two roads involved give the matter further consideration. Subsequently shippers desiring the reduction complained to the I. C. C. but the I. C. C. decided against them.[88]

Taking into consideration on the one hand the language of the rules, and on the other the uncontradicted testimony and exhibits of the Southern defendants indicating a considerable degree of independence of action at various levels, I reach the same conclusion as in the case of the Northern defendants, namely, that the rules as interpreted in practice contemplated or expected that carriers would exhaust the appellate procedures before taking independent action, but that the right to take such action was recognized at every stage.

This finding does not touch the question of whether, in the case of an appeal, the stay provisions against publication pending decision were regarded as binding. Mr. Kerr indicated they were not, in the passage quoted above. The question is perhaps academic, because in the case of an appeal by the proponent of a rate which has been adversely recommended, his appeal represents in and of itself, by his own act, the staying of publication pending the appeal.

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[86] Apparently in this case the appeal was by the Chairman; see Kerr, V, 1559.

[87] V, 1357.

[88] Citing *Pocahontas Operators Association, et al. v. Norfolk & Western R.R., et al.* (March 11, 1941) 243 I.C.C. 731.

The question would become important only if the proponent's rate were favorably recommended by a committee and then *some other road*, which did not favor the change, should seek by an appeal both to stay the action and to obtain adverse action from the higher officials. However, while the rules would permit that sort of appeal, no evidence was submitted to show that in Southern Territory such appeals actually occur in practice. The statistical evidence relating to Official Territory which has been reviewed above contains instances only of appeals by rate proponents.

The evidence now about to be reviewed indicates that as a practical matter, when appeals are taken by other than a proponent, they are taken by Committee Chairmen under provisions containing uniform stay provisions in both Official and Southern Territory.

(c) *Chairman-Appeals*

Georgia contended that "the completely ephemeral nature of the theoretical right to take individual action is nowhere more clearly revealed than in the provisions in both the North and the South that the Chairmen shall appeal all notices of individual action which they may regard as inimical to the interests of the carriers as a whole. To suggest that individual members of rate bureaus possess the absolute right to take independent action at all times and simultaneously to acknowledge that rate bureau chairmen may appeal from such action is, the State contends, to reduce the ordinary terms of discourse to utter nonsense."[89]

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[89] Final Brief, pp. 67, 68. Georgia also suggested at p. 47 that there was some impropriety in the "extraordinary authority vested by the rate bureaus in the chairmen" to prevent a proponent, even after unanimous bureau approval, from effectuating a rate "until such date as the chairman specifies." The evidence shows, and I so find, that the chairman's authority to fix the date of tariff publication exists only in Southern Territory (as to the different practice in Trunk Line Territory, see Burgess, XIII, 4185-4188; ND-31, Vol. L, 159); that it constitutes neither approval nor disapproval of the rate (as to this, and the detailed problems of tariff publication, see Kerr, IV, 1300-1309); that the function is

The rules, as Georgia alleged, do provide, in both Southern Territory and Trunk Line Territory, at every stage of rate association procedure, and in substantially uniform language,[90] that:

> Should the chairman [91] regard action by the Committee [or Association] as "inimical to the best interests of the carriers as a whole," he shall [or may] appeal to the Committee [or Association or Conference]. "Pending consideration by the latter no action will be taken towards publication" [or, "the

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ministerial only, normally being performed by tariff clerks (Kerr, IV, 1303); that it arose historically out of considerations of convenience and practicality involving the avoidance of the discriminations and preferences which would arise in the event of non-simultaneous publication in the books of several different tariff agencies (Tilford, VI, 1820); that the authority, such as it is, has not been abused (Tilford, VI, 1821; Doss, XV, 4842); and that carriers may and sometimes do fix their own dates (Tilford, VI, 1819).

[90] For the text of the rules, in *Trunk Line Association Territory*, see S-110, I, 231-235 (Gen. Freight Committee to Freight Traffic Managers Committee); *ibid*, 232 (F.T.M. to Traffic Executives); S-108, I, 227, 228 (Traffic Executive Association to Presidents). In *Southern* Territory: S-160, I, 274, 276 (General Freight Committee to Executive Committee of Southern Freight Association); *ibid*, 274 (Executive Committee of Southern Freight Association to Traffic Executive Association-Southern Territory); S-161, I, 278, 280 (Traffic Executive Association-Southern Territory to Southeastern Presidents' Conference).

[91] The Chairmen are all paid officials. In the North the Chairman of the Traffic Executive Association-Eastern Territory is appointed from among the chairmen of the three sub-territorial associations. Thus, Burgess, while chairman of the Trunk Line Association, also acted as chairman of the Traffic Executive Association-Eastern Territory, and as such he could appeal action taken by the latter Association to the Presidents Traffic Conference (XIII, 4139). He could also, as chairman of the Trunk Line Association, appeal the action of any subordinate committee within that association to a higher committee; and so could the chairman of each such committee (XIII, 4138). In the South Kerr, as chairman of the Southern Freight Association, is ex officio chairman of each of its subsidiary committees (IV, 1130) and therefore can appeal from one to another, and to the Traffic Executive Association-Southern Territory. As chairman of the latter he can appeal to the Presidents Conference (IV, 1292).

effectiveness of the proposed action to be withheld by the interested carrier or carriers" pending, etc.].

The defendants explained the rationale of these rules as follows. Burgess testified that the purpose was to insure that "important and far-reaching proposals, which are likely to affect the carriers as a whole by breaking up or seriously disturbing an existing reasonable and non-discriminatory rate structure, to the detriment of both shippers and carriers, are given the consideration their importance merits by the proper grade and rank of traffic officer before being made effective." [92]

Kerr testified to like effect, saying that it sometimes happens "that subordinate officers do not see or appreciate the ultimate effect of hasty or ill-advised actions and, in such cases, it is my duty, as a neutral officer, to refer the matter to higher officers for their consideration and recommendation." [93] He also conceived it to be his duty to bring to the attention of the Executive Traffic Officers "important policy matters" in which "the final decisions are peculiarly within the prerogatives" of such officers; [94] and to take to a higher committee action by a lower committee which in some previous form had already been before the higher committee. He explained this as follows: "Sometimes matters have been before the members of a higher committee, such as the Executive Committee of the Southern Freight Association, and later a proposal covering substantially the same matter comes before a subordinate committee, such as the General Freight Committee, in the same or in a modified form, and a different recommendation is made. These should be referred to the appellate or higher committees for review in the light of their previous actions or recommendations." [95]

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[92] XIII, 4136.
[93] IV, 1292, 1293.
[94] IV, 1293.
[95] IV, 1293, 1294.

Kerr testified that, as in Official Territory, the Chairman has no vote in the disposition of an appeal and that appeals by the Chairman are "very rare". He added that "more often than not my appeal is not sustained,"[96] but he gave no examples.

Burgess testified that an appeal by a committee chairman "is decidedly the exception, rather than the rule, and is only taken in the exceptional and important types of cases which I have described. That is, those cases affecting carriers as a whole in a region or a district with respect to a particular traffic or kind of rates." "Even when he appeals," Burgess said, "he cannot prevent a carrier from going ahead if it is unwilling to await the outcome of the appeal."[97]

Upon cross-examination regarding the provisions for stays, referred to above, Burgess said that in spite of these provisions carriers "are free to, and do, exercise the right to go ahead with such action as they wish to take without awaiting the outcome of an appeal. This provision, therefore, does not prevent independent action pending an appeal."[98]

Burgess further testified, regarding the right of independent action pending an appeal by a Chairman:[99]

> "The situation in a chairman's appeal does not differ from the situation in a member's appeal. In either case there is no penalty of any kind that can be or that is visited upon any line which is unwilling to defer action it may wish to take during the pendency of the appeal.
>
> "It happens in practice that lines are not willing to wait until an appeal can be disposed of by a higher committee, and in such instances those lines give notice to that effect and go ahead with the tariff publication they wish to make.
>
> "That is true whether the procedure is that of a chairman's appeal or a member's appeal."

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[96] IV, 1294, 1295.
[97] XIII, 4142.
[98] XIII, 4144.
[99] XIII, 4150, 4151.

On cross-examination Burgess conceded that the rules as applied in practice permitted the Chairman of the Association to appeal to the Presidents not only from committee action but from an announcement of independent action by an individual carrier. He was then asked if it was not true that under the rules the announcing carrier would have to withhold the effectuation of the proposed action until the appeal had been determined. He replied:[1]

> "It is hoped that he will, but there is no way of requiring such withholding and there is no penalty that can be visited on a line for not withholding."

Kerr also conceded on cross-examination that there were cases where, as Chairman of Southern Freight Association, he would appeal to the Traffic Executive Association from an announcement of independent action, "with the consent and knowledge of the road that gave the announcement."[2] He was then asked:[3]

> "Q. Does not that appeal operate as a stay of the action pending the appeal?
>
> "A. Theoretically it does, but actually it does not. It does not in those cases where the proponent files a notice of independent action and insists that it be carried out."

Kerr cited as authority for such action the rule in Traffic Executive Association-Southern Territory previously described which declared that "nothing in these articles shall be construed as a limitation upon the final right of any member . . . to take separate and independent action." He conceded that the word "final," which counsel for Georgia suggested was meant to make the stay provisions effective, "may be subject to more than one interpretation, but you will recall that I gave you an instance of a case that was appealed to the Southeastern Presidents' Conference that was reannounced by the President of the propo-

[1] XIII, 4285.
[2] V, 1535.
[3] V, 1557.

nent railroad before the Southeastern Presidents' Conference had time to consider it and take any final action."[4]

As previously noted at p. 529 above, Burgess testified that during the four years of his incumbency as Chairman of the Traffic Executive Association-Eastern Territory (May 1, 1942 to March 1, 1946) he had taken only four appeals from that Association to the Presidents and that "not one of them ever got to the Presidents meeting. We never had an appeal to the Presidents meeting on any one of the appeals that I took for the reason that something happened" (e. g.: change of view by the shipper, etc.) "that caused the announcing line to have to change its proposal."[4a]

On cross-examination of Burgess Georgia introduced minutes of five cases of appeals by prior Chairmen of the Traffic Executive Association-Eastern Territory from independent announcements, as follows:

1. July 8, 1937, the Chairman appealed to the Presidents Conference from an independent announcement by the Wabash. On September 16, 1937 the Presidents decided to take no action; "the rates were further considered by subordinate committees and ultimately went into effect."[5]

2. December 16, 1937, the TEA-ET adversely recommended a proposal by the Boston & Maine and others for a new route, with appropriate rates, from New York to Boston by water and thence to Canada by rail and back into the Middle West. The B. & M. announced its intention to proceed independently. The Chairman appealed to the Presidents. The latter took no action because there was then pending before the I. C. C. an application for Fourth Section relief, which would first have to be granted before the new rates could go into effect. In March, 1938 the I. C. C. granted the relief, and the Presidents then gave letter approval to the proposal, subject to certain adjust-

[4] V, 1559.
[4a] XIII, 4288, 4289.
[5] S-517, text at XIII, 4415; discussion at XIV, 4435-4437.

ments relating to the description of the destination territory, which were duly worked out. The rates then went into effect.[6]

3. On July 19, 1938 the Chairman appealed from independent announcements by the B. & O., the Pennsylvania, the Reading and the Central Railroad of New Jersey. On July 27, 1938 the Presidents considered, referred the matter back, and it was amicably settled on August 2, 1938.[7]

4. On January 12, 1939 the Chairman appealed from an independent announcement by the Boston & Maine, but the appeal was never perfected. "I think," said Burgess, "there had been some misinformation given to the Traffic Executive Association . . . as to whether this applied to import or export traffic, and when that was cleared up there seemed to be no further opposition to it and there was no occasion to take it to the Presidents, and the result was . . . the Boston & Maine went ahead and published the rates as they proposed."[8]

5. On April 13, 1939 the Bangor & Aroostook, having had a rate proposal adversely recommended in succession by the General Freight Committee, the Freight Traffic Managers Committee, and the Traffic Executive Association-Eastern Territory, announced its intention to proceed independently. The Chairman thereupon took an appeal to the Presidents. The record does not show what happened.[9]

This completes the evidence regarding Chairman-appeals. The only specific examples in Official Territory of the exercise of the Chairman's authority which appear in the record are the four mentioned by Burgess and the five cited by Georgia on his cross-examination. In these nine cases the results of the appeals may be summarized as follows.

In five cases the proposals were withdrawn before reaching the Presidents.

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[6] S-515, text at XIII, 4409; discussion at XIV, 4425-4431.
[7] S-516, text at XIII, 4411; discussion at XIV, 4431-4435.
[8] S-517, text at XIII, 4415; discussion at XIV, 4437-4439.
[9] S-514, text at XIII, 4403; discussion at 4404-4406 and XIV, 4425.

In two cases the Presidents refrained from acting; in one of these the rates ultimately were effectuated and in the other the matter was "amicably settled".

In one case the Presidents approved the proposal, subject to certain geographical adjustments which were worked out.

In the final case the record does not show what happened to the appeal.

Thus there is no evidence that the Presidents exercised any coercive influence over the disposition of rate proposals.

On the other hand, in all but the last case, which shows nothing, it appears that after the appeal was taken publication was withheld pending the ultimate disposition of the case. Thus the stay provisions were observed, even in those cases in which announcements of intent to take independent action had already been made. These examples speak more persuasively than Mr. Burgess's statement, unsupported by examples, that carriers "are free to, *and do*," exercise the right of independent action pending appeals brought by Chairmen.

In Southern Territory only one case example of a Chairman's appeal was mentioned in the record, and in that case Kerr stated that independent action was taken prior to consideration by the Presidents. But no details were given.

C. *The Railroads' Alleged Fear that the Bureau Membership May Launch Concerted Attacks Against Rate Proposals Filed Independently with the I. C. C.*

As an additional ground for contending that the defendants' asserted liberty of action was a "shadow devoid of substance," Georgia stated that "any carrier contemplating independent action contrary to the recommendation of its bureau must realistically face the fact that the *bureau membership may launch a concerted attack against the adjustment before the I. C. C.* In fact, it is not unusual

for the chairmen, after obtaining the permission of the A. A. R., of course, to act as agents for the various complaining lines by filing a joint petition with the I. C. C. protesting a tariff disapproved by the bureau." [10]

The evidence cited to show *concerted bureau membership attack* consisted of the following three incidents: [11]

> 1. Independent action by the Illinois Central contrary to a Southern Freight Association recommendation. Mr. Sheppard testified that thereafter "the rates were suspended," the case was heard, and the I. C. C. approved the rates. It does not appear who sought the suspension.
>
> 2. Independent action by the New York Central with a number of other railroads joining, contrary to recommendations of the Traffic Executive Association-Eastern Territory and the Presidents Traffic Conference-Eastern Territory. Mr. Franklin testified that "some of the railroads" complained to the I. C. C., which suspended the rates. (Sequel not shown)
>
> 3. Independent action by the Chesapeake & Ohio contrary to recommendation of the Presidents Traffic Conference-Eastern Territory. Mr. Hull testified that "other interested carriers" complained to the I. C. C. The I. C. C. refused to suspend.

These examples do not establish the existence of concerted bureau membership attack, or the fear of it.

Georgia's allegation above about the *Chairman's role* rested upon two instances in which the Chairman of the Southern Freight Association asked for suspension of a rate filed by one carrier, on behalf of all the other Southern carriers because all were in accord and it was convenient for the carriers and the Commission to act on one petition.[12]

The two instances last cited show that occasions may

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[10] Final Brief, p. 68. Emphasis added.

[11] Being all of the citations under Georgia's proposed Finding 124. The first item is in VII, 2155; the second, in XI, 3289, 3290; and the third, in XIV, 4763, 4764.

[12] VI, 1778 (Georgia's proposed Finding 125).

arise in which a proposed adjustment may be opposed by all the other carriers in a given territory, and that in such instances the Chairman may for procedural convenience file a petition for suspension on behalf of all of them.[13] The remainder of the evidence analyzed above fails to show that instances of this sort are frequent or typical, or that carriers are in fact deterred from taking independent action for fear of concerted bureau membership attack before the I. C. C. The evidence relating to independent action, heretofore reviewed, indicates that they are not so deterred.

D. *The Alleged Obstacles in the Way of Obtaining Consents to Interterritorial Rate Proposals*

Georgia charged that the "coercive pressures just described at work in the South and the North apply with cumulative vigor to those interterritorial proposals which bulk so large in the instant case and which must separately run the gamut of bureaus in both regions."[14]

This charge, and certain accompanying allegations which will be noted below, require some preliminary analysis of the nature and handling of interterritorial rate proposals.

1. *The Nature of Interterritorial Rate Prosposals*

Up to about 1928 most interterritorial rates between the South and the North were *combination rates*, made up of the sum of local rates to the border gateways. Conse-

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[13] Georgia's statement quoted above that the Chairman does this only "after obtaining the permission of the A.A.R." presumably has reference to the A.A.R. resolution of May 17, 1935, discussed at pp. 447-460 above. That resolution provided that one group of carriers should not move to suspend another group's rates without first seeking a conference with officers of the A.A.R. The evidence showed that approval of the A.A.R. was not called for, and that the conferences were mediatory in nature.

[14] Final Brief, p. 75.

quently there were very few *joint through rates* between the South and the North. Burgess testified that:[15]

> "Such joint through rates as did exist were made up or built up of what was commonly called a specific north of the border, plus whatever the lines south added and the rates made up of that aggregate of the northern specific and the southern specific were divided as they were made, so that proposals did not come to the North nor did we send proposals to the South in those days when there was contemplated a specific through rate."

In a series of decisions in the case known as *Southern Class Rate Investigation*,[16] handed down in 1926 and 1927, the Interstate Commerce Commission fundamentally altered the situation by revising the entire structure of class rates within Southern Territory and between Southern and Official Territory, prescribing joint through class rates for interterritorial movements, and urging upon the railroads the establishment of joint through commodity rates. In consequence, as Burgess testified, "it very soon developed to be the practice to make commodity rates in terms of or with percentage relation to the class rates, and, after that time, there was a great growth of joint through commodity rates and the consideration of those, of course, has been an important matter since that time."[17]

Thus the interterritorial rate fabric has come to consist chiefly of joint through rates in place of the old combination rates; and joint through rates require consideration by carriers in each of the territories involved. In the first instance such rates have to be considered from the point of view of their effect on other carriers, localities and shippers, and then, if the rates pass this test, their effectuation requires bargaining between the participating carriers as to the divisions of the proceeds.

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[15] XIV, 4567.
[16] 100 I.C.C. 513, 109 I.C.C. 300, 113 I.C.C. 200, 128 I.C.C. 567.
[17] XIV, 4568.

2. *Method of Handling Interterritorial Rate Proposals in the Territorial Associations*

The usual procedure is that an interterritorial rate proposal is acted upon first within the territorial association of the proponent carrier and then within the association of the other territory affected. Thus, Kerr testified that while the Southern Freight Association is entirely independent of any other association:[18]

> "Proposals originating with the members of the Southern Freight Association, and which go through the Association, are forwarded to the Chairmen of similar associations in other territories, because the carriers in these other territories have set up these other associations as their agents for that purpose.
>
> "In like manner, proposals originating with carriers in other rate territories, which are filed with the associations they set up, are likewise received from the Chairmen of those other associations and distributed by me, as Chairman, to the members of our association."

Every through rate proposal approved by the Southern Freight Association is automatically sent to all three sub-territorial associations in Official Territory.[19] Barring the rare case in which the proposal turns out to be of only local significance to one of the sub-territorial associations, the proposal is duly processed in all three, exactly as in the case of "a general basis" intraterritorial proposal (i. e., a proposal which affects carriers or shippers in more than one sub-territory. The testimony has shown that all but a handful of proposals are of this sort).[20] There is one unimportant difference between the handling of Southern rate proposals and the handling of Official Territory proposals in the Trunk Line Association; proposals of the latter sort, if not approved by mail, go to the General

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[18] IV, 1201.
[19] Burgess, XIII, 4300-4302.
[20] Pp. 261, 262, *supra*.

Freight Committee, whereas proposals of the former sort go to the Southern and Southwestern Committee.[21] This committee operates on the same level as the General Freight Committee. The Southern and Southwestern Committee considers only proposals originating in Southern Territory; the General Freight Committee deals only with proposals originating in Official Territory; in all other respect the two committees serve the same function. Appeals are taken in the same way as in the case of a proposal originating in Official Territory, i. e., by any member road or by the chairman of the particular committee in cases where the action recommended is in his opinion inimical to the best interests of all the carriers.

In Southern Territory, rate proposals received from other territories are processed in exactly the same manner as Southern intraterritorial proposals, with one slight exception. After the proposal has been received, analyzed, and distributed to the members by the Standing Rate Committee (the initial committee of rate experts) it automatically goes on the docket of the General Rate Committee for discussion if there is one objection. In the case of intraterritorial proposals three objections are necessary.[22]

The question to be determined at this point is whether in the procedures described above for handling interterritorial rate proposals there are superadded any elements of alleged coerciveness which do not appear in the handling of intraterritorial proposals. In Volume Three I shall consider the question whether Southern interterritorial rate proposals are handled in the North in a way dis-

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[21] Pp. 258, 259, *supra*.

[22] See Kerr's testimony at IV, 1313: "Q. But the recommendation has to produce at least three objections? A. That is in the case of a proposal filed by a member line. Now, a proposal that comes to our lines from the carriers in another territory, known as a foreign line proposal, one objection of the Standing Rate Committee would automatically result in that proposal being placed on the General Freight Committee docket."

criminatorily different from the way in which Northern interterritorial rate proposals are handled in the South. Here I am concerned only with the question of coerciveness in North and South alike.

It is the fact, as Georgia points out, that interterritorial rate proposals have to be considered in two different territories, while intraterritorial need be considered only in one; and that, therefore, the handling is more elaborate in the first instance than in the second. But it does not follow from this that the handling is of a different sort.

It is also the fact that in the case of every interterritorial proposal the proponent road in one territory must find at least one road in the other territory willing to concur in the joint rate; whereas in the case of intraterritorial proposals concurrences in joint rates need be sought only from carriers within the same territory. But it does not follow from this that non-concurrence would be any more coercive in the first instance than in the second. Whether or not one road should concur with another in a proposed joint rate is at the outset a question of bargaining, since not only rates but divisions of revenues are involved. And in the bargaining, unless and until the I. C. C. should direct otherwise, each road may consider from its own viewpoint how the proposed rate would affect its earning position and the position of the shippers on its line upon whom it depends for business.

All this is elementary, and I mention it here only to emphasize the point that non-concurrence of Northern roads in Southern rate proposals is not in itself evidence of coercion, either on the part of the Northern roads against the Southern, or on the part of the Northern roads against other Northern roads.[23]

The procedural situation facing a Southern road which

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[23] At pp. 172-174 I have considered Georgia's various contentions as to the meaning and legal effect under the Sherman Act of the concept of coercion. See also pp. 617, 618.

wishes to effectuate a joint rate into the North was summed up by Oliver of the Southern Railway, in a passage cited by Georgia, as follows:[24]

> "Those other rate territories have their associations through which rate adjustments are considered within their territory and interterritorially.
>
> "Upon advice that a proposal is approved in Southern Freight Association, the Official territory lines' association will report the result of consideration of its member roads. If they approve, the rate change stands ready for the tariff publishing agents to put into effect.
>
> "Q. Suppose the Official territory lines fail to concur in a proposal, say that the Southern Railway had initiated.
>
> What course would be open to you in that event?
>
> "A. Perhaps the first thing that I would do would be to urge them to reconsider and try to refute their arguments or reasons for declining to concur.
>
> The next would be to try and find a road in that territory which might be willing, individually, to join me. If I could secure one it would be up to the other lines in that territory to join or forego the opportunity to participate in the traffic.
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> • • • • •
>
> Failing to reach my objective in that way, the Southern lines could consider publishing an appropriate rate to the gateway points on the Ohio River and to the Virginia Cities. In that way the entire reduction would have to be absorbed by the Southern lines.
>
> Another course is to publish a rate in which the Official territory lines are willing to join."

The same description would fit the situation of a Northern road seeking to effectuate a joint rate into the South.

At pp. 531-534 I have reviewed the statistics indicating that the South fares no worse in the North than the North

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[24] IX, 2610, 2611.

does in the South in obtaining independent concurrences in joint rates which have been disapproved by the rate bureaus. Such concurrences are relatively few, in both territories, but there is nothing to show that their paucity is due to coercive pressures.

There are three possible obstacles of a procedural nature facing interterritorial rate proposals which do not face—or do not normally face—intraterritorial proposals. They are:

First. Request by a group of roads in one territory, opposed to the proposal of a group in another territory, for a conference under the A.A.R. resolution of May 17, 1935. As shown at pp. 447-460 above, these conferences are held upon request by Mr. Cleveland; they could be called in the case of intraterritorial as well as in the case of interterritorial conflicts, but the evidence indicates that cases of the latter sort are the more frequent. I have previously found, however, that these conferences, whatever the source of the controversy, are mediatory only, are not coercive in character, and are sometimes dispensed with altogether, without any consequent penalties.

Second. Georgia charged "that any proposal contemplating a movement from a point in the South to a point in Trunk Line hardy enough to survive the regional hurdles just described is in *constant jeopardy of an arbitrary, coercive, and discriminatory disposition by the A.A.R.*" [25] I find no support in the record for this statement, or for the similar statement that: "if the interterritorial proposal sought to be effectuated by the Southern road should be so unfortunate as to run counter to an expressed policy of the A.A.R., even if some non-conforming Northern road should concur, the matter would *in all probability be appealed to the A.A.R.* . . ." [26] After reviewing the evidence of the A.A.R.'s activities at pp. 423-507 above, I found only

[25] Final Brief, p. 58. Emphasis added.
[26] Final Brief, p. 79. Emphasis added.

two instances in which the A.A.R. Board had taken action with respect to particular rates, and that these two instances were insufficient to support a finding that interference by the A.A.R. Board in particular rate adjustments was a significant factor in rate relationships. Indeed the only South-North rate adjustment on which the A.A.R. ever acted, so far as the record discloses, was the citrus fruit case of 1936, discussed at p. 482 above. Its exceptional nature, and the irrelevance of the A.A.R. resolution to the outcome, were there shown.

Third. Consideration of proposals by the Joint Conference of Contact Committees. This is a body whose existence and functions have not yet been discussed. It requires some special analysis, which here follows:

3. *The Joint Conference of Contact Committees*

Georgia alleged with regard to this Conference:[27]

> "After an interterritorial proposal contemplating a reduced rate on a movement from a point in the South to a point in Trunk Line has ground its way through the Northern rate mills, it is then confronted with the necessity of overcoming opposition of rate associations outside the North. To insure that no major rate territory shall take action believed to be inimical to any other such territory, the seven major rate territories have organized a Joint Conference of Contact Committees . . ."

(a) *The Origin of the Joint Conference*

The Joint Conference was arranged in 1928, shortly following the decision by the Interstate Commerce Commission in the *Southern Class Rate Investigation*, referred to at p. 558. Prior to that time a great many of the rates in Southern Territory were departures from the principle contained in the Fourth Section of the Interstate Commerce Act—that is to say, they charged more for a short than for a long haul. These departures had been

[27] Final Brief, p. 55.

permitted by the Commission to meet not only actual but potential water competition.

In the Transportation Act of 1920 the Fourth Section of the Interstate Commerce Act was amended so as to preclude the Commission from granting Fourth Section relief because of potential water competition; the competition had to be actual.[28]

Tilford of the Louisville & Nashville, one-time Chairman[29] of the Joint Conference, testified that the combined effect of this change in the Fourth Section and of the new class rate structure prescribed by the Commission in 1928 was that "our whole scheme of rates that had been in effect before was completely disrupted. . . . The railroads were confronted with a tremendous undertaking to revise all the rates."[30] At first the carriers tried to carry out the revisions "in the ordinary method, the Southern lines to originate the proposal, send them to the Eastern roads, they [to] consider the matter and decide whether the adjustment proposed met their concurrence."[31] However, the carriers found that this procedure was impractical. Accordingly, the chief traffic officers of the Southern and Official Territory carriers "had a conference and decided that we would have to find a more expeditious method to comply with the decisions of the Commission and, as a consequence, it was agreed that these groups of men that had the duty and responsibility of producing the revisions would meet periodically and discuss their revision[s], and there reach an understanding, if they could, of the rates that would be proposed to the Interstate Commerce Commission by the filing of tariffs."[32]

Asked if this was the beginning of what was known as the Joint Conference of Contact Committees, Tilford replied "Yes. That was the beginning of it, and its whole purpose

[28] Tilford, VI, 1661.
[29] IV, 1320, 1321.
[30] VI, 1662, 1663.
[31] VI, 1663.
[32] VI, 1664.

was to expedite compliance with the Commission's decisions."[33]

Kerr, who succeeded Tilford as Chairman of the Conference, testified to the same effect. He pointed out that in the Commission's 1928 decision the Commission had advised the carriers to revise their commodity rate structures to follow the same pattern as that set by the prescribed class rate structure; and that also, as a result of the change in the law already referred to, the Commission had denied Fourth Section relief "in connection with some ninety odd commodity groups" and in "many other instances."[34] Commenting on the task confronting the railroads, he said:[35]

> "There was no practical way to handle these rate revisions of broad scope generally involving all of Southern territory and in which practically every Southern carrier was a partner with every other Southern carrier, and thus, between the South on the one hand and Official territory on the other hand, except by a conference of interested lines. * * *
>
> "So, as I say, the task was so great and the pressure of meeting effective dates fixed by the Commission, which were postponed from time to time, that the carriers had to organize and handle these matters largely by conferences."

It was not the Southern carriers only who were concerned about completing the necessary revisions as soon as possible. According to Kerr:[36]

> "The carriers in Official territory at that time had about the same interest, if not exactly the same interest, as the Southern carriers in complying with these . . . Fourth Section orders of the Interstate Commerce Commission.
>
> "In other words: they were under the same necessity of putting their interterritorial rates into compliance with long and short haul principles as were the Southern carriers."

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[33] *Ibid.*
[34] IV, 1317.
[35] IV, 1317, 1318.
[36] IV, 1318.

Soon all the other major rate territories were involved:

> "At about this same time we had a similar decision involving rates between the Southwest on the one hand and the South and Official territory on the other, and a little later we had a decision involving the class rates, and later on the commodity rates, between Western Trunk Line territory on the one hand and Southern territory on the other. . . . Just about at that same time the Eastern and the Western carriers were faced with the decision requiring a readjustment of their class rates between Western Trunk Line territory and Official territory. . . . The Official territory lines had to cope with that situation and keep it in mind when working out rate adjustments with Official territory in the South." [37]

The Southern Freight Association, in connection with working out Fourth Section denial orders issued between 1910 and 1920, had had in existence a "Fourth Section" Committee. This committee became particularly active after 1928 and was the logical committee to meet with similar committees in the other territories. Thus it became known as the "Contact—Fourth Section Committee" and the conference of these committees "for lack of a better term", as Kerr said, became known as the Joint Conference of Contact Committees.[38]

(b) *Present Status of the Joint Conference*

The evidence showed that the greater part of the work of the Joint Conference had been completed by the end of 1934

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[37] IV, 1318, 1319. Tilford testified to the same effect in VI, 1667. For a more detailed discussion of the leading decisions, with citations, see Dickinson, II, 778-781; III, 813-821.

[38] Kerr, IV, 1320; and as to the development of the Fourth Section Committee in the South, 1316-1318. The duties of the Committee ("to consider and take action on general revisions necessary to comply with Fourth Section orders, or general revisions of wide scope requiring consideration and study beyond the ordinary duties of the General Freight Committee") are found in Article V of the Articles of Association of the Southern Freight Association, SD-2, Vol. N. The Committee consists of traffic officers below the rank of Vice Presidents.

and that it has comparatively little to do today. A report to the Southern Freight Association in 1937, describing the progress made by the Joint Conference,[39] discloses that up to January, 1937 a total of 685 commodity groups involved in Fourth Section denial orders had been covered by rate revisions and that comparatively few remained to be disposed of. This exhibit, Kerr pointed out, demonstrated "the tremendous task that faced the carriers not only in the South but those in Official territory and, to some extent, those in other territories in complying with these denial orders of the Commission"; and the exhibit indicated "the extent to which the interested carriers in the South and in Official territory were able to reach understandings with each other as to the proper measure of the interterritorial commodity rates."[40]

The exhibit showed, among other things, the number of commodity groups covered by rate revisions agreed upon by the Joint Conference in the years 1931 through 1936, as follows:

1931	98
1932	263
1933	104
1934	46
1935	35
1936	20

Another defendants' exhibit[41] showed that in the year 1939, 19 proposals were originated by Southern Freight Association carriers and considered by the Joint Conference. Two of these were for changes in commodity descriptions and they were approved. Seventeen were proposals for interterritorial rate reductions. One was withdrawn; four were disapproved; one was approved as amended; and eleven were approved as submitted.

In the same year, as shown by another exhibit,[42] Southern

[39] SD-11, introduced by Kerr at IV, 1324.
[40] IV, 1326.
[41] SD-7A, Vol. N, introduced by Kerr at V, 1580.
[42] SD-7, Vol. N, discussed by Kerr at IV, 1262-70.

Freight Association members submitted the following numbers of proposals to the following rate associations:

Trunk Line Association	755
Central Freight Association	786
New England Freight Association	752
Illinois Freight Association	571
Western Trunk Line Association	314

(submittals to Southwestern Freight Association not shown).

Making due allowance for the fact that all but a few of the proposals submitted to the Trunk Line, Central Freight and New England Freight Associations were probably identical proposals, copies of which were sent to all three at the same time,[43] and that copies of some of these proposals may also have been forwarded to and therefore figured in the totals of the other associations listed above, the exhibit nevertheless shows how small the volume of business of the Joint Conference has become in recent years in comparison with the first six or seven years of the activities of the Conference, and in comparison with the work of the other Associations.

(c) *Procedure and Voting in the Joint Conference*

The Conference has functioned intermittently, without definite rules of procedure.[44] Tilford described its methods as follows:[45]

> "After reaching a satisfactory discussion of the subject, one of the groups or one individual of a group may suggest a method that could be used in complying with the order on a particular type of traffic and after there was a discussion, each group, each separate group, would caucus right there—it was a very large room

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[43] As noted at p. 559, Burgess testified that this was the regular practice in forwarding rate proposals from the Southern Freight Association to Official Territory.

[44] Kerr, IV, 1329-1331.

[45] VI, 1665-1667.

—and they would caucus right there and, by their own rules and methods reach a conclusion as to what the position [of] their group of carriers would be . . . then the Chairman would ask each of these groups what the conclusion of its group was, and the spokesman for that group would then announce what, for instance, the New England group decided, what the Southern group decided, what the Trunk Line group decided, and so forth, and the net result was that our procedure was precisely the same procedure we had before where the views were interchanged by correspondence.

• • • • •

"Each group would decide for itself whether it would join in an action with respect to a given recommendation or not join in the recommendation, and there are a number of cases where one of the other groups would vote it out; a sort of United Nations organization, any one group could vote in such a way as to veto the recommendation of the majority, because they would decline to participate in the adjustment and, in that event, being faced with the order of the Commission, we had to start over again and find a different method."

In the rules of procedure which were never formally adopted there was an express provision affirming the right of independent action, drafted in 1941 and revised in 1943.[46]

[46] The 1941 draft covered only independent action by the separate committees ("No committee shall be deprived, after consideration by the Joint Conference, of the right of independent action either with respect to proposals covering adjustments within its own territory or between such territory and other territories to the extent such other territories may concur.") S-167, I, 290. The 1943 draft included individual carriers as well as committees, and was more emphatic in tone ("Nothing herein contained, and no action taken by or at any meeting of the interterritorial conference shall abridge or annul the right of the carriers in any participating association, committee or bureau, or of any one or more of such carriers to take such actions with respect thereto as they or it in their or its free and uncontrolled discretion shall deem appropriate.") Kerr, IV, 1331.

Kerr testified that in practice "each and every carrier reserves the right of independent action."[47] He also said:[48]

"My own opinion is, as Chairman of this organization, and Chairman of the Southern Contact Committee, that the votes do not mean much in and of themselves. . . . The fact remains that no interterritorial rate can be changed without the concurrence of the carriers that participate in those rates and, . . . if one group of carriers say that they will not participate in any lower rate than a certain level, then they have that right . . . and the other carriers or group of carriers have no power to change it except by complaint before the Commission and through an order by the Commission."

Georgia took sharp issue with Kerr's statement that the "votes do not mean much in and of themselves." Georgia drew attention to the composition of the voting line-up of seven as follows:

Southern Freight Association	1
Northern carriers, total of	3
(consisting of:	
New England Freight Association	
Trunk Line Association	
Central Freight Association,	
each, however, voting separately)	
Illinois Freight Association	1
Western Trunk Line Association	1
Southwestern Freight Association	1
Total	7 votes

Georgia then introduced in evidence a memorandum written in November, 1937 by a Mr. Mitchell, member of the Standing Rate Committee of the Southern Freight Association, to Kerr, Chairman, in which he emphasized the key position of the Illinois Freight Association in the

[47] IV, 1333.
[48] *Ibid*, and 1334

voting line-up of the Joint Conference.[49] He stated that the Official Territory lines, while voting separately, "nearly always" vote as a unit. Therefore, "having four votes," (i.e., with the addition of the Illinois Freight Association) "necessarily they have an advantage and can often control the action of the Joint Conference of Contact Committees. Our only hope in getting a fair deal with our interterritorial proposals that go to the Joint Conference for disposition is through the Illinois Freight Committee. Until the recent past that Committee required only one negative vote to defeat a proposition, therefore, to illustrate, a proposal from the south to Chicago, while favored by a majority of the Illinois lines, their vote would be in the negative if one east to west line voted in the negative."

Mitchell then pointed out that a year or so previously, through the efforts of Sperry, Chairman of the Illinois Freight Association, "to better this situation," the one-vote negative had been changed to a requirement of four negatives. However: "These it is not difficult to get from lines whose major interest is east and west, rather than north and south."[50]

Mitchell therefore urged a further change calling for decision by the majority, a change which he believed would be approved if Sperry could be induced to recommend it. If the change were made, then "with the help of the ICRR, C & EI, Monon, CB & Q and others, we would be enabled to get the vote of the Illinois lines on any meritorious proposition, and then with the assistance of the Southwest and Western Trunk Line we would have a majority. I think this would be entirely fair and would give the Official Classification lines on the one side and our lines on the other an opportunity to sell our proposal to the Illinois Freight Committee, and give the Illinois Freight Committee the power to handle these matters on their merits."

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[49] S-168, I, 290, 291.

[50] Georgia pointed out that the Pennsylvania, the B. & O., the New York Central and the Nickel Plate (a subsidiary of the Chesapeake & Ohio) are members of the Illinois Freight Association. S-374, II, 529, 530 (as of 1943).

Kerr testified that he was not in accord with Mitchell's views, and he read into the record a memorandum which he had written Mitchell in August, 1939, "dealing with the same subject," in which he had said:[51]

> "However, although the Official territory lines have at least three votes to our one vote, the fact remains that regardless of how the result of the vote stands, interterritorial rates cannot be established between Official and Southern territories unless they are concurred in by both groups." (I.e., as he explained, "the Official territory group, on the one hand, and the carriers in the Southern group on the other hand, to the extent that they were interested in particular rates").

If Kerr's memorandum of August, 1939 is to be regarded as directly responsive to Mitchell's memorandum of November, 1937, what Kerr was saying in substance was this: Nothing in particular would be gained by changing the rules of the Illinois Freight Association so as to give the proposals from Southern territory a wider chance of acceptance within that Association, because even if the Southern lines, with that Association, and with the votes of the committees from the Western and Southwestern lines, could outvote the Northern lines 4 to 3 on any given Southern proposal, it would make no difference, since the proposal could not in any event be effectuated without the concurrence of the Northern lines.

This reply would be unanswerable if a majority vote of the Conference had no significance. Did such a vote in fact have any significance, other than as a mere registering of a certain collection of views?

In one sense it did not. The evidence is clear that in spite of a majority vote by the Conference Committees, dissenters could, and from time to time did, block action by non-concurrence. For example, in addition to Kerr's testimony as to the right of independent action referred to above, the defendants introduced an exhibit showing what happened to the proposals considered by the Joint

[51] IV, 1339.

Conference of Contact Committees in 1937, 1938 and 1939, initiated by carriers in Official, Illinois and Western Trunk Line Territories.[52]

There were 32 such proposals in the aggregate, 2 from the Western Association, 1 from the Illinois Freight Association, and the remainder from Trunk Line, Central Freight and New England. Most of the proposals were for reductions in rates. 6 of the proposals were disapproved by the majority (3 Trunk Line proposals for reductions into the South; 2 New England proposals for reductions, one into the South and the other into the Southwest; and 1 Central Freight proposal for reductions into the South. In these cases it may be noted that majority votes were obtained against the Northern proposals). Out of the 26 remaining proposals approved by the majority, the Southern lines blocked action in 5 by non-concurrence —a demonstration of Kerr's point about the ability of any group to veto the majority action.

In one other of the 26 cases tabulated there was a note that "Southern Lines voted against proposal but offered no objection after approved by majority vote."[53] This note tends to show that, while the lines reserved the right to act independently, a majority vote had a certain presumption in its favor. This presumption was also indicated in a note to one of the 5 cases above in which action was ultimately blocked by Southern non-concurrence, the note reading: "Recommendation carried note Southern lines reserved right to appeal. Matter considered by Southern Executives. No publication made pursuant to recommendation."[54] The reservation of a "right to appeal" seems to be a way of saying that majority action normally should be followed.

Mitchell in his memorandum to Kerr was not questioning the capacity of the Southern lines (or of any lines) to refuse to concur in majority proposals which they did not

[52] SD-9, Vol. N.
[53] *Ibid*, p. 5 of SD-9, item 2.
[54] *Ibid*, item 4.

favor. He was, however, contending for a revised voting set-up which might produce *more* majority votes in *support* of Southern proposals not favored by the Northern lines. His memorandum would have been pointless unless in actual practice a majority vote was a useful thing to get, unless, that is to say, it carried with it a persuasiveness which might, in some instances at least, induce dissenters, even though it could not compel them, to accept the verdict of the Conference.

In the rules of procedure of the Conference, which were never actually adopted, there appeared (immediately preceding the provision for independent action already referred to) the following:[55]

> "10. Majority Vote to Govern
>
> "All actions of the Joint Conference shall be by majority vote of the several contact committees, each committee having one vote, except that as to subjects of lim.ted application action shall be by the directly interested contact committees."

While, as stated, the rules were never actually adopted, they were formulated by the chairmen of the several territorial associations at a meeting held for the purpose in 1941;[56] and it seems fair to infer that the majority action rule set forth above, like the rule reserving the right of independent action, expressed the common understanding as to the way in which the Joint Conference was actually functioning.

These rules, together with the exhibit just analyzed, and the Mitchell memorandum, all lead to the conclusion that the votes in the Conference did count for something, and carried with them an expectation of compliance with the majority, subject always to the right of dissenters to block action by non-concurrence. I so find.

It does not follow from this, however, as Georgia charges, that the Northern defendants exercise a "discriminatory

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[55] S-167, I, 290.
[56] Kerr, IV, 1329.

control"[57] in the Joint Conference. It may well be, as the Mitchell memorandum stated, that as a result of the four-negatives rule in the Illinois Freight Association it is hard for the Southern lines to get majority support from that Association for Southern proposals not favored by four of the east-west members. On the other hand, there is nothing to show that the east-west members' proposals fare any better when the Southern lines are in opposition to them. The Mitchell memorandum itself mentioned four lines (one of them, the Illinois Central, being a Southern defendant), "and others", on whose support the Southern carriers might count, at least for affirmative backing. Nor does the evidence show that the Northern defendants were responsible for the maintenance of the four-negatives rule. The Mitchell memorandum itself suggests that the membership of the Illinois Freight Association was ready to abolish the rule if asked.

On the basis of this scanty evidence a finding of discriminatory control would not be warranted. The evidence as a whole does warrant a finding that there is no coercive control. (I have dealt at this point with the alleged discrimination, which properly belongs in Volume Three, partly for convenience, and partly because the charge was made by Georgia only in connection with her description of the Joint Conference procedure, and not in connection with her main case on discrimination)

E. *Georgia's Case Example of Logs—Alabama to Alta Vista, Virginia*

This case, presented by Georgia under the heading of "Coercive and Discriminatory Price Fixing", involved a proposed rate reduction on logs from certain stations in Alabama to Alta Vista, Virginia, the entire movement being over the lines of the Southern Railway. The case involved no relationship between Southern and Northern lines and, therefore, no alleged discrimination. It was

[57] Final Brief, p. 56.

cited by Georgia as an example of the "power of defendants to coerce, prevent, hinder and delay the filing of rate proposals. . . ."[58] Certain other Southern lines objected to the proposal on the ground that it would adversely affect other rates. Oliver of the Southern Railway testified that after the rate and the objections thereto had been considered, and the proposal had been disapproved by the Southern Freight Association, he withdrew it because he had concluded "from my own investigation and from the arguments and views presented, that we should not go forward and reduce these rates through independent announcement."[59] The case at most shows (a) that under the rate association procedure rate changes covering a movement entirely on one line are submitted for study and consideration by the appropriate committees, and (b) that such changes may affect other rates on other lines, thus calling for joint consideration before any changes are effectuated. There is no evidence in this case of any coercion or threats of coercion of the Southern Railway. A detailed analysis of the case is in Appendix "F" (pp. 897-900, *infra*).

III. *The Alleged Power of the Railroads to Coerce Dissenters Through the Routing of Traffic*

A. *The General Nature of Georgia's Charge*

As has already been seen, neither the Articles of the A.A.R. nor the Articles or rules of the territorial associations contain any penalties or sanctions. Georgia contended, however, that sanctions were inherent in the power of railroads to route traffic against each other and thus to punish non-conformers. Georgia's argument ran as follows:[60]

> "The railroad industry is uniquely adapted for the exertion of group power against a protestant road

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[58] Final Brief, p. 156.
[59] IX, 2603.
[60] Final Brief, p. 99. Citations omitted, emphasis added.

because the railroads are one another's best customers. This is primarily true because the freight tonnage of any particular railroad is derived to a major extent from freight originating on 'or destined to' the lines of other roads.

"Further, not only is each individual road dependent upon joint through routes to service a major part of its freight tonnage, but a large, and perhaps most profitable portion of its tonnage consists of overhead traffic neither originating on nor 'destined for' its lines but merely passing over them largely as a matter of grace on the part of the originating carrier.

"It is because of this peculiar interdependence upon one another for traffic, that each railroad exists at the sufferance of all the others. *It is from this, that the combination here derived its power to discipline its membership.* No individual railroad, depending upon joint and overhead traffic from other carriers, could afford to withstand the *concerted threat of the rest of the industry to route against it.* As will be seen hereafter, this power to route traffic in the railroad industry is at once the power to coerce and the power to discriminate."

There is no evidence in the record, nor did Georgia contend, that in the numerous instances of independent action cited by the defendants any of the roads which took such action were disciplined by adverse routing of traffic. Georgia's argument must therefore be (1) that the disciplinary power exists, and (2) that the knowledge of its existence deters a larger exercise of independent action.

B. *The Power of Shippers to Route Traffic, and the Extent of its Exercise*

1. *The Defendants' Evidence that Most Traffic is Shipper Routed*

The defendants deny altogether the existence of the power to punish each other by the routing of traffic. They point to Section 15(8) and (9) of the Interstate Commerce Act,

under which the shipper may route the traffic as he desires.[61]

The uncontroverted testimony is that in all but a very small fraction of cases the shippers exercise the power thus given to them by the Interstate Commerce Act. Oliver of the Southern Railway testified that in his experience at least 95 percent of the traffic moving over his line is routed by the shipper, and that "the movement of southbound unrouted traffic is almost non-existent."[62] Franklin of the Pennsylvania similarly testified as to the virtual non-existence of southbound traffic that is not routed by shippers.[63] Burford of the Erie stated that "practically all the traffic" is shipper-routed.[64]

Referring specifically to overhead traffic, Tilford of the Louisville & Nashville estimated that less than 5 percent of that traffic was not shipper-routed.[65] Doss of the Atlantic Coast Line testified that over 90 percent of the traffic on his line was routed by shippers.[66]

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[61] 49 U.S.C. Sec. 15(8), (9); 36 Stat. 553 and 48 Stat. 487. Paragraph 8 provides that when a shipper delivers freight for shipment to a point to which two or more through routes are available, he "shall have the right to designate in writing by which of such through routes such property shall be transported to destination. . . ." The carrier must then "route said property and issue a through bill of lading therefor as so directed," and each connecting carrier must carry out the routing instructions. Moreover, where competing lines constitute portions of a through route, the shipper shall "in all instances have the right to determine" over which of these lines his freight shall move.

[62] Oliver further said: "I think I am rather liberal with that 5 percent. It is somewhere between 5 percent and zero, but there is a trickle of unrouted traffic moving over the various railroads in the country. My experience over many years has been that more and more the shippers are exercising their right to route traffic, and that is particularly true with respect to southbound traffic." IX, 2628, 2629.

[63] XI, 3331, 3332.

[64] XII, 3681.

[65] VI, 1767.

[66] Except in the case of shipments moving from one point on the Atlantic Coast Line to another point on the same line, in which cases "the route would be so obvious that it would be over the Coast Line." XV, 4965.

Sheppard of the Illinois Central was asked on cross-examination whether, if a shipper marked his bill of lading "Illinois Central and connections", the freight would be regarded as "shipper-routed". He replied that it would not; that under a bill of lading of that sort "we would be free to route the shipment any way we wanted beyond our connection."[67]

> "But, that is not the way it comes to us. It comes to us routed 'Illinois Central, Indianapolis, Pennsylvania', or 'Illinois Central, Indianapolis, New York Central', or 'Illinois Central, Indianapolis, B. & O.' and, if it is going farther than that, it will carry it all the way to the Boston and Maine with all the intermediate lines in between.
>
> "That is the way the major portion of the traffic—in fact I will say practically all of it—comes to the Illinois Central."

He was then asked:[68]

> "Q. You do receive some traffic, do you not, from shippers on the line of the Illinois Central which contains only the specification 'Illinois Central and connections'?
>
> "A. Very little. There might be a few cars."

In cases where the shipper does *not* exercise his privilege of routing traffic, the originating carrier then selects the particular connections. The defendants denied that in such cases they could act arbitrarily and pointed to provisions of the Interstate Commerce Act that no carrier shall "unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper," and that the Commission may direct the routing of such traffic "whenever the public interest and a fair distribution of the traffic require."[69]

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[67] VIII, 2291.
[68] VIII, 2293.
[69] 49 U.S.C. Sec. 3(4) and 15(10), 54 Stat. 903, 48 Stat. 487.

2. *Georgia's Charge that Shippers' Choices are Limited by Rail Influences*

Georgia contended that the choice of carriers available to the shipper, while broad in theory, is, in fact, very confined. It is confined, in the first place, as a result of various rail influences.

For example, Georgia said, "shippers *local to the originating carrier* are largely subject to the influence of that carrier. This is obviously so if only because such shippers are utterly dependent for service and equipment upon the originating carrier to whose lines they are local. Apart from the severe box car shortage, which presently requires the railroads to exercise a nice discrimination in allocating available equipment, it is manifest that a shipper incurs a severe jeopardy by affronting the originating carrier to whose lines he is local." [70]

In support of these statements no evidence was offered, but only an extract from a report by Professor Ripley, appearing in an Interstate Commerce Commission report in 1901, with regard to the power of the Southern Pacific over its shippers resulting from its control of all of the local lines.[71] This excerpt is not sufficient to support a finding of fact that today, in Southern and Official Territory, the power of the shippers to route their traffic is not a real one.

Georgia then asserted that even shippers who are fortunate enough to have a choice of originating carriers "are subjected to various rail influences." Three such influences were mentioned: [72]

(a) The fact that "the railroad industry itself is a large consumer of innumerable supplies and services, and shippers are frequently anxious to give traffic to railroads purchasing for their own consumption the products of such shippers." In support of this statement Georgia cited the

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[70] Final Brief, p. 105. Emphasis added.
[71] 63 I.C.C. 455, 579.
[72] Final Brief, p. 106.

testimony of Mr. Sheppard of the Illinois Central, who agreed that as a matter of reciprocity "shippers will frequently route at least part of the traffic over the lines of railroads to whom they are selling a considerable quantity of material."[73] On the other hand, Mr. Sheppard also testified that "the only traffic the railroad controls, that is, substantially controls," is its own "company material. In other words, we go down to the East, say to McKeesport and Pittsburgh, and places like that, and buy certain items to be used in our shops, repairing cars, and so forth. Now, that traffic we do have a right to route, and that is the 'railroad controlled routing' but that is a very small part of our business."[74]

(b) The next influence upon shippers was ascribed by Georgia to the soliciting agents which the "railroads generally maintain in strategic market centers throughout the country for soliciting as much traffic for as long a haul as possible over their respective lines."[75] The inference was that because of the importunities of these agents the shippers' freedom of decision in matters of routing was impaired. An opposite inference seems at least equally plausible, namely, that the shippers' freedom of choice in routing is generally so great that the railroads who are in competition for their favors come to them as suppliants.

(c) As a third example of the influences to which shippers are subject, Georgia asserted that "from time to time the railroads pool their soliciting forces either to solicit preferentially for each other or to foreclose prejudicial soliciting against each other."[76]

The evidence cited in support of this statement consisted only of a soliciting agreement between the Southern Pacific and the Illinois Central, entered into in 1930. It came about in connection with the acquisition in 1930 by the Southern Pacific of the Cotton Belt (the St. Louis Southwestern Rail-

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[73] VIII, 2308.
[74] VIII, 2294.
[75] Final Brief, p. 106.
[76] *Ibid*, p. 107.

way).[77] Prior to the acquisition the Southern Pacific and the Cotton Belt had maintained many routes with the Illinois Central over which the Illinois Central solicited business for its roads. The Illinois Central wished to maintain these routes so that the solicitation could continue. The I.C.C. directed that the routes be maintained. The agreement in question was then made.

Under that agreement, since 1930, the non-shipper routed traffic which the Southern Pacific-Cotton Belt was able to route in connection with the Illinois Central amounted to but 8/10 of 1 percent of the total deliveries. The Illinois Central routings in connection with the Southern Pacific-Cotton Belt averaged about 5/10 of 1 percent. All the rest of the traffic—that is to say, over 99 percent in the case of each road—was routed by the shippers.[78]

Sheppard of the Illinois Central stated that these statistics were "excellent demonstrations of the fact that under the Interstate Commerce Act shippers not only have the right to route their traffic, but they exercise that right in practically all cases. As compared with the total, there were very few cars which the railroads could and did route."[79]

Finally, Sheppard testified that while the agreement contemplated preferential routing in the case of the small fraction of traffic not routed by shippers, there was also a provision "which leaves the parties free to deal with other friendly connections on a parity. The exhibit shows that in actual substance and as to things tangible, the experience has been that the parties could do and actually did very little for each other under the arrangement."[80]

The foregoing evidence with regard to solicitation, viewed as I must view it strictly in the light of the record as made before me, shows no more than that, in the very small

[77] The facts here set forth are from the testimony of Sheppard of the Illinois Central, XVI, 5428, 5429.

[78] These statistics are from SD-50, Vol. O, and Sheppard's testimony at XVI, 5431, 5432.

[79] XVI, 5432.

[80] XVI, 5433.

fraction of cases in which shippers do not route the traffic for themselves in their own way, they are occasionally persuaded by the originating carrier to insert a particular routing designed to favor some connection of that carrier. The evidence does not support an inference that this slight residual influence over routing either curtails the freedom of shippers or affords a weapon for coercion of other carriers.

3. *Georgia's Charge That Shippers' Choices Are Limited by Restrictions upon Routing Laid Down by the Railroads*

Georgia contended that the choice of shippers was confined, as a practical matter, to the carriers operating over the several alternative routes *specified in the published tariff* by the participating carriers. While the shipper could, if he wished, specify other routes and other carriers to the desired destination, he would in that case have to pay the sum of the rates of each carrier. This combination of rates would normally be greater than the joint through rate in question. Hence the shipper, for economic reasons, would have to limit himself to the particular choice of routes and carriers embraced in the joint through rate. Therefore, Georgia argued, the shippers' choice is not, as a practical matter, sufficiently broad to eliminate the coercive power which railroads can exercise over each other by the threat of exclusion from participation in particular joint through rates.

The defendants conceded that in the establishment of new through rates a good deal of bargaining takes place among the carriers with regard to the routes to be included. If a railroad can take freight exclusively over its own line between a given origin and destination point, it is naturally not disposed to enter into routing arrangements with other carriers which would enable them to pick up that freight either at the origin point or at some intermediate junction point and carry it thence either to the destination point or to some other intermediate junction point on the

road in question. Naturally its desire is to ship the maximum amount of freight possible between the origin and destination points over its own line without permitting the traffic for a portion of the distance to be diverted to other carriers.[81]

Similarly, in establishing joint through rates the participating carriers have a natural desire to avoid the inclusion of routes which would operate to "short haul" the participants by permitting the diversion of traffic to other carriers between points which they themselves can service directly with their own lines.

The propriety of this desire has been recognized in Paragraph 4, Section 15 of the Interstate Commerce Act, which provides that when the Commission is called upon to prescribe a through route it shall "give reasonable preference to the carrier by railroad which originates the traffic." (This requirement is subject to certain important exceptions. The preference is to be extended only "so far as is consistent with the public interest." The through route must not be "unreasonably long as compared with another practicable through route which could otherwise be established." The Commission must find that the proposed through route is needed to provide "adequate, and more efficient or more economic, transportation.")

Paragraph 4 of Section 15 further provides that the Commission shall not require any carrier to embrace any through route "substantially less than the entire length of its railroad . . . which lies between the termini of such proposed through route." This provision does not apply where one of the carriers is a water line; it is subject to the exceptions noted above in the preceding paragraph; it is also subject to the anti-discrimination provisions of Section 3.

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[81] Etheridge of the Seaboard Air Line said: "We are all rather jealous of and zealously guard our own local station traffic and try to swing on to it as long as we can; in fact that is contemplated under Section 15, paragraph 4 of the Interstate Commerce Act." X, 3061.

Just as railroads whose lines can carry freight all the way between the termini of a proposed route have a natural desire not to "short haul" themselves by permitting intermediate carriers to participate, so intermediate carriers who could participate in the route desire to be included. Doss testified that "under the Interstate Commerce Act the right of a railroad to its long haul is protected, and we are in a battle with each other all the time as to whether or not this road or that road will give this road or some other road participation in through routes especially when the haul is a long one from one far part of the country to another far distant point." [82]

The defendants, however, contended that they could not be arbitrary in excluding each other from participation in through routes. In the first place, they said, it is to the interest of all the carriers, as Etheridge of the Seaboard testified, "that there be diverse routes between competitive points, provided they are so-called logical routes that do not involve undue circuity or wasteful transportation. . . . From the point of view of the carrier, each competing line is in position to get an even flow of traffic over all parts of the system: Thus, one section or division would not be overburdened and another have so little density as to make operation thereon unprofitable." [83]

In the second place, the defendants said, any carrier which is being unreasonably excluded from participation in a through route may petition the Interstate Commerce Commission for relief under the several sections of the Act already referred to.

Georgia introduced no evidence to show that shippers were dissatisfied, either generally or in particular instances, with the routes which were made available to them.

C. Georgia's Examples of Alleged Routing by Particular Railroads Against Other Railroads

Georgia contended that "the record abounds with in-

[82] XV, 5039.
[83] X, 2933, 2934.

stances where carriers have deliberately excluded other carriers from participating in traffic by specifically limiting the routes via which the lower through rate tariff shall be applicable." And Georgia spoke of "the discrimination which can be worked between connecting carriers by manipulating the routes via which the tariffs are made applicable."[84] And again, Georgia charged that "the manner in which the power to restrict and influence the routing described above can be used by a group of lines acting in concert to penalize another group of lines is graphically illustrated by the Record."[85]

The instances cited by Georgia may be summarized from Appendix "H", beginning at p. 908, as follows:

1. *Frisco-Southern Railway Dispute*[86]

Georgia noted a statement by Prince of the Southern Railway that "the Frisco undertook to restrict some routing against the Southern . . . we protested those restrictions and the Commission suspended the tariff . . . the tariff was later withdrawn." Prince's statement, made in connection with a subject other than routing, contained no further details.

2. *The Clewiston Case*[87]

The Atlantic Coast Line, in a joint through route from Clewiston, Florida to the North, sacrificed a portion of its own haul (from Clewiston to Jacksonville) in order to let the Florida East Coast Railway handle that portion. The Atlantic Coast Line made this sacrifice because of what it regarded as a mutually beneficial arrangement with the Florida East Coast Railway, "like hundreds and hundreds of other transit arrangements that contemplate the inbound movement of raw materials" (in this case raw sugar

[84] Final Brief, pp. 103, 104.
[85] *Ibid*, p. 108.
[86] Appendix H, Section I.
[87] *Ibid*, Section II.

cane brought in by the Florida East Coast to Clewiston for refining) "and the later and subsequent movement out over the line that brought in the raw materials" (i.e., the Florida East Coast).

If the Atlantic Coast Line had chosen to take the sugar out of Clewiston on its own rails, the sugar would have gone northward by a different route, and the Seaboard could have participated in that route at a particular junction point. The Seaboard did not, however, regard the established routing as discriminatory.

3. *Crossing East of Cairo, Illinois* [88]

Cairo is on the Mississippi at the southern tip of Illinois. Traffic from the Southwest to the East via Cairo moves to Cairo on Southwestern territory carriers. From Cairo it can go East in two ways: (a) first to the North and then to the East, on Official Territory carriers; or (b) first to the East on Southern carriers for a portion of the haul, and then the rest of the way East on Official Territory carriers. The Official Territory carriers would not concur in through rates via route (b) because of a dispute with the Southern carriers, then pending before the I.C.C., over the divisions of revenues. This dispute was settled by the I.C.C. in 1939.

4. *Rio Grande Crossings* [89]

Some Northern carriers, but not others, refused to participate in joint rates covering shipments of wall board from Official Territory to Rio Grande crossings for export to Mexico, unless the routing went via Cincinnati. This, like the preceding case, involved a dispute over divisions.

5. *Shipments from Fertilizer Plant at Blackshear, Georgia to Miami* [90]

As a result of an undescribed "working relationship," the Atlantic Coast Line included the Florida East Coast

[88] *Ibid*, Section III.
[89] *Ibid*, Section IV.
[90] *Ibid*, Section V.

Railway in a portion of this route. The Seaboard was not included. There was no other evidence.

6. *Preferential Traffic Agreement between the Atlantic Coast Line and the Southern Railway* [91]

The agreement between these two carriers, each undertaking to favor the other with unrouted traffic, represented a renewal in 1944 of an agreement made in 1902 at a time when the shipper did not have the right to route traffic. The evidence showed that over 99 percent of the traffic was now shipper-routed, so that the agreement had become of only slight importance. It grew out of traffic arrangements involving joint use of certain tracks.

7. *Alleged Discrimination in Routing Against the Georgia and Florida Railroad* [92]

This short-line railroad does not participate in joint through routes from Florida to the East, because, so the evidence showed, the route would be unduly circuitous.

8. *The Gin and Rum Case* [93]

The Southern carriers, prior to the last war, had established low import rates from Florida ports to Cincinnati. These low rates assumed importance in the last war when shippers of gin and rum from the West Indies were driven into Florida ports by the submarine menace and found that they could reach Northern destinations more cheaply via Cincinnati on combination rates than via Richmond on the established joint through rates. The Southern carriers, who stood to make more on shipments via Richmond, asked the Northern carriers to reduce the joint through rates. The Northern carriers at first refused, but ultimately concurred though at a loss of revenue to themselves.

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[91] *Ibid*, Section VI.
[92] *Ibid*, Section VII.
[93] *Ibid*, Section VIII.

9. *Alcoholic Liquors and Other Shipments from Gulf Ports* [94]

During the last war there were heavy and abnormal shipments of the above sort to Eastern destinations, reversing the normal flow of traffic. The cheapest route to the East was on combination rates via Cincinnati. The Northern carriers declined to lower joint through rates on other routes to the level of the combination rates, because under the existing divisional formulae they would have derived less revenue by such a step.

In these cases it cannot fairly be found that the Northern carriers were seeking to "penalize" the Southern or Southwestern carriers, as Georgia alleged, any more than that the Southern or Southwestern carriers were seeking to "penalize" the Northern carriers. If, in fact, the Northern carriers were intending to maintain the status quo, and the Southern and Southwestern carriers were in the wrong in attempting to change it, the Southern and Southwestern carriers could be said to be attempting to "penalize" the Northern carriers. If, on the other hand, it could be established that the Northern carriers were wrong in not yielding to the demands of the Southern and Southwestern carriers, then the Northern carriers could be said to be penalizing the Southern and Southwestern carriers in standing pat.

The record, however, does not warrant a finding either way. It reveals simply a difference of opinion over a competitive question of the division of revenues.

Burgess testified that the 1939 decision by the I.C.C. in the Divisions case between the Official and Southern Territory carriers [95] had "very materially" reduced the controversies over divisions, and that "the questions that arose in the war were, in the main, I think it is fair to say, due to the abnormal and the reverse flows of traffic that had to be dealt with at that time." [96]

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[94] *Ibid*, Section IX.
[95] 234 I.C.C. 175.
[96] XIII, 4380.

10. *Green Coffee from Texas* [97]

This case involved the non-concurrence by Official Territory carriers in certain rates proposed by Southwestern carriers unless the rates were made applicable via routes through Cincinnati and West. The questions at issue were again, revenue and divisional questions.

The actions cited by Georgia in the cases summarized above were not for the purpose of disciplining or punishing any railroads, nor had they anything to do with rate association recommendations or procedures. The actions were all motivated by economic considerations, and insofar as they involved controversies, the controversies were chiefly over divisions of revenues.

D. *Georgia's Allegations Regarding Disagreements Over Divisions, and Their Coercive Implications*

Adverting to the controversies just mentioned, Georgia asserted that the railroads prefer to settle them by negotiation; that they regard these controversies as purely "intra-family affairs"; and that they are so "sensitive" about divisions "that they hesitate to take such questions to the Interstate Commerce Commission lest the only effect of an award by the Commission of equitable divisions be the diversion of traffic by the other lines involved." [98] The implication of these assertions, in the context of Georgia's argument about routing, is that railroads act together in concert to coerce others by refusing to agree to proper divisions and by threatening to divert traffic in case of an appeal to the Interstate Commerce Commission.

The evidence does not bear out the implication. Burgess testified on cross-examination that while "in the majority of cases" divisions are arranged by negotiation rather than by appeal to the Commission, there are "some big divisions cases that have been in the courts and before the Commis-

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[97] Appendix H, Section X.

[98] Final Brief, p. 108.

sion."[99] "All I know is that many divisions cases have been there and you say 'very delicate'—they go through and they go to the court. The Southwestern case went there and the Western Trunk Line case went there and the Trans-Continental case went there, and we had the New England Commodities case some years ago, and a number of lesser divisional cases."[1]

> "Q. Mr. Burgess, let me rephrase that last question and ask whether, in your view, is it not a fact that one of the reasons why these divisions cases are normally settled by negotiation rather than by appeal to the Commission is the fact that even if you go to the Commission and get what you regard as a fair divisional formula, there is a strong possibility that the other lines involved may route traffic against you?
>
> "A. No. I never heard that view expressed, and I don't think it is a reality.
>
> "The fact is, of course, that roads try to adjust their differences between themselves in conference, and there is a very earnest and sincere and honest effort made toward adjustment, but, when they come to a point where they cannot accomplish that result, then there is no hesitancy on the part of the roads in going to the Commission and asking the Commission to adjust the differences and there has been no suggestion that I ever heard of in which the question of re-routing or the question of the diversion of traffic was made in any way."[2]

Burgess's characterization of divisions controversies as "intra-family affairs", noted above by Georgia, was in connection with certain specific cases in which Burgess was emphasizing the fact that no shippers were in any way concerned with the outcome or expressed any interest in the controversies; if any shipper had complained to the railroads the complaint, he said, "would have been seriously considered."[3]

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[99] XIV, 4589.
[1] XIV, 4591.
[2] XIV, 4592, 4593.
[3] XIII, 4365, 4369.

The only evidence offered in support of the statement that railroads hesitate to take divisions controversies to the Interstate Commerce Commission, for fear of retaliation through diversion of traffic, consisted of an extract from testimony given by Joyce and Sargent of the Chicago & Great Western and the Chicago & North Western Railroads respectively before the Interstate Commerce Committee in 1938. As has been noted earlier, the defendants objected to the admissibility of this testimony.[4] Subject to this objection, they introduced as an exhibit a copy of the hearings in question.[5] From this exhibit it appears that the testimony dealt in part with the divisions received by the Western Trunk Lines, including the Chicago & Great Western and the Chicago & North Western, out of the Trans-Continental rates from Mountain-Pacific territory to Chicago and the east.

Sargent contended that the proportions of revenue accruing to the Trans-Continental lines were excessive.[6] In the portion of the testimony offered by Georgia, Sargent testified that it was a "delicate thing" for a railroad to take a divisions controversy to the Interstate Commerce Commission because "there is a tendency for a diversion of traffic"; specifically there was a fear that if his line complained, the Western Trans-Continental lines might divert traffic in retaliation.[7]

The defendants objected to this testimony on the ground, among others, that even if Joyce and Sargent were co-conspirators, which the defendants denied, their statements were not made in furtherance of the alleged conspiracy, and did not relate to any acts or declarations that were in furtherance of the alleged conspiracy. Upon this ground I conclude that the evidence is inadmissible. *Logan* v. *United States*, 144 U. S. 263, 309; *Brown* v. *United States*,

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[4] Their brief is in II, 626-631.
[5] AD-11, Vol. D, pp. 188-206.
[6] *Ibid*, pp. 190, 191.
[7] S-59, I, 155.

150 U. S. 93; *International Indemnity Co.* v. *Lehman* (C.C.A. 7th, 1928) 28 Fed. (2d) 1, 4, cert. den. 278 U. S. 648; *United States* v. *Nardone* (C.C.A. 2d, 1939) 106 Fed. (2d) 41, 43, reversed on other grounds 308 U. S. 338; subsequent opinion 127 F. (2d) 521; cert. den. 316 U. S. 698; *Van Riper* v. *United States* (C.C.A. 2d, 1926) 13 Fed. (2d) 961, 967. Other grounds of objection made by the defendants I do not think it necessary to discuss.

Even if the testimony should be held by this Court to be admissible, its probative value may be regarded as substantially affected by the fact that prior to the Joyce-Sargent hearings the Western Trunk Lines, including the two lines here in question, had litigated with the Trans-Continental lines the division of revenues accruing west of Chicago and St. Louis in *Divisions of Freight Rates*, 203 I.C.C. 299 (1934), in which the Commission sustained the existing divisions; and that in 1939, a year after the Joyce-Sargent hearings, the Chicago & Great Western and five other Western Trunk Line carriers filed a complaint with the Interstate Commerce Commission, asking the Commission to prescribe divisions between those carriers and Official Territory carriers (*Frank O. Lowden, etc., et al.*, v. *Ahmapee & Western Railway Co., et al.*, I.C.C. No. 28277, et al.; complaint filed May 22, 1939. Case pending).

Finally, the Northern defendants in their Brief on the Facts, beginning at p. 514, cited four pages of cases from 1920 to 1941, in which carriers, both individually and in groups, had litigated questions of divisions before the Interstate Commerce Commission. The individual railroads included carriers of every description and size in every rate territory.

If the Joyce-Sargent testimony be regarded as admissible, I find nevertheless that the evidence taken as a whole does not support the plaintiff's charge that carriers hesitate to take divisions questions to the Interstate Commerce Commission for fear of retaliation by diversion of traffic.

E. *Georgia's Allegation that Concerted Solicitation May Coerce Compliance with Rate Association Decisions*

Georgia, citing a statement by Franklin of the Pennsylvania, pointed out that "it is admittedly 'possible for one Northern line and one Southern line to pool their efforts at solicitation.' " Georgia then argued that "it is equally possible for all other lines acting in concert to pool their solicitation efforts to punish one line which may refuse to abide by the terms of the conspiracy."[8]

The statement of Franklin was in fact only a portion of a sentence, the whole of which was as follows:[9]

> "While it might be possible for one Northern line and one Southern line to pool their efforts at solicitation, this would not give the Northern lines as a group any leverage over the Southern lines as a group, because it would only lead to some second Northern line joining with a second Southern line to solicit for a competing route."

Franklin then added:

> "In other words, the cleavage of interest would not be between all the Northern lines on one side and all the Southern lines on the other side.
>
> "Traffic solicitation would be an impossible way of enabling the Northern lines as a territorial group to exert any pressure on the Southern lines as a territorial group."

I find no support in the evidence for the implication in this portion of Georgia's Brief.

F. *Summary of the Main Points*

The power of shippers to route traffic is absolute and is exercised in the case of all but a small fraction of traffic.

There is no evidence that railroads which have taken independent action in the past have been disciplined by

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[8] Final Brief, p. 108.
[9] XI, 3332.

other railroads through the adverse routing of the small remaining fraction of traffic.

In the establishment of new through routes the initiating railroads have power to say what carriers shall be included. There is no evidence that railroads which have taken independent action in the past have been disciplined by other railroads through non-inclusion in future through routes.

The question remains whether the railroads refrain from a larger degree of independent action because of fear that otherwise disapproving railroads might in the future discipline them in one or both of these ways. The record does not establish the existence of any such fear.

IV. *The Railroads' Alleged Mutuality of Interest in "Preserving the Integrity of the Rate Bureau System"*

Georgia alleged:[10]

> "In the fourth place, the preservation of the integrity of the rate bureau system is subserved by a strong mutuality of interest among the railroads. One of the principal purposes motivating the organization of the rate bureau machinery was the protection it afforded railroad revenues . . . "
>
> • • • • •
>
> ". . . in the final analysis, enlightened self-interest alone impels each carrier to conform against the evil day when it may desire to invoke the aid of its rate bureau to prevent the effectuation of some proposal of another carrier regarded as inimical to itself.
>
> "In the framework of reference here, then, . . . the carriers are, in fact, not free to take action contrary to the recommendations of their respective bureaus. • • • If even a single road indulged in the practice of taking independent action whenever its proposals were disapproved by its bureau, the hierarchy would collapse of its own weight."

[10] Final Brief, pp. 71, 72.

These allegations may be summed up in two propositions as follows:

(1) *A major purpose of the rate association system is to conserve railroad revenues. Therefore the railroads have a mutual interest in making the system work.*

(2) *If railroads elected to take independent action every time their proposals were disapproved by the associations the system would break down. Therefore real independence of action is illusory.*

These two propositions seem to me to constitute the crux of this portion of Georgia's case, since upon careful analysis the various charges of "coercion" previously discussed in this Report do not appear to be substantiated by the record.

Because of the importance of this portion of the case I shall refer from time to time to certain parts of the record which seem to bear upon it, even though Georgia did not specifically cite them in that connection.

A. *The Allegation that a Major Purpose of the Rate Association System is to Conserve Railroad Revenues, and that Therefore the Railroads Have a Mutual Interest in Making the System Work*

1. *The Historical Purposes of the Territorial Rate Associations*

As described in Part One of this Volume the Associations in Southern and Official Territory began as deliberate rate-fixing agencies with sanctions applied through pooling arrangements. When pooling arrangements were prohibited by the passage of the Interstate Commerce Act in 1887, sanctions in the way of money penalties and other compulsory features were substituted until the agreements embodying them were declared illegal in the *Trans-Missouri* and *Joint Traffic Association* cases following the passage of the Sherman Act.

While all sanctions and compulsory features were thereafter eliminated from the agreements, there has existed

down to this day a substantial continuity of structure and procedure in the Territorial Associations. The elimination of sanctions and compulsory features did not render the Associations useless, as might otherwise have been the case, because Congress, through a series of enactments, gave to the Interstate Commerce Commission adequate power to prevent rate wars and the practice of secret rebates by which those wars had been carried on.

Rate proposals for the most part, we know, are proposals for rate reductions. Thus in a representative three-months period in 1940, out of 1220 proposals filed with the Southern Freight Association 1134, or 93 percent of the total, were for reductions.[11] Etheridge of the Seaboard testified that proposals were "almost invariably" for reductions.[12] In Official Territory, in the first three months of 1943, 2813 proposals were presented, out of which 2550 reductions, or over 90 percent, were approved.[13]

Similarly, during April, May and June, 1945, out of 782 proposals acted on by the Trunk Line Association, 723, or 92 percent, were for reductions.[14] It is interesting to note that whereas 64 of the proposals for reductions were disapproved, *all* of the proposals for increases were approved —an indication that the defendants view proposed reductions with more concern than proposed increases.

Even more striking on this last point were the figures

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[11] SD-5, Vol. N, covering the months of January, February and March, 1940 (a representative period, according to Kerr's statement in cross-examination at V, 1529). 71 of the proposals involved advances in rates, and 15 involved both reductions and advances.

[12] X, 2965.

[13] Burgess, XIII, 4171.

[14] ND-22 (pp. 55-63), in Vol. J. I excluded proposals which were withdrawn or not acted on after having been filed. Hodkinson, a member of the Auxiliary Committee of the Trunk Line Association, stated that the period was "fully representative and typical." XII, 3800, 3801. On cross-examination he testified that "rate bureaus have received more proposals for changes in rates during the pre-war years, if anything, than during the war years for the reason that during war years shippers were only interested in getting their freight moving." XII, 3909.

submitted by the defendants showing proposals presented to the Northern associations by the Southern Freight Association during the five years 1938 to 1942 inclusive.[15] 3707 proposals for reductions were filed and 619 for increases, the reductions being 81 percent of the total. Only *three* of the proposals for increases were disapproved, as against 628 of the proposals for reductions.

That the railroads should treat proposed rate reductions with some severity, while approving nearly all rate increases, is no doubt a reflection of their financial needs. And the fact that most rate proposals are for reductions is natural enough. For the railroads are constantly under the pressure of shippers to reduce rates for competitive purposes; and in addition, the railroads themselves have had to face increasing competition from other forms of transportation, and from time to time have had to make reductions in rates to meet this competition.[16]

The main business, then, of the territorial rate associations has been, and is, the consideration of proposals for rate reductions. These proposals are processed through the territorial associations today in substantially the same way in which they were processed before the sanctions and compulsory features were removed. This fact indicates a continuity of purposes, as of methods. The original purpose to *fix* rates, however, has evolved into a purpose to discourage unnecessary rate reductions.

Territorial rate associations exist and have existed for other purposes as well. These have been mentioned at pp. 226-234. They include the avoidance of unlawful discriminations and of delays and expense to shippers, and the facilitation of clearances with connecting carriers in the case of proposed joint through rates.

It is not possible to weigh with certainty the importance of each of these purposes. I do find, however, that the

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[15] ND-21, Vol. H, Book 2, p. 1.

[16] See the I.C.C. table of the decline in revenue per ton-mile from 1929 to 1936 due chiefly to competitive rate reductions; p. 357 above.

purpose of discouraging unnecessary rate reductions is a major one, as Georgia charges. This will become clear from the evidence summarized hereinafter.

2. *The Historical Purposes of the Association of American Railroads*

As has already been seen, the A.A.R. was established with the general object of conserving and increasing the revenues of the railroad industry.[17] One of its objects was to deal at the national level with rate questions of importance to the industry. Other objects included the promotion of operating efficiency and the avoidance of competitive wastes in service. These other objects have occupied much more of the agenda of the Board of Directors than questions of rate policy. When the A.A.R. has dealt with questions of rate policy, however, its main purpose, so far as shown by this record, has been to conserve and increase railroad revenues.

In connection with the general rate increase cases of 1934-1937 (*Ex Parte 115* and *Ex Parte 123*) its activities included efforts to check rate erosion and the making of improvident rate reductions, and to encourage procedural steps in the territories toward the same ends.[18]

As the record has shown, the A.A.R. has taken a negligible part in the consideration of particular rates, limiting itself to the enunciation of policies as described above. And it has had no coercive authority and has exercised no coercive means in support of these policies.[19]

However, in view of its national prestige and the inclusiveness of its membership, one may fairly find that its announced desire to discourage unnecessary rate reductions helped to support and strengthen efforts toward that end on the part of the territorial associations.

In that sense it can be said that the A.A.R. has played an influential role in holding down the number and

[17] Pp. 283-291, 300-303 above.
[18] Pp. 362, 368, 381, 388-398, 395-397 above.
[19] Pp. 402-507 above.

extent of rate reductions. How far its influence went in the period 1934-1947 no one can measure, but that the influence existed in some degree cannot be doubted on the basis of the record before me. Nor can it be doubted that in view of the A.A.R.'s declared purpose to conserve and increase revenues, of the efforts of its Traffic Department and the pledge of its membership to carry out that purpose, the A.A.R. stands as a continuing overall influence in the railroad industry on the side of avoiding unnecessary rate reductions.

3. *Particular Procedural Rules in the Territorial Associations Designed to Avoid Unnecessary Rate Reductions*

(a) *Secrecy in Voting*

In the rate association procedure, both North and South, shippers' representatives are not permitted to be present when the carriers' executives reach the point of voting on specific proposals. In Official Territory the voting may be by secret ballot so that neither the shippers nor the carriers themselves will know how particular roads cast their votes.[20] And, in addition, whether the voting be by secret ballot or not, it is understood in both Southern and Official Territory that the way in which particular railroads voted should be kept confidential.

Etheridge of the Seaboard testified as follows on cross-examination:[21]

> "Q. Is it not also so that the Articles of Association of the Southern Freight Association, as well as the rules of the conferences generally preclude you from disclosing to the shipper what railroads have approved

[20] The rules of the Trunk Line Association (ND-31, Vol. L, at p. 151) and the Traffic Executive Association-Eastern Territory (*ibid* at p. 143) provide that "whenever in the discretion of the Chairman, circumstances warrant such action, the views of the members concerning a question under discussion at a meeting shall be determined by a secret ballot." There appear to be no similar rules in Southern Territory.

[21] X, 3057, 3058.

or what railroads have not approved any particular adjustment?

"A. We never reveal how various lines voted, or even ourselves."

• • • • •

"Q. May he (the shipper) be present at the time of the voting or does he go out?

"A. He is invited out."

Explaining why secret ballot votes, when called for, may be useful, Burgess of the B. & O. testified:[22]

> "Some proposals in their very nature involve extremely controversial and competitive situations concerning which an open vote by certain lines, based upon their true belief as to the merits of the proposal, could well be used to their traffic disadvantage and embarrassment by their competitors.
>
> "It will readily be understood how one line, knowing how its competitor voted on a proposal, could use the competitor's vote to its advantage with shippers if the vote were adverse to the shipper interests the first line was willing to favor. In such circumstances *pressure from large and influential shippers might well preclude a true and impartial vote, if taken openly.*
>
> "Although there is no way in which one carrier or group of carriers can effectively coerce another carrier, the carriers themselves are *peculiarly vulnerable to pressure from large shippers.*"

Burgess further sought to justify the provisions permitting secret ballots by stating that:[23]

> "Any requirement for open voting would strike at the foundation of the efficacy and value of the conference method and tend naturally to force the real decisions to be made outside the conference room, with the consequent loss to all concerned of the value of free discussion."

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[22] XIII, 4174, 4175. Emphasis added.
[23] XIII, 4175.

Etheridge, defending the principle of keeping proceedings confidential, and demonstrating the railroads' mutuality of interest in this principle, stated:[24]

> "I have sometimes favored propositions which have been defeated and, in conference with interested shippers, I have not indicated that I have supported it, not believing it fair to the other lines to do that."

Lending its own support to the principle of confidentiality, the Board of Directors of the A.A.R. on September 20, 1935, adopted the following resolution:[25]

> "It is exceedingly desirable at meetings of railroad representatives that there should be a free and fearless discussion of proposals involving changes in rates, rules, regulations, policies and practices in order to secure a proper determination of such questions. Accordingly, it is announced as the policy of this Board that all discussions of such subjects are to be strictly confidential, and under no circumstances shall the position of any representative of any railroad be disclosed by any representative of another railroad attending such meetings; and it is recommended that each and every organization holding such meetings shall take the necessary steps to make this recommendation effective by the adoption of penalties or otherwise."

This resolution was adopted on the same day as the resolution designed to limit truck-rail rates, discussed at pp. 423-447 above. This was at a time when the railroads were in acute financial distress and were seeking rate increases from the I.C.C., *Ex Parte 115* having been begun some six months earlier. The resolution regarding secrecy may therefore fairly be regarded as one more step in the effort to conserve revenues.

Georgia charged that the effect of the secrecy provisions "is to permit a railroad to take one position with the shipper and the contrary position in the confidence of the

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[24] X, 3057.
[25] S-53, I, 166, 167.

rate bureau conference."[26] Georgia cited testimony by Etheridge to the effect that the agreement between the railroads and the National Industrial Traffic League contemplated that a carrier would file a proposal on behalf of a shipper even where the carrier itself might not favor the proposal;[27] also, that "on occasions" he had presented proposals to Southern Freight Association which he himself did not approve; and that in such cases, "even though I asked the Chairman to issue the proposal at the request of the shipper, I would vote my convictions."[28] Etheridge seemed to suggest that in such cases he would inform the shipper at the outset that he did not favor the proposal, but his testimony is not wholly clear on this point.[29]

In any event, the secrecy provisions taken as a whole are clearly designed to protect from shipper-retaliation railroads which vote against reductions, and to keep other railroads from going after traffic on the strength of voting for such reductions.

(b) *Voting as a Method of Persuading the Minority to Go Along with the Majority*

As has already been noted, the form of decree which Georgia seeks would permit in each rate territory a single rate conference, conducted in the form of public hearings at which carriers and shippers interested in particular rate proposals could openly express their views. This proposed decree would eliminate the practice of voting, not only in secret, but altogether. Counsel for Georgia in final argument contended for "free debating publicly, where the public can come in, in open daylight, and discuss these rate changes in this association. . . . You can discuss it all day until you are blue in the face, up and down, with the shippers sitting over there listening, all in the open,

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[26] Final Brief, p. 64.
[27] X, 3048. So, as to the practice, Oliver, IX, 2582.
[28] X, 3056.
[29] X, 3047.

no one giving a wink or anything, but all in the open—that is what Georgia is asking."[30] Further, counsel for Georgia stated, the proposed decree "would preclude any voting"; the single conference or association in each territory would be "no more than a public forum . . . no more than a mere exchange of information there back and forth. . . ."[31]

Burgess, expressing opposition to this point of view, emphasized the need of each line's knowing what each other line intended to do with regard to a given rate proposal. If there were no way of ascertaining this, either by voting, or by a statement of intention which would come to the same thing,[32] then "the lines would be in no different position at all from what they would be if they had all stayed in their own offices and individually and separately made up their own minds as to whether they would or would not file a tariff of the changes contemplated by the proposal. It has already been testified in this record how detrimental it would be to shippers if the lines serving them, separately and independently, filed rate changes without there being any way for other interested lines and competing shippers on the other lines, to know about it before the filing was done."[33]

On this basis the defendants justify the provisions for voting in the Territorial Associations. However, it is clear that these provisions represent something more than a convenient way of ascertaining the views of the members. Inherent in the whole rate association set-up, both North and South, is the conception that the majority opinion of any given committee constitutes "action" by that committee with which "it is expected" that member lines will comply, or from which an "appeal" may be taken by any member, or by the Chairman if he regards the "proposed action" as inimical to the best interests of the railroads as a whole.

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[30] Mr. Shaw at XIX, 6630.
[31] Mr. McGovern at XIX, 6708.
[32] XIII, 4173.
[33] *Ibid.*

In other words, the *counting* of views for and against a given proposal, and not merely the *exchange* of views, is an essential feature of rate association procedure. It is a method of persuading the minority to go along with the majority.

The importance attached to the counting process is illustrated by the exceptional rule in Official Territory, applicable to the sub-territorial committees below the grade of Traffic Vice-Presidents, that "when a reduction in revenue is involved the affirmative view of three-fourths of the members present shall be recognized as the action of the committee."[34] As has previously been described, this provision was adopted in August, 1938, following certain criticisms by the Interstate Commerce Commission of the manner in which the carriers had been permitting their revenues to be frittered away by improvident rate reductions. Burgess testified that the first action which the Traffic Executives (i.e., the Traffic Vice-Presidents) took to meet the Commission's criticisms was "that the Executives themselves would personally deal with all rate reductions of the kind that the Commission is criticizing, and, therefore, proposals involving reductions were withdrawn from consideration by all committees subordinate to the Traffic Executives. The Traffic Executives themselves took over personal handling of such proposals and dealt with them themselves under their *usual majority rule*."[35] After the taking of this step, the Traffic Executives soon modified the rule so as to permit the subordinate committees to act on proposed rate reductions, first where the action was unanimous, and later on when a three-fourths vote was had.[36]

Burgess emphasized the fact that "the three-fourths rule has no application to the vote in the Traffic Executive Association meeting, for, as I have already said, in that

[34] P. 399 *supra*.
[35] XIII, 4179. Emphasis added.
[36] XIII, 4183.

meeting proposals to reduce rates, like all other proposals, are *determined on the basis of a majority vote,* from which independent action may be taken if a dissatisfied member desires to take it." [37]

The defendants sought to show that the three-fourths rule was not in fact an effective brake upon rate reductions. Thus, Burgess testified that: [38]

> "The best evidence, I think, that the three-fourths rule in the lower committees does not retard or prevent rate reductions is to be found in the fact that of all proposals handled in Official Territory in the first three months of 1943, the vast majority, over 90 percent, were for reductions which the committees approved."

2,813 proposals, Burgess said, had been presented in those three months, and the action of the committees on 2,550 of them approved a reduction in the rates.[39] He also testified that, according to the Interstate Commerce Commission's statistics, "the average rate level today, as expressed in mills per ton-mile, has been definitely downward during the era of the conference method of rate initiation, and is today, notwithstanding the enormous increases in cost of service, as low as it has ever been in history." [40]

Despite Burgess's denial of the importance of the three-fourths voting requirement in the subordinate committees, the fact remains that it was adopted as part of a plan to meet the Commission's criticisms of improvident rate reductions, and that the carriers must have regarded the requirement as having some persuasive effect upon their actions. Morover, in May 1939 the Eastern railroads rescinded another rule which they had adopted to meet the Commission's criticisms, providing that Chief Traffic Of-

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[37] XIII, 4184. Emphasis added.
[38] *Ibid.*
[39] XIII, 4171.
[40] *Ibid.* The statistics appear in ND-11, Vol. G.

ficers should personally sign all rate reductions for their lines;[41] but they did not rescind the three-fourths rule.

(c) *Appeals by Chairmen to Traffic Executive Associations and Presidents' Conferences*

In discussing the appellate authority vested in the Chairmen, which has been described at pp. 548-555, Burgess testified as follows:[42]

> "Some proposals are of such nature and character that their establishment by an individual line would create the sharpest kind of unjust discrimination and prejudice between competing shippers, unless all other lines made similar changes in behalf of the shippers on their lines. If all lines should be forced to make such changes, or, as Coordinator Eastman once stated 'go out of business' by not changing their rates, *the result would be that the rate relationships between competing shippers would be preserved the same as before the changes, but on a level of freight rates lower than the reasonable level authorized by the law, and the consequences would be a threat to the financial ability of the railroads* serving those shippers to continue to provide the service.
>
> "All that is contrary to the National Transportation policy as expressed in the Interstate Commerce Act.
>
> "Cases of that sort, therefore, merit the fullest and most careful consideration by the higher and more responsible traffic officers. . . ." (Emphasis added)

I am not at this point questioning the lawfulness of the Chairmen's authority; I am considering only the purpose of conferring it. A major purpose indicated by Burgess's testimony above was to check rate reductions whose only consequence would be a general lowering of levels.

The few examples given in the record of the exercise of the Chairmen's authority were all cases of appeals from proposed reductions which had been either approved by committees or independently announced.[43] By contrast, the

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[41] P. 397 *supra*.
[42] XIII, 4136, 4137.
[43] Discussed at pp. 551-555 *supra*.

examples of appeals by member roads, as distinguished from appeals by Chairmen, were of appeals from proposed reductions which had been *disapproved* by committees.[44] While it is possible under the rules, both North and South, for a dissatisfied member road to appeal from the action of a committee *approving* a reduction proposed by another member road, the record contains no instances of such an appeal. That function is left for the Chairmen in cases where they regard the approval as inimical to the interests of the railroads as a whole.

From the foregoing it seems reasonable to conclude (1) that a major purpose of permitting member road appeals was to give another chance in a higher committee to a road which had been unable to obtain in a lower committee a favorable vote for a desired rate reduction; and (2) that a major purpose of authorizing chairman-appeals was just the opposite, namely, to hold up a rate reduction on which a member road had already obtained a favorable committee vote, by taking the proposal to a higher committee (assuming that the Chairman regarded the proposal as inimical to the best interests of the carriers as a whole). Given this latter purpose, the provisions for stays pending the outcome of chairman-appeals, and the general observance of those stays so far as illustrated in the record, are understandable.

The importance attached by the defendants to the provisions for chairman-appeals, with accompanying stays, especially in conjunction with Traffic Executive Associations and Presidents' Conferences as part of the appellate set-up, clearly appears from the record of events in 1937-1938 which has previously been reviewed in tracing the railroads' efforts to obtain general rate increases from the I.C.C. in *Ex Parte 115* and *Ex Parte 123*.

Thus President Pelley of the A.A.R., in his letter of November 22, 1937 to the Chairman of the Southeastern Presidents' Conference, discussed at pp. 368-372 above,

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[44] Pp. 543, 544, 548 *supra*.

spoke of the organizations that had been set up in the East and West "the purposes of which are to better control the rate situation and to avoid to the fullest extent consistently possible rate erosion." And he spoke of the request by President Hill of the Louisville & Nashville that "some machinery be set up at once in the South. . . ." The contrast between the organizations in the East and those in the South was, as already seen, that there had been adopted after World War I in the East, but not in the South, provisions for a separate Traffic Executive Association and for chairman-appeals with accompanying stays (and for member appeals) both to that Association and to the Presidents' Conference. It is evident from Pelley's letter that these post-war provisions were (a) what he had reference to when he spoke of organizations whose purposes were "to better control the rate situation," and (b) what the President of the Louisville & Nashville had reference to when he asked that "some machinery be set up at once in the South. . . ."

This construction of Pelley's letter is supported by the further passages (at p. 371 above) in which he suggested that the Southeastern Presidents arrange for the setting up of an "Appeal Traffic Executive Committee" to which, and to a Committee of the Presidents, appeals could be taken by the Chairman with accompanying stays (and by member roads also). Pelley stated that this was "substantially the plan which is operating successfully in the Eastern territory . . ."

Later on, when Kerr, Chairman of the Southern Freight Association, proposed to the Southeastern Presidents the establishment of the Traffic Executive Association-Southern Territory and the inclusion of the Southeastern Presidents' Conference as a final appellate body, with provisions for chairman-appeals and stays, as previously described, he stated that the plan had been prepared in cooperation with chief traffic officers "for the purpose of providing the checks

necessary to conserve revenues of the Southern group as a whole." [45]

After the Southern roads had adopted this plan Cleveland, in a letter to association chairmen, discussed at p. 388 above, observed that:

> "In Southern territory there was established a Committee of Traffic Executives and an appeal Committee of Presidents, with which changes in these two territories a basis was set up for very much better controlling the situation than had previously existed."

Finally, note should here be taken of certain statements made in connection with the Illinois Freight Association set-up. These statements and the surrounding circumstances have been discussed at pp. 388-394 above. Pertinent extracts from them here follow.

Following the changes made in Southern Territory, Cleveland wrote to Sperry of the Illinois Freight Association that "the Southern territory and the Western territory have now perfected arrangements for strengthening the organization in their territories to the end of preventing to the fullest extent possible erosion of the rate structure," in view of which Cleveland suggested that Sperry's Committee "ought now to be able to take this proposition up and to submit a plan for consideration."

Sperry's Committee proposed a plan authorizing appeals (including chairman-appeals with stay provisions) from subordinate committees to the Traffic Executive Committee of the Association and thence to a new special Committee of Six Presidents. In distributing the proposal Sperry said that in the opinion of his Committee it would "place the legislative machinery of the Illinois Freight Association on a more nearly comparable basis with that followed in the territories under the jurisdiction of the Eastern Executive Association, Southern Executive Association and Western Traffic Executive Committee."

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[45] P. 373 *supra*.

As previously noted, except for the provision for an appeal to the new Committee of Presidents, the essence of the plan had been approved nearly a year earlier. The Traffic Executive Committee rejected that portion of the plan authorizing an appeal to a special Committee of Presidents, and some time later Cleveland, reporting to his Traffic Advisory Committee under the caption of "MACHINERY BY WHICH TO PREVENT TO THE FULLEST EXTENT POSSIBLE THE EROSION OF THE RATE STRUCTURE", stated that as a result of the actions theretofore taken, the arrangement in the West had been "strengthened"; that in the South "an appeal to the Southern Presidents' Conference" had been provided; and that "the only territory that did not appear to be covered is Illinois Freight Association territory." The Traffic Advisory Committee then adopted a minute to the effect that "the situation in Eastern, Western and Southern territories was in a satisfactory condition and that the chairman should make a final report to Mr. Pelley with regard to the failure, and the reasons therefor, in connection with the situation in Illinois Freight Association territory."

The defendants have pointed out, and the record shows, that in practice the Presidents' Conferences, both North and South, have taken a negligible part in the disposition of rate proposals, and that Chairman-appeals have been very rare.

However, the fact that the purpose of establishing the appellate authority was to check rate erosion more effectively has been made clear by the record. Even if that authority has been less frequently exercised than was anticipated at the time of its establishment, there is nothing in the record to suggest that the original purpose has ceased to exist.

On the basis of the foregoing evidence I find that in the period 1937-1938 responsible spokesmen for the territorial associations in the South and in Illinois and in the A.A.R. affirmed and believed that the checking of rate reductions

had been assisted in the East, and would be assisted in the South and elsewhere, by the establishment of separate Traffic Executive Associations and Presidents' Conferences as appellate bodies to which appeals could be taken by member roads, and by the chairmen from action deemed by them to be inimical to the interests of the carriers as a whole, with accompanying provisions to the effect that pending appeals by the chairmen, no action should be taken. Since there is no reason to suppose that these views were peculiar to the period in which the particular urgency of checking rate reductions caused them to be uttered, these views may properly be regarded as further evidence of the fact that a major purpose of the territorial rate associations as now constituted, is to reduce the extent of rate erosion.

The defendants have a mutual interest in achieving this purpose. The interest is substantial, affecting as it does the railroads' revenues. The defendants' recognition of this interest has been amply illustrated in the evidence summarized above.

B. *The Allegation That if the Railroads Elected to Take Independent Action Every Time Their Proposals Were Disapproved by the Associations the System Would Break Down, and that Therefore Real Independence of Action Is Illusory*

I have previously found, at pp. 538, 539, that the great bulk of rate proposals are approved by the territorial associations; that when rate proposals are disapproved independent action is taken in only a small fraction of the cases; that this fraction is particularly small in the case of interterritorial rate proposals; and that the general acquiescence in disapprovals, illustrated by the relative paucity of independent action, is further illustrated by the relative paucity of appeals in such cases.

What is the reason for this general acquiescence in disapprovals? Georgia says at this point in her argument: it is because otherwise the rate bureau system, which the railroads desire to maintain to check rate erosion, would

break down. The defendants answer: it is because in the discussions leading up to disapprovals the proponent roads, or their necessary connections, or both, are persuaded of the rightness of the majority's views. They therefore voluntarily refrain from action. In the exceptional cases in which they believe their position to be right they act independently.

There can be no doubt, on the basis of the whole record, that the railroads are contractually free to act independently when it suits them to do so, and that the right of independent action is not, as Georgia would make it out to be, illusory. On the other hand, the factors just reviewed in Section A above—the historical purposes of the Associations and the several procedural rules in support thereof—together with the railroads' strong financial self-interest in achieving those purposes, warrant a finding that the paucity of independent action is due not exclusively to the logical persuasiveness of majority arguments in particular cases but also to a general realization that if majority recommendations were disregarded with much frequency the system would tend to break down, to the injury of all.

In other words, I find that the exercise of independent action, while restrained by no coercion or penalty, is to some extent held in check by self-imposed restraints in the interests of the industry. I say "to some extent" because in the nature of things the degree of self-restraint, of acquiescence in distasteful majority action, cannot be exactly determined. The only question is whether it exists at all.

A finding that it did not exist at all would require that the factors reviewed in Section A above, together with the factor of financial self-interest, be given no weight, or be explained away by strained contentions not warranted by the record.

In view of that record it does not seem to me tenable to regard the elaborate structure of the associations, with their rate-fixing origins and their provisions for secrecy, for the counting of votes, and for appeals by paid officials and accompanying stays, as mere conferences for the eluci-

dation of the rate requirements of the Interstate Commerce Act. The defendants sought to present them in that light, but they also conceded that it was "expected" and "hoped" that the proponents of rate reductions would abide by adverse majority action; and in 1937 and 1938 when they had occasion to describe the purposes of their associations they talked frankly about "controlling the rate situation" and "providing the checks necessary to conserve revenues."

For the reasons stated, I view the procedure of the territorial associations, in its present form, as a deterrent to the freedom of rate-making, a deterrent not coerced or enforced by threats of penalties but self-imposed as the result of influences born of history, habit, and strong mutual self-interest. This deterrent does not destroy the right of independent action but to some extent clogs or dampens down its use.

V. *The Alleged Domination of the Southern Defendants by the Northern Defendants*

As has been noted, Georgia's amended complaint alleged that the Southern defendants "generally are dominated and coerced by the Northern defendants . . ."[46]

In the matter of which Georgia chiefly complains, namely, the establishment of the Association of American Railroads, the record shows that the Southern defendants acted jointly and in accord with the Northern defendants in setting up the Association, and the record is barren of evidence that in so doing the Southern defendants were proceeding in any way contrary to what they believed to be their own best interests.

Georgia, however, pointing to the fact that the Northern roads are heavy debtors of the Southern roads (the traffic balance being in favor of the South),[47] argued that the Northern roads are in a position to withhold from the

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[46] *Supra*, p. 10.

[47] Franklin of the Pennsylvania Railroad, VIII, 2361; XI, 3332-3333.

Southern roads the joint through charges which the Northern roads collect as destination carriers, and that this capacity to withhold revenue "forges the last link in the chain of coercion binding the South." [48] No actual evidence of any exercise, or threatened exercise, of coercion by this method was introduced, however, and witnesses for the defendants testified that in terms of its revenue-producing characteristics, as well as in respect of its tonnage, the northbound traffic was more important than the southbound; [49] that there was active competition for traffic among the Northern lines [50]—more intense, in fact, than among the Southern lines; [51] and that the Northern carriers "do not have the whip-hand at all. Each Northern carrier is more dependent upon its Southern connections than they are upon it." [52]

Finally, officers of both Northern and Southern defendants testified that to their knowledge no Southern railroad had ever been coerced by any Northern road or combination of roads by traffic withdrawals or restrictions or by any other method.[53] This testimony, like much of the defendants' testimony, was self-serving, but it was uncontroverted.

There being no proof of the allegation that the Southern defendants "generally are dominated and coerced by the Northern defendants," the conclusion of the allegation ("and therefore, even when the Southern defendants desire, they cannot publish joint through rates between Georgia and the North when the Northern carriers refuse to join in such rates") necessarily falls. However, this portion

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[48] Final Brief, p. 114.
[49] Sheppard of the Illinois Central, VIII, 2361.
[50] Dervin of the New York Central, XV, 5235.
[51] Franklin of the Pennsylvania, XI, 3309.
[52] *Ibid.*
[53] Tilford of the Louisville & Nashville, VI, 1767; Sheppard of the Illinois Central, VII, 2167-8; Oliver of the Southern Railway, IX, 2628, 2655; Etheridge of the Seaboard, X, 2963-4; Gottschaldt of the Gulf, Mobile & Ohio, X, 3134-5; Doss of the Atlantic Coast Line, XV, 4848-9; Franklin of the Pennsylvania, XI, 3371; Burford of the Erie, XII, 3681-2; Hull of the Chesapeake & Ohio, XIV, 4754; McGohan of the B. & O., XIV, 4675-6.

of the allegation requires clarification and a special comment.

Under the Interstate Commerce Act, if one railroad fails to persuade another to join with it in establishing a joint through rate, the proponent of the rate can effect publication of it only by complaining to the Interstate Commerce Commission and inducing the latter to prescribe the rate.[54] Except as the Commission may prescribe such rates, they can be made only by mutual agreement between the connecting carriers involved. A refusal by a Northern road to agree to a proposal by a Southern road for a joint through rate could not therefore be regarded, in and of itself, as coercion; the refusal might be unreasonable or arbitrary or mistaken but, as counsel for Georgia said, "each individual northern railroad had the undoubted legal right to refuse to concur in the rate tendered by the southern railroad,"[55] and this refusal would not constitute coercion.

On the other hand, coercion of a Southern road could take place if a Northern road, alone or in combination with other Northern roads, having refused to join in a rate proposed by a Southern road, thereafter restrained the Southern road from petitioning the Interstate Commerce Commission to prescribe the rate. It is difficult to see in what other sense it could be charged that the Northern roads use coercion on the Southern roads in the fixing of joint through rates.[56]

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[54] Under § 15(3) of the Act, 54 Stat. 911, 49 U.S.C. § 15(3), the Commission has power to do this "whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint . . ."

[55] Mr. McGovern in his final argument, XIX, 6737.

[56] Georgia's original complaint, in paragraph 7 (from which the amended complaint, in paragraph 13, derived the allegation that "even when the Southern defendants desire, they cannot publish joint through rates . . . when the Northern carriers refuse to join in such rates") stated, in some additional explanatory matter following the quoted language, which for some reason was omitted from the amended complaint, that "even when the Southern carriers could act independently" in the matter of joint through

Georgia did not produce any example of such coercion; the defendants denied that the power existed, as a practical matter, and introduced evidence which indicated that Southern railroads as well as Northern, and small as well as large, frequently took their controversies over joint through rates and the divisions of revenues pertaining thereto to the Interstate Commerce Commission for settlement.[57]

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rates, they refuse to do so. The only way the Southern carriers could act "independently" in joint through rates would be to apply to the Interstate Commerce Commission for an order prescribing the rates. It seems quite clear that this was what the original complaint had in mind by its reference to independent action, and that it also had in mind that the refusal of the Southern roads to take independent action was because of their domination by the Northern roads.

[57] Pp. 591-595 *supra*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDANTS

REPORT OF THE SPECIAL MASTER

(Submitted in Three Volumes)

VOLUME THREE

(Pages 619 to 923)

ANALYSIS OF THE EVIDENCE
IN SUPPORT OF THE FINDINGS IN VOLUME ONE
Containing:

PART ONE. THE NATURE OF THE ALLEGED DISCRIMINATORY THREAT AGAINST THE SOUTH, INCLUDING GEORGIA, INHERENT IN THE POWER ACQUIRED BY THE DEFENDANTS.

(*First Installment*, consisting of the alleged discriminatory voting arrangements, and the alleged "Rate Wall" policy of the Northern defendants).

PART TWO. CASE MATERIAL RELATING TO RATE CONTROVERSIES BETWEEN THE SOUTH AND THE NORTH (INTRODUCED BY GEORGIA TO ILLUSTRATE THE DEFENDANTS' ALLEGED "COERCIVE AND DISCRIMINATORY PRICE-FIXING").

PART THREE. THE NATURE OF THE ALLEGED DISCRIMINATORY THREAT AGAINST THE SOUTH, INCLUDING GEORGIA, INHERENT IN THE POWER ACQUIRED BY THE DEFENDANTS.

(*Second Installment*, consisting of the alleged discriminatory rate structure resulting from differences in the southern and northern rate levels).

PART FOUR. THE QUESTION OF INJURY TO GEORGIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 10, Original

THE STATE OF GEORGIA, COMPLAINANT

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., DEFENDANTS

REPORT OF THE SPECIAL MASTER

(Submitted in Three Volumes)

VOLUME THREE

PART ONE

THE NATURE OF THE ALLEGED DISCRIMINATORY THREAT AGAINST THE SOUTH, INCLUDING GEORGIA, INHERENT IN THE POWER ACQUIRED BY THE DEFENDANTS

(FIRST INSTALLMENT, CONSISTING OF THE ALLEGED DISCRIMINATORY VOTING ARRANGEMENTS, AND THE ALLEGED "RATE WALL" POLICY OF THE NORTHERN DEFENDANTS)

I. The Alleged Discriminatory Voting Arrangements

A. Within the Association of American Railroads

Referring to the Articles or "Plan of Association" of the A.A.R., Georgia charged that:[1]

> "The Plan of Association, which provides that of 18 votes on the Board of Directors only four, less than one-fourth, are controlled by railroads operating in

[1] Final Brief, p. 8.

> the South, automatically conveys to the Northern defendants domination and control of all freight rates, including rates to, from, or within Georgia. The direct result of this illegal domination and control over all freight rates is necessarily to prevent Georgia from enjoying the privileges of competitive freight rates and to discriminate against Georgia in the rates fixed by the conspiracy."

There was no allegation that the disparity in voting power had ever been used to penalize the South. The argument was rather that the mere existence of the disparity necessarily resulted, through the dominating power possessed by the Northern defendants, in rate discrimination against Georgia.

Attorney General Shaw, in final argument, stated that:[2]

> ". . . once we have established the fact that we are discriminated against in the mechanism of the Association of American Railroads by the voting procedure there . . . what I said to begin with is true, that the gun is cocked and directed toward the South.
>
> "Now, I agree that if we just had a conspiracy that operated uniformly in forty-eight states, you would have a different situation altogether. But when that gun is directed directly toward Georgia, then we say that Georgia has a right to be in this Court complaining of such conduct. . . ."

Mr. Shaw described the "appellate mechanisms within each of the territories" as "the mount on which the gun is erected". He then said:[3]

> "If the gun was taken away completely and you simply had an appellate mechanism which in no way discriminated against Georgia, that is all the forty-eight states were on a par, then you may have a case in which only the Government itself could complain.
>
> "I think it is when the gun is pointed against Georgia that we have a standing to be here.
>
> "That would be my personal view of it.
>
> "But, I qualify that by saying that all of the lower

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[2] XIX, 6644, 6645.
[3] XIX, 6646.

appellate bodies play a part in this over-all combination, and it is impossible, the way the combination operates, to segregate one section from another or one part of the combination from another."

Mr. McGovern, while also arguing that the voting set-up was discriminatory, took the view that it was not essential to Georgia's case on discrimination. The basic factor in Georgia's case on discrimination was the imposition of a coercive mechanism on an unequal rate structure. The existence within that mechanism of a voting disparity in favor of the North was an "additional" element in the proof but not an "essential" one.[4]

The origin of the voting provisions in the Articles of the A.A.R. has been reviewed at pp. 323-325 above. As stated there, the original plan called for a Board composed of representatives of five Northern roads, four Western roads and three Southern, with the President of the A.A.R. ex-officio a member. Because of the extensiveness of the Western territory two additional places were given the Western roads, making a board of fifteen. In this form the Articles were adopted, apparently by the unanimous vote of the member roads and certainly without any suggestion in the record on the part of any Southern road that the arrangement was discriminatory. Subsequently the Board was enlarged by giving each of the three sections one additional representative, making, with the Chairman, a Board of eighteen.[5]

In this line-up no section had a majority. Therefore, to take any affirmative steps against, or to block action desired by, a particular section, the representatives of the two other sections would have to vote together in numbers

[4] XIX, 6768, 6769, 6772.

[5] The amended Articles of February 14, 1946, AD-3, Vol. D, pp. 13, 14, contain provisions to this effect. As indicated above, the Articles as originally adopted provided for a Board of fifteen. The enlargement may have been made prior to February 14, 1946, but the record does not so indicate.

sufficient to make up a majority. On this basis the West and the South could combine against the North, and the North and West could combine against the South. There is no evidence in the record, nor any charge by Georgia, that the North and West ever combined in this way against the South, or, indeed, that the members from any two sections ever combined against the members from a third. Georgia's theory appears rather to have been that under the A.A.R. Articles a member of the Board of Directors could declare a matter to be "controversial" and the Board could then make a decision by a three-fourths vote which the members would have to comply with or else go to arbitration and comply with the arbitration award; and that the North, having more than one-fourth representation on the Board, could prevent any action of this sort ever being taken, whereas the South, having less than one-fourth, could not exercise such a veto.[6]

However, as previously stated at p. 407 above, the record contains only one instance of a case in which the Board declared a matter "controversial" (alleged violation by the Chicago Great Western of an A.A.R. resolution prohibiting joint rates between trucks and buses) and in that case no decision was actually made. Finally, in the revised Articles of the A.A.R., dated February 14, 1946, the provisions relating to controversial cases were deleted, along with the arbitration provisions, which never had been used in practice.

On the basis of this record I find that the allocation of representatives on the Board of Directors of the A.A.R. as between the Northern, Southern and Western roads has not resulted in discriminatory acts against Georgia or the South and does not constitute a threat of discrimination against Georgia or the South.

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[6] E.g., Shaw at XIX, 6645.

B. *Within the Joint Conference of Contact Committees*

As previously noted, Georgia drew attention to the special arrangement within the Illinois Freight Committee, which is a member of the Joint Conference of Contact Committees, whereby four negative votes may defeat a proposal. Georgia contended that this, in conjunction with other factors, operated to turn over control of the Joint Conference to the Northern roads, four of whom were represented on the Illinois Committee. At pp. 564-576 above I summarized the evidence on this point, and I found that discriminatory control had not been established.

II. The Alleged "Rate Wall" Erected by the Northern Defendants Against the Movement of Southern Products into Official Territory

In much of Georgia's presentation it was suggested that the Northern rate bureaus dealt in a discriminatory fashion with the interterritorial rate proposals from the South. Insofar as this allegation rests upon inferences from the statistical evidence, there is no showing, as I have found in Finding 82 above, that Southern proposals are treated by Official Territory Associations in a manner significantly different from the manner in which Northern proposals are treated by Official Territory Associations or by the Associations in Southern Territory.

The allegation rests primarily upon the charge that the Northern railroads have deliberately established in the North a "rate wall" designed to block or curtail the movement of Southern products into Official territory.

A. *The Nature of Georgia's Allegations*

Georgia, after citing evidence designed to show that the rate level in the South was higher than in the North, charged:[7]

"That such rates are higher is no mere accident. The evidence is conclusive that the rate differential was

[7] Final Brief, p. 89.

> deliberately perpetuated by the refusal of the Northern lines to concur in rate adjustments that would permit Southern producers to reach Northern markets on rate levels equal to those enjoyed by Northern producers."

In support of this charge, Georgia relied primarily upon a statement by Oliver of the Southern Railway, made in February, 1932 in a proceeding before the Interstate Commerce Commission. This statement, insofar as quoted by Georgia, was as follows:[8]

> "The new policy of these connections is to build a rate wall at the Ohio and Potomac Rivers which will prevent or greatly curtail the movement of southern products into Official Territory."
>
> * * * * * * *
>
> "Originally, and for many years, there were a number of independent railroads operating in a north-south direction to and from Ohio River Crossings. For example: We had independent railroads from Cincinnati to Toledo, to Indianapolis, and to many other points in what is known as Central Freight Association territory.
>
> "In the course of time, these north-south lines were absorbed into the east and west trunk lines, such as the Pennsylvania, the Baltimore & Ohio, and the New York Central. Therefore, the individual interest of each of these railroads was in the development of east-west rather than north-south traffic, and their former rate policy was changed."

It will be seen from the foregoing that Oliver was complaining about a general policy, newly adopted by the Northern carriers, of keeping Southern products from Northern markets. The historical origins of this situation and the sequel to it, as shown by the record, will be discussed presently.

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[8] IX, 2629, 2631.

Georgia also cited the following statement by Kerr, then assistant to the Vice-President in charge of traffic of the Louisville & Nashville, in the same proceeding before the Commission in which Oliver testified:[9]

> "Import traffic from the Gulf and South Atlantic ports to the territory east of the Chicago-Indianapolis-Cincinnati line [the "Monon" line] has generally moved on basis of the domestic class rates, to the extent that there was any movement at all of such traffic, it having been found impossible to induce the Official Territory lines, such as the Baltimore & Ohio, Pennsylvania Railroad and New York Central Railroad, whose major interests lie in an east and west direction and serving the North Atlantic ports, to join in the establishment of competitive import rates in line with those applicable from the North Atlantic ports to the same points."

This particular controversy about import rates had a special history of its own, including a decision by the Commission in 1934 (two years after Kerr's statement) which, according to the defendants, resulted in a rate basis very favorable to the South. Since this case was not a part of the main stream of the North-South controversies which led up to the alleged "rate wall", I have treated it separately at pp. 778-789, infra.

Georgia also cited an extract from a brief of counsel for the Official territory carriers, submitted in a 1935 proceeding before the Commission, as follows:[10]

> "Official Territory lines have perhaps the most vital interest in interterritorial competitive adjustments of any single group of carriers in the country for the reason that the populous Official Territory provides the markets for a large part of the traffic produced elsewhere in the United States. That territory is hemmed in on the South, the Southwest, and the West by territories, and carriers serving them, all seeking to market their products within the territory served by Official lines. In many instances, such commodities, sought to

[9] Georgia's Trial Brief, p. 80; V, 1412.
[10] Georgia's Trial Brief, p. 79; XI, 3501-3503.

be marketed within Official Territory, come into direct competition with the commodities produced in that territory. Official lines, therefore, *are in duty bound to protect the geographical or other natural advantages possessed by shippers or producers on their lines, and as a matter of justice and equity, they may not be required to join in such low bases of interterritorial rates as to nullify or neutralize these natural advantages.*" (Emphasis added)

B. *The Defendants' Contentions Regarding the Alleged "Rate Wall"*

The defendants contended that the so-called "rate-wall" was a temporary historical phenomenon precipitated by the large-scale reworking of the Southern, Northern and interterritorial class rate structures by the I. C. C. in the '20s and by its cancellation of many commodity rates as in violation of the long- and short-haul provisions of Section Four of the Interstate Commerce Act. These actions of the Commission, according to the defendants, upset established relationships and made it necessary for the Southern and Northern carriers to negotiate joint rates under new and difficult conditions. The controversies which resulted, however, the defendants said, were only temporary and were brought substantially to an end by further decisions of the I. C. C. well before the institution of Georgia's case.

These contentions rested upon a succession of I. C. C. decisions and reports, supplemented by oral testimony. It was expected that I would make an independent study of the decisions and reports, and this I have done. The following historical survey is based upon that study. It bears out in the main the defendants' contentions.

C. *How the So-Called "Rate Wall" Arose and What Happened to It*

1. *The History Leading Up to It.*

Until the early '20s it seems to be generally agreed that Southern producers had little reason to complain about

northbound railroad rates.[11] These consisted chiefly of specially constructed commodity rates, which were lower than the class rates and frequently consisted of the sum of the local rates to the borders between Southern and Official Territory.[12] There were also in effect between the South and Trunk-Line and New England territory some joint class-rates, at levels which were apparently satisfactory to the Southern carriers.[13] The Commission observed in 1926, in its first supplemental report in the *Southern Class Rate Investigation*, infra, that:

> "The record shows, and it is a matter of general knowledge, that the southern carriers have been alive to the desirability of fostering the growth of manufacturing plants on their lines and of aiding such plants in meeting northern competition." [14]

And the Commission cited testimony to the effect that there was "very little class traffic moving from the southeast to the eastern territory. There is a great movement of manufactured products and farm products and products of mines, but all of that moves on commodity rates."

On January 15, 1928, as the Commission later stated,[15] a "comprehensive and unified system of class rates between Official and Southern territories became effective . . .

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[11] See, e.g., Commisioner Eastman's remarks in the *Southern Governors' Case* (State of Alabama et al. v. New York Central Railroad Company et al.) 235 I.C.C. 255, at 340-342.

[12] Burgess, XIV, 4566, 4568. He also testified that some combination rates consisted of the sum of a local or so-called "specific" rate in the South plus a "specific" in the North.

[13] *Divisions of Rates, Official and Southern Territories* (1939) 234 I.C.C. 175, 178, 179. The Commission in passing cited its statement in *New England Divisions* (126 I.C.C. 579, 615) that: "It appears that the southern carriers have had the principal voice in fixing the level of the freight rates between the two groups, but that the eastern carriers have had the principal voice in fixing the divisions."

[14] 109 I.C.C. 300 at 319. The main decision was in 100 I.C.C. 513; other supplementary decisions were in 128 I.C.C. 567; 113 I.C.C. 200.

[15] In the *Divisions* Case, *supra*, note 13, at 178.

having been prescribed in *Southern Class Rate Investigation.*" The latter investigation was followed by the *Eastern Class Rate Investigation* (note 21 below). In each investigation the Commission sought only to bring about internally harmonious class rate structures, without affecting the relative levels of the Southern and Northern structures. The prescription of these unified class rate systems, of which the Southern portion, for historical reasons, was much higher than the Northern, was the last of a series of events which brought about the so-called "rate wall". These events were as follows.

1. In a series of reports and decisions beginning with *Fourth Section Violations in the Southeast* (1914) 30 I. C. C. 153, 32 I. C. C. 61, and ending in 1921 with *Corporation Commission of North Carolina* v. *Director General*, 57 I. C. C. 523, 62 I. C. C. 64, 64 I. C. C. 264, the Commission required a widespread readjustment of commodity rates within the South and from South to North, cancelling many of them as in violation of the Fourth Section of the Interstate Commerce Act.[16] This Section, as previously noted, prohibited the railroads, save with the approval of the Commission in exceptional cases, from charging less for a long haul than for a shorter haul over the same line in the same direction.[17]

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[16] For this history see Dickinson, II, 751-755.

[17] Section 4 in its present form reads, in its essential portions, as follows: "It shall be unlawful for any common carrier. . . to charge or receive any greater compensation. . . .for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. . . .but this shall not be construed as authorizing any common carrier. . . .to charge or receive as great compensation for a shorter as for a longer distance: *provided*, that upon application to the Commision such common carrier may in special cases, after investigation, be authorized. . . .to charge less for longer than for shorter distances. . . .but. . . .the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence. . . ." 49 U.S.C. Sec. 4(1), 54 Stat. 904.

The Southern rate structure had long been distorted by the creation of depressed rates to trading centers along navigable rivers where steamboat competition was intense, and to other centers where keen railroad competition had developed.[18] Many of these distortions conflicted with the Fourth Section and led to the Commission action described above.

2. As interterritorial commodity rates were cancelled, class rates automatically took their places in all those instances in which the Southern and Northern roads were not able to agree upon what the new rates should be. In addition, the Commission made it clear to the Southern carriers in *Southern Class Rate Investigation*, supra, that it expected them to revise their commodity rates generally on a more harmonious and uniform basis, utilizing the class rate distance scales in framing the new rates.[19] This revision, the Commission indicated, would eliminate the necessity for the large number of Fourth Section relief orders which had been temporarily granted or for which applications had long been pending.[20]

3. The establishment of new interterritorial rates either on the class basis or in relation to it, upon terms satisfactory to Southern shippers, was made more difficult by the fact that the Southern class rate level, as prescribed by the Commission, averaged about 39 per cent higher than the Northern.[21] As already indicated, the two class rate systems had

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[18] These centers became known as "basing points". They included many adjacent points carrying the same rates as to the centers about which they clustered. They were a peculiarity of the Southern structure. To a considerable extent they were wiped out in the Fourth Section decisions noted above. Dickinson, II, 753-773; SD-1, Vol. N, explained at IV, 1137-1139.

[19] The Commission so stated in *Rates From, To, And Between Points In Southern Territory* (1933) 191 I.C.C. 507, 537, 538.

[20] Kerr, IV, 1146 to 1149.

[21] The *Divisions* Case, *supra*, note 13, at 190, 191. At about the same time that the Commission had undertaken the *Southern Class Rate Investigation* it began a similar investigation in Official territory which was not, however, completed till 1930 (*Eastern Class*

grown up independently, and, for historical reasons not necessary to describe here, the Southern structure had developed on a much higher basis than the Northern, which the Commission in its several investigations was not concerned with changing. Given the 39 per cent average difference in level, the new interterritorial rates from the South to given points in the North would of necessity ordinarily be higher, mile for mile, than the Northern rates to the same points, because of the inclusion in the blended result of so much of the haul as carried the higher Southern rates. By the same token interterritorial rates to given points in the South would ordinarily be lower, mile for mile, than the Southern rates to the same points, because of the inclusion in the blend of the lower Northern component. These rate consequences precipitated the following major controversies between the Southern and Northern roads in their attempts to negotiate new interterritorial rates.

2. *Nature of the Controversies Between the Southern and Northern Roads.*

(a) *The Southern Railroads' Desire for "Destination Levels"*

The Southern railroads favored, in cases where their shippers were meeting substantial competition in Northern markets, the adoption of interterritorial rates to Northern destinations on the same level, mile for mile, as the Northern rates on like commodities to those destinations. Southern producers would thereby still suffer the disadvantage of greater distance from the Northern markets, but they would at least reach those markets on the same mile-for-mile basis, instead of on the higher basis which would result from blending the Southern and Northern rate components. The

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Rate Investigation, 164 I.C.C. 314). The 39 per cent was the average difference between the first-class rates as prescribed in the two territories. The percentage of excess in the *interterritorial* first-class rates was estimated by the Commission at "not more than 28 or 30 per cent." *Southern Divisions* Case, *supra*, at 191.

"destination level" principle, applied to southbound movements, would similarly give to Northern producers selling in Southern markets the same mile-for-mile rates as Southern producers, instead of the lower basis which would result from blending the Northern and Southern rate components.

The Northern railroads, generally speaking, looked with disfavor upon both of these consequences of applying the destination level principle to interterritorial rates.

(b) *The Northern Railroads' Desire for Equality of Southbound and Northbound Rates*

The Northern carriers, in their controversies with the Southern during this period, frequently took the position that the rates southbound should be the same, mile-for-mile, as the rates northbound; that it would be unfair to Northern producers to permit Southern producers of a given commodity having markets in both territories to ship north on a mile-for-mile basis lower than that charged to their Northern competitors for southbound shipments. The Southern railroads rejoined that to permit Northern producers to ship into the South on mile-for-mile rates lower than those within the South would soon result in a lowering of the Southern rate structure. And this, the Southern railroads said, they could not stand, because their transportation costs were higher than the Northern railroads' costs and they needed the revenues which came from the higher Southern rate structure.

(c) *The Divisions Controversy*

At the same time that the Southern railroads sought the reduction of northbound interterritorial rates to the Northern level, they desired to keep a disproportionate share of the divisions of the joint revenues. They were unwilling, in Commissioner Eastman's phrase, to "stand the shrink."[22]

[22] From his dissenting opinion in the *Southern Governors'* Case, *infra*, 235 I.C.C. 255, 347. The full passage, illustrating the importance of this controversy in relation to the North-South rate

They needed, so they said, to keep a higher divisions factor than the Northern railroads because their transportation costs were higher and their revenue needs greater.[23] The Northern railroads did not agree with this position.[24]

These were the three major points of conflict between the Southern and Northern railroads which arose during the '20s and '30s. According to the defendants, the existence of these conflicts explains why it was that in this period the Northern railroads repeatedly were unable to agree to interterritorial rate proposals made by the Southern roads, thereby giving rise to the charge that they had erected a "rate wall" against the intrusion of Southern manufactures into Northern markets.

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structure, was as follows: "Where a railroad reaches a common market in competition with other railroads serving other producing sections, we have always allowed that railroad, provided it does not go below minimum reasonable limits, to make rates to that common market on a competitive basis. The record here shows that the Illinois Central, which serves the South, but reaches with its own rails Chicago and other points in the North, normally does that very thing. So far as the other southern railroads are concerned, the difficulty is that with a few minor exceptions they do not reach points in the North with their own rails, but must depend upon northern railroad connections. These northern railroads are now usually unwilling to join their southern connections in competitive rates on the northern level; but one good reason for such unwillingness has been wholly disregarded by the complaining southern producers. It is the fact the southern lines have insisted on divisions which would give them the lion's share of the joint revenue."

[23] Doss of the Atlantic Coast Line, XV, 4936.

[24] Franklin of the Pennsylvania testified that: "The Northern roads claimed that where the new rates from the South to the North were put on the same level as rates within the North, the Southern roads' division, or share, of the rate should be mile-for-mile on the same basis as the Southern roads' share; that, in other words, there should be what we call an equal division factor.

"The Southern roads objected to this and asked for a higher factor, which did not seem fair to the Northern roads.

"This was the main bone of contention down to the decision of the Interstate Commerce Commission in the *Southern Divisions* Case in 1939. . ." XI, 3312, 3313.

3. The Commission's Disposition of the Controversies Between the Southern and Northern Roads.

The controversies which have been described came before the Commission, and were very largely resolved by the Commission, in the period roughly from 1928 to 1940 inclusive.

(a) *The Divisions Controversy*

The Commission took up the whole question of divisions in an investigation which was begun in 1931 but not concluded till July 25, 1939.[25] In its order the Commission sustained the right of the Northern carriers to an equal divisions factor in cases where the interterritorial rate was fixed on the same mile-for-mile basis as the rate within Official territory. In relation to the Georgia case this was the most important part of the decision. It meant that thenceforth the Southern roads, when they sought rate equality into Northern markets, could no longer insist on retaining a disproportionate share of the divisions.

On the other hand, the Commission partly upheld the claims of the Southern roads in situations where the interterritorial rates were to remain on a *higher* basis than the rates within Official territory. The Southern carriers argued that in such situations the Northern carriers ought not to derive any more from traffic handled in conjunction with the Southern lines than they could derive, mile-for-mile, from the same traffic handled in conjunction with other Northern carriers within Official territory. The Southern lines felt that in such cases, because of their higher transportation costs and greater financial needs, they should receive the entire increment in the through rates over and above the Northern levels.[26] As a compromise, the

[25] *Divisions of Rates, Official and Southern Territories* (1939) 234 I.C.C. 175.

[26] Ibid, at 185-189.

Commission fixed divisional factors 25% higher than those for the Northern lines on general traffic of this sort.[27]

On July 29, 1939, four days after the Commission's order in the *Divisions* case, the Commission on its own motion launched a major investigation into interstate class rates, covering the South, the North and most of the rest of this country.[28] This investigation was destined, as will be seen, to lower very materially the spread between the levels of the Southern and Northern class rate structures, and to move toward the ultimate elimination of any substantial differences between the two territories. This investigation, however, was not completed till 1945, and therefore belongs to a much later stage of rate history, which is covered at pp. 798-809 infra. In this portion of the Report I am dealing only with the Commission's efforts, in the period of the '30s, to dispose of the controversies created by the effort to revise interterritorial commodity rates so as to comply with the Commission's requirements.

(b) *Equality of Southbound and Northbound Rates*

The Commission in this period of the '30s disposed of the claim of the Northern railroads that the southbound and northbound rates on given commodities should be equal. The Commission held in several cases that so long as the Southern class rate structure was on a higher level, it was proper that southbound rates should remain higher than northbound even when the northbound rates had been reduced to, or approaching, the northern level.[29]

(c) *The Level of Interterritorial Rates from South to North*

Only in the matter of establishing northbound interterritorial rates at the Northern level, mile-for-mile, did the Commission fail to lay down a positive rule for general

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[27] Ibid, at 190.

[28] *Class Rate Investigation, 1939*, 262 I.C.C. 447, 454 (1945).

[29] The Commission so decided, for example, in the *Hosiery* and *Paper* cases, *infra*.

application. The differences within the Commission in dealing with this issue mirrored to a considerable extent the differences between Southern and Northern interests, and revealed the complexity of the problem. The Commission persisted in treating the issue on a case by case basis, taking into account among other things the history and relationships of the challenged commodity rates; the competitive situation of the producers, North and South; and the varying transportation conditions. The Commission's willingness, however, to require the Northern roads to agree to the Southern position in particular commodity rate cases became stronger as time went on; and in its most important decision in this field, the *Southern Governors'* case, decided in November, 1939, a few months after the decision in the *Divisions* controversy, the Commission very nearly accepted the full Southern position.

The nature and the consequences of the Commission's actions in dealing with this issue can best be understood by a chronological review of its principal decisions during the period in question.[30]

(i) *The Hosiery Case (1929)* [31]

In the hosiery industry "subnormal" commodity rates from the South to the North had early been established. The Commission found that "they originated in the desire of the Southern lines to promote the textile industry in the South, which at the time of the inception of the rates was but slightly developed." [32] These rates did not conform to

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[30] I have not attempted to cover all the decisions but only those which seemed most representative, taking into account Mr. Dickinson's summary in III, 819-839 and ND-3, Vol. E ("Partial List of Reports of the Interstate Commerce Commission Dealing with Freight Rates Within the South and Between the South and Official Territory, 1906-1946").

[31] *Hosiery from Southern Points to Points in Southern, Official, and Western Classification Territories*, 156 I.C.C. 117.

[32] 156 I.C.C. 117, 119 (quoting from the earlier *Bear Brand* case there referred to). In his concurring opinion Commissioner Eastman said at p. 132: "Southern manufacturers of textiles—and the same

the Fourth Section, and after the *Southern Class Rate Investigation* supra, it became necessary for the Southern roads to convert them into rates based on distance scales.

The Southern roads, in their negotiations with the Northern, stood out for the "destination level." "Added importance," the Commission said, "attaches to this . . . proposal of the Southern carriers because of their desire to continue or establish such a competitive basis on other manufactured products of the South." [33]

The Northern roads declined to join in the proposal of the Southern roads and contended for equal southbound rates. The Commission disapproved the position of the Northern roads.[34]

The question then resolved itself into what should the northbound rate be. The Commission approved a northbound rate basis approximately on the Northern level. The higher southbound rate was left intact.

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may be said of southern manufacturers generally—have long enjoyed, and felt that they were fairly entitled to, a relatively low, competitive basis of rates to the great northern markets. Such an adjustment has been granted and defended on the ground that they were 'infant' industries struggling to establish themselves against adverse conditions and handicapped by their remoteness from the principal consuming territory. Broadly speaking, the rates on the same commodities over the same rails in the reverse direction have been much higher. * * * However, it is a matter of common knowledge that textile manufacturing is no longer an 'infant' industry in the South. Indeed this record shows that, so far as cotton-hosiery knitting mills are concerned, there are very nearly as many of them in southern territory as there are in all of official territory, although it may be that their output is not as great. * * * certainly the record in no way proves that the southern manufacturers would be at any total net disadvantage even if freight rates were not adjusted in their favor."

[33] 156 I.C.C. 117, 121.

[34] In an earlier proceeding relating to this rate adjustment (the *Bear Brand* case, *supra*, note 32), the Commission had gone on "the general principle that rates from the South to Official Territory must be the same as those in the reverse direction." 156 I.C.C. 117, 130. The Commission observed that "we were not then fully advised of the serious consequences of a strict adherence" to that principle. "Such consequences are now brought to our attention on the voluminous record in the present proceeding." Ibid at 130.

(ii) *The Stoves Case (1930)* [35]

In the following year the Commission dealt with a similar situation involving the stoves industry, in a manner somewhat less favorable to the Southern producers.

There, as had happened in the hosiery industry, it became necessary to convert commodity rates into class rates, and the same arguments arose between the two sets of carriers: the Southern carriers wished northbound rates approximating the Northern level, and the Northern carriers resisted by demanding the same rates southbound.

As had happened in the hosiery industry, the Southern carriers had previously established relatively low commodity rates into the North "upon representations of certain southern manufacturers . . . that the lower rates were necessary to enable them to compete with manufacturers in official territory . . ." [36]

However, these relatively low northbound rates did not apply "from all manufacturing points in southern territory, manufacturers at some of the southern producing points having been unable to obtain rates on a similar basis."

As in the *Hosiery* case, the Southern carriers made a broad plea, extending beyond the particular industry in question to southern industry generally, for equalizing northbound rates with the Northern level: [37]

> "The principle for which we are here contending applies not only with respect to the commodity immediately under consideration, but, in a large measure, to all articles manufactured in southern territory. The south does not and for years will not be able to consume the articles which it manufactures. The great proportion of the manufactured articles of the south must find a market in the densely populated section north of the Ohio and Potomac rivers and, to some extent, in the territory west of the Mississippi River.
>
> "Rate adjustments which paralyze any section of the

[35] *Stoves, Ranges, Boilers and House-Heating Furnaces,* 169 I.C.C. 169.

[36] Ibid at 174-5.

[37] Ibid at 175.

> country should not be required, and unless the south has an outlet into other territories for its products there can be no continued growth and development with respect to manufacturing enterprises in this territory. • • • The southeastern and Carolina lines believe this to be a most serious situation and one that merits the most careful and sympathetic consideration by the Commission."

The Southern carriers then rested their case for rate parity into the North upon the decision in the *Hosiery* case.

The Northern carriers, in addition to their request for equal southbound and northbound rates, argued that the Northern stove industry was already suffering from Southern competition, and that the Southern stove industry was more prosperous than the Northern.[38]

In the end the Commission evolved a compromise formula. Its essential basis was that the differences between the northbound rates and those within the North should not exceed the differences which would result from applying from South to North 31.5% of first class, and within the North 35% of first class. The result was to produce northbound rates lower than southbound but materially higher than within the North—in this particular case averaging about 20% higher.[39]

The Commission did not explain the rationale of its formula, saying merely that "shippers in southern territory . . . to points in official territory are entitled to rates *fairly related* to those paid by their competitors in official territory on traffic to the same destinations."[40] (Emphasis added)

Commissioner Brainerd, concurring in part, expressed the view that the formula laid down by the majority provided

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[38] Ibid at 176.

[39] The final formula was fixed on reargument, 182 I.C.C. 59. The 20 per cent calculation appears from the Commission's opinion in *Cotton, Woolen, and Knitting Factory Products*, 211 I.C.C. 692, 725.

[40] *Stoves, Ranges, Boilers and House-Heating Furnaces*, 169 I.C.C. 169, 179.

too wide a spread between the northbound rates and the rates within the North.[41]

It is evident that the *Stoves* case marked a defeat for the Southern carriers. They had hoped, on the basis of the *Hosiery* case, to obtain the establishment of a general principle of parity of northbound rates with northern rates on competitive products, mile-for-mile to the same destinations. Instead they were given a formula based on the theory that northbound rates should be somewhat above the Northern level (though lower than the southbound rates—a concession to the Southern view).

The sharpness of the Southern defeat on the issue of northbound rate parity was accentuated by the Commission's subsequent application of the stoves formula to rate situations in several other industries. Typical of these cases was the following one, involving a portion of the glass industry.

(iii) *The Blue Ridge Glass Corporation Case (1931, 1932, 1934)* [42]

In this case (which required three successive decisions) the Commission finally applied the percentage formula of the *Stoves* case to shipments of window-glass and rough-rolled glass from Southern territory to Official territory.[43] As indicating the complexity of the Commission's problem, in the final decision there were four dissenting opinions. Commissioner Lee, expressing in this and in succeeding cases the Southern point of view, argued that the northbound rates fixed by the Commission would not afford the principal Southern producer "a fair opportunity to compete with other producers."[44] Commissioner Farrell, on the other hand, felt that some of these northbound rates would be unduly preferential of Southern producers, and that

[41] Ibid at 181.
[42] *Blue Ridge Glass Corp.* v. *Akron & B. B. R. Co.*, 176 I.C.C. 449 (1931), 182 I.C.C. 493 (1932), 201 I. C.C. 421 (1934).
[43] 201 I.C.C. 421, 432.
[44] Ibid at 436.

some of the southbound rates would be unduly prejudicial to Northern producers.[45] Commissioner Aitchison believed that the Commission should limit itself to prescribing the rates from the single Southern point which produced in volume, instead of prescribing rates applicable to shipments from Southern territory as a whole.[46] Commissioner Tate favored blended rates constructed, as a maximum, on the percentages of distance hauled within Southern and Official territory respectively (which percentages would be applied to the class rates).[47]

(iv) *The Consolidated Stone Cases (1934)* [48]

These cases, which were covered in one decision, involved the levels and relations of rates on different descriptions of stones throughout the country east of the Rocky Mountains.

The Southern producers vigorously contended that on northbound shipments they were "entitled to a parity as a matter of right," [49] and that anything less would "unduly hamper" them "in competition with the Northern producers." [50] The Northern producers, on the other hand, were "unanimous in opposing anything approaching a parity of levels," and testified that they were in active competition with the Southern producers, "and they cited instances where southern producers were successful in obtaining contracts in competition with northern producers, notwithstanding the existence of higher rates from the southern producing point . . ." [51]

The majority opinion described the whole problem of the relationships between northbound rates and northern rates on competitive traffic as a "vexing one," with regard to which the Commission's actions had "not been uniform." [52]

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[45] Ibid at 437.
[46] Ibid at 436, 437.
[47] Ibid at 437-439.
[48] 200 I.C.C. 65.
[49] Ibid at 103.
[50] Ibid at 102.
[51] Ibid at 103.
[52] Ibid at 104.

The opinion contrasted, for example, the *Stoves* formula cases with the *Hosiery* case supra, and with an earlier "destination level" case (*Krupp Foundry Co.* v. *Southern Ry. Co.*, 148 I.C.C. 743) in which the northbound rates were *below* the northern rates for the same distances, and in which the Commission had directed their *increase* to the northern level to avoid prejudice to northern producers.

The Commission then prescribed rates on stone from the South to the North which reflected the following percentages over mile-for-mile parity with the North: on paving stone, 4 per cent; on rough stone, 8 per cent; on dressed stone, 22.5 per cent; and on carved stone, 30 per cent.[53] Commissioner Tate, specially concurring, stated that in his judgment these spreads were too high.[54]

Obviously this case was another set-back to the Southern point of view.

Then followed a proceeding of major importance to the South, involving the basic textile industry, in which again the Southern demand for rate parity to the North was denied.

(v) *The Cotton Textile Case (1935 Decision)* [55]

This case dealt chiefly with the rates from the two great textile manufacturing sections, in New England and in the Piedmont region of the Southeast, to the large markets in Official territory.

In 1931, as a result of the denial of Fourth Section relief,[56] the interterritorial commodity rates which had been in effect for some years had to be cancelled. These rates had been lower than the class rates, and the Southern manufac-

[53] This summary is from the Commission's description of the case as set forth in *Cotton, Woolen, and Knitting Factory Products*, 211 I.C.C. 692, 726.

[54] *Consolidated Stone Cases*, 200 I.C.C. 65, 129, 130.

[55] *Cotton, Woolen, and Knitting Factory Products*, 211 I.C.C. 692, decided November 21, 1935.

[56] *Cotton Fabrics in Southern Territory*, 172 I.C.C. 26.

turers had been flourishing at the expense of the Northern. As the Commission described the situation: [57]

> "New England interests described general conditions as to the textile industry there as appalling, and referred to many instances of whole communities of home owners which now have no industry. As the factories in the North lost their markets and the business of producing the coarser grey goods grew in the South, the northern mills turned more and more to the production of the finer goods and finished goods ready for consumption. The southern mills having now extended their activities into the production of the finer goods and of the finished goods, the northern production of these articles is diminishing."

As a result of this situation it was not surprising that the Commission's action in 1931 compelling a complete revision of the rate structure should have produced the sharpest conflicts. The Northern railroads, as the Commission described the situation, had "an insistent purpose . . . to join in no basis of interterritorial rates lower than the classification basis, and to make the difference in the class-rate levels in the different territories of controlling importance in arriving at differences in rates to a common market . . ." [58] The Commission noted the "equally determined purpose of the southern lines to accord to their manufacturers a level of rates from the southern manufacturing points to official territory no higher than the rates within that territory applicable from the northern milling points."

In its decision the Commission began by citing decisions such as the *Hosiery* case, in which the Commission had directed a mile-for-mile northbound parity with northern rates, as desired by the Southern interests. The Commission said that those cases had been decided on the basis of the special facts and had not been followed in "later and more comprehensive proceedings," citing as examples the compromise decision in the *Stoves* case, supra, and others

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[57] 211 I.C.C. 692, at 704.
[58] Ibid at 714.

which had followed it.[59] After reviewing these cases, the Commission stated that "when we found undue prejudice to the South because of the great disparity between the levels from the South and within the North, we have *only reduced the disparity to the extent shown to be necessary* to remove the violations of law. While the decisions generally recognize the propriety of a relation of the rates from the South somewhat more favorable than that produced by the respective first-class rates, *they do not generally support the contention of southern interests for an absolute maximum rate basis of parity.*" [60] (Emphasis added)

The Commission then considered the cotton textile rate relationships and concluded with a decision which in the main required rates from the South to the North approximately 10 per cent higher mile for mile than the basis prescribed within the North.

Commissioner Lee, dissenting in part, argued that "a mile-for-mile parity from all producing sections to the markets of official territory should be established. . . . We are clearly not warranted in according the northern carriers the right, *over the objection of the southern carriers,* to require the payment of rates on textiles from points of production in the south to destinations in the north approximately 10 per cent higher, mile for mile, than the basis prescribed within the North. A rate adjustment which seemingly produces a *rate wall* anywhere along the Ohio and Potomac will undoubtedly result in continued controversy and dissatisfaction and in the long run be detrimental to both the northern and southern carriers and producers." [61] (Emphasis added)

Commissioner Miller dissented on the ground, among others, that the southern producers had been given too much by the adjustment. He argued that "the spreads here fixed are materially less than those fixed in the *Stoves*

[59] Ibid at 724.
[60] Ibid at 728.
[61] Ibid at 794, 795.

case'' and others, and that ''on the bases hitherto obtaining the northern mills have steadily lost ground to the southern mills in the important northern market, and, in my judgment . . . the northbound interterritorial rates have been relatively too low. The approved relationship is only a slight improvement over the present one.'' [62]

Commissioner Mahaffie likewise dissented, on the ground that transportation conditions, and not competitive relations, should be the only basis on which rates should be prescribed, and that in this case the rates had been fixed below the level warranted by transportation conditions.

(vi) *The Coke Case (1936)* [63]

In this case a division of the Commission, following the general pattern set by the *Stoves* formula, had originally fixed northbound rates on coke which averaged about 10 per cent above the northern level.[64] On a hearing by the full Commission in 1935 this spread had been somewhat reduced.[65] Finally, in the instant case in 1936, upon reconsideration, the Commission in a divided decision held that the northbound rates should be on the *same* basis, mile for mile, as those within the north.

In overruling the objections of the northern producers and carriers to rate parity the majority of the Commission found that the Southern coke producers were able to sell in the North on the existing rates ''only to a limited extent''; and that the Southern carriers were convinced, and the unrebutted evidence of the Southern producers was to the effect, that the establishment of rates any higher than the northern level would ''restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues.'' [66]

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[62] Ibid at 796.

[63] *Coke from Alabama and Tennessee to Central Territory*, 215 I.C.C. 384.

[64] As stated in the *Cotton Textiles* case, *supra*, 211 I.C.C. 692, 726.

[65] 208 I.C.C. 281.

[66] 215 I.C.C. 384, 385.

The majority then held: (1) that the Northern producers "have no just ground for complaint against interterritorial rates from the South to Central territory on the same level, mile for mile, as those they pay";[67] and (2) that if, as the Northern carriers contended, northbound rates higher than the northern level were warranted because of higher Southern costs, "it would be proper that the increment accrue solely to the Southern carriers." The Northern carriers "are entitled only to maximum reasonable compensation," which would be afforded by the same rates, mile for mile, as those they charged within the North.

Four of the Commissioners (Meyer, Mahaffie, Porter and Miller) dissented. The dissenting opinion, by Commissioner Meyer, took the view that the rates should be judged by the ordinary standards of transportation conditions and not by competitive considerations, and that if the Southern carriers wished to lower the rates to the North for competitive purposes on behalf of the Southern producers, they could do so "by reducing their rates to the border of the two territories" (i.e., by reverting to combination rates of which the Southern component only would be reduced). "I do not recognize", he said, "a right in this Commission to require the Northern lines to join in less than maximum reasonable rates for the sole purpose of enabling Southern lines to better meet Northern competition."[68]

As indicating the importance which was attached to this decision, the Northern lines appealed to the Courts. The decision was affirmed in 1938 in *Baltimore & Ohio Railroad Company, et al.* v. *United States*, 304 U. S. 58.

Even before its affirmance the decision was regarded as a victory for the Southern point of view. Oliver of the Southern Railway testified in the present proceeding that the *Coke* case marked "the first definite and positive statement from the Interstate Commerce Commission" that the Official Territory lines should be required "to join us in

[67] Ibid at 386.

[68] Ibid at 388.

publishing the rates we sought where their necessity, as a matter of commercial competition, was established." [69]

However, the Commission soon made it clear that the majority action in the *Coke* case was not intended to lay down a rule of general application, but that each case was to be decided on its particular facts. This viewpoint was developed in a supplementary decision in the *Cotton Textiles* case, handed down in 1937.

(vii) *The Cotton Textiles Case (Supplementary 1937 Decision)* [70]

In the original *Cotton Textiles* decision in 1935, as set forth above, the Commission had sharply rejected the claims of the Southern producers for rate parity into the North. In February, 1937, the Commission, while granting some reductions on certain articles and making certain other modifications in the original decision, affirmed the greater part of it.

Commissioners Miller (who opposed any reduction) and Lee (who favored parity) dissented as they had done in the original decision. In the course of this second dissent Commissioner Lee relied strongly on the *Coke* case, which had been decided in the meantime, and argued that no valid distinction could be drawn between that case and this one. He also argued among other things, that while it was true that the class rates were higher in Southern territory than in Official territory, "this does not mean that freight rates are higher in all cases in the South. Many southern products move on commodity rates which are lower than the corresponding rates in the North. In fact, it is entirely possible that the level of rates in the South, as a whole, is as low as it is in the North. The transportation burden is distributed differently in the two sections." [71] Accordingly the difference in class rates, which appeared to be

[69] IX, 2632.
[70] 220 I.C.C. 189.
[71] Ibid at 197.

"the only reason for justifying higher rates on the southern product" should not influence the decision. He concluded, as in his previous dissent, by stating that the Commission's action created "a rate barrier where none has heretofore existed"; and he added that "under it, *there would seem to be little hope for equality in rates on any other southern products.*" [72]

On May 26, 1937, about three months after this decision, the Southern Governors filed their complaint with the Commission in the proceeding which became known as the *Southern Governors' Case.* It should be noted, however, that cotton textiles were not included in their complaint, and there is some indication elsewhere in the record that the southern carriers (whatever may have been the views of the southern producers) were reasonably satisfied with the textile rate adjustment.[73]

(viii) *The Southern Governors' Case (Decided November 22, 1939)*

This case (the official title of which is *State of Alabama et al.* v. *New York Central Railroad Company et al.*) [74] is of basic importance to the Georgia case for two reasons. First, the defendants' witnesses testified that it marked the end of the period of controversies which accounted for the "rate wall". Secondly, the opinion set forth, more fully than in any other case, the Commission's conceptions of the duties of the carriers with respect to the adjustment of interterritorial rates. These duties will afford a guide later on in considering the conduct of the carriers in the case examples of discrimination offered by Georgia.

Tilford, former Chairman of the Southern Freight Association, whose duties kept him in close touch with the case, testified that in the *Southern Governors' Case* "an effort was made to locate every commodity in the South that

[72] Ibid at 199.

[73] S-295, I, 385, letter from Oliver of the Southern Railway to Kerr.

[74] 235 I.C.C. 255.

might have any difficulty in moving from the South to the North because of freight rates being higher than those prevailing in the North.

"The complaint in that case listed some sixty descriptions of traffic, but when the case came up for trial there were only seventeen of them on which the Southern Governors concluded they could make out some kind of case. . . ."[75]

Actually the Commission dealt in its decision with 20 (not 17) commodities (the difference may be due to a difference in grouping).

By a 5 to 4 vote, with two Commissioners not participating, the Commission granted the Southern Governors' demands with respect to 10 of these commodities, and denied the demands with respect to the remaining 10. The dissenting Commissioners (Eastman, Porter, Miller and Mahaffie) opposed, for varying reasons, all of the reductions. Commissioner Lee, who had consistently taken the Southern view, wrote the opinion for the majority. The majority did not, however, fully accept the contentions of the Southern Governors, as will be seen; instead they approved substantially the position taken by the Southern carriers.

The Contrasting Positions Taken by the Southern Governors and the Southern Carriers

The Southern Governors, according to the Commission, took the general position that on articles manufactured or processed in the South there should be "a substantial equality of rates, distance considered, from the South to the North with the rates on like articles within the North. Departures from such equality, to be lawful, must, they urge,

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[75] VI, 1757. Commissioner Eastman in his dissenting opinion in the case, at p. 334, noted that the complaint "brings in issue the interterritorial rates on a very limited number (which might also be called 'suprisingly small') of Southern mineral and manufactured products. Conspicuous by omission are the major products manufactured, mined, or grown in the South which account for the greater part of its commerce with the North."

be based solely on differences in conditions affecting the actual transportation from the respective producing sections, which differences, they contend, do not here exist with respect to the articles named in the complaint." [76]

The Governors made the same charge of violation of the anti-trust laws which Georgia makes in this case; according to the Commission:

> "The record establishes that, aside from such regulatory control as is exercised by us, northern carriers effectively control the interterritorial rates to that part of the North east of the Monon line; in fact, these carriers freely admit that such is the case. Complainants, therefore, contend that the northern carriers, by *cooperation and agreement among themselves* and by absorption of roads in the North which otherwise would have been competitive in making rates from the South, *restrain the freedom of action of the southern carriers in the establishment of interterritorial rates in violation of the antitrust laws.* . . ." (Emphasis added)

In addition to this charge of violation of the anti-trust laws, with which the Southern Governors conceded that the Commission could not directly deal,[77] they alleged, as Georgia has alleged in this case, that "the northern carriers, in maintaining joint rates on various commodities from northern producing points to destinations in the North and at the same time refusing to join with the Southern carriers in the same level of rates from Southern producing points on like commodities to the same destinations, are *unjustly discriminating* against the latter carriers and the public which they serve." (Emphasis added)

Thus the Southern Governors, in the two passages just quoted, charged in effect a conspiracy to coerce the Southern roads in the fixing of rates and to discriminate against the South in the rates which are fixed—precisely the charge

[76] 235 I.C.C. 255, 309.

[77] The Commission, after referring to its lack of authority, stated: "We shall make no findings herein with respect to the alleged violation of the antitrust laws." Ibid at 310.

which Georgia is making in the present proceeding. The historical connection between the *Southern Governors' Case* and the suit which Georgia has brought is therefore apparent.

The Southern railroads, according to the Commission, "do not advocate any fixed rule or formula for uniform application in the determination of north-bound interterritorial rates but, on the contrary, believe the circumstances and conditions surrounding the transportation of each commodity, including particularly the nature and extent of the commercial competition which it encounters in the North, should be considered, the principal guide, however, being the destination territory level."[78]

Preferring thus to rest upon a case by case basis, like the Commission itself, the Southern carriers supported the desired rate reductions with respect to those particular commodities named in the complaint "concerning which southern producers have testified that they encounter keen competition in their sale in the North, and that in order to market their products in the North they must have rates approximating the destination level. . . ."

The differences between the Southern Governors and the Southern carriers stemmed, in part at least, from revenue considerations. The Southern carriers, affirming that costs of transportation were higher in the South than the North, were opposed to any general rule of rate parity which might have the effect of reducing the generally higher rate level of the South. For this reason they advocated northbound rate reductions only in particular instances where a given commodity was encountering "keen competition" there and needed the reduced rates in order to move freely. Moreover, while they supported mile-for-mile parity with respect to those commodities named in the complaint which fell into these categories, they stated their general position to be that "southern manufacturers of articles competitive with like commodities produced in the North are

[78] 235 I.C.C. 255, 313.

entitled to rates from the South to the North approximating the level within the North, *or on such other basis as will permit a free movement of traffic.*" [79] Thus the Southern carriers' test of the nature and extent of the commercial competition met with in the North seemed in the last analysis to merge into a test of freedom of movement—a natural enough approach, from the point of view of immediate self-interest, for why should the Southern carriers sacrifice much-needed revenue by a rate reduction just because a commodity was meeting with price competition in the North, if it was freely moving northward via rail routes?

The Southern Governors, on the other hand, asserted that the costs of transportation in the South were generally the same as in the North. Therefore, while they also asserted that the articles named in the complaint were not moving freely and were encountering "severe competition" in Northern markets,[80] they took the more general position that it was enough to show, in the absence of differences in transportation costs, that Southern producers of a particular commodity were in competition with producers of like commodities in the North, and that in reaching Northern markets they were "compelled to absorb or otherwise overcome the differences in rate levels." [81] This approach made it unnecessary to consider either the freedom of movement of the commodity in question or the nature and extent of the competition which it met with in Northern markets.

The Commission, however, concluded that consideration of these factors was essential. In keeping with the position which it had taken a few years earlier in *Ex Parte 115* and *Ex Parte 123* against the making of unnecessary rate reductions (pp. 346-368 supra), the Commission preferred to leave the higher northbound rates intact except where reductions were needed to promote

[79] Ibid at 312.
[80] Ibid at 311.
[81] Ibid at 312.

freedom of rail movement or to help obviate real competitive difficulties. Committed thus to a case-by-case approach involving an inquiry into questions of degree, the Commission parted company with the Southern Governors' position and substantially approved that of the Southern carriers. On the other hand, the Commission did not altogether equate competitive difficulties with freedom of movement, as the Southern carriers seemed to be doing, but granted reductions with respect to certain commodities which were encountering substantial competition, though freely moving.

The Principal Contentions of the Northern Carriers and Interveners, and the Commission's Action with Respect Thereto

(a) The Northern carriers (and intervening Northern states and associations of shippers) contended that in relating interterritorial commodity rates to the class rate relations previously prescribed by the Commission, the Northern carriers had merely pursued a plan suggested and approved by the Commission itself.[82]

In considering this question the Commission in its opinion went into the history of the rate structures, noting among other things the revisions of the class rate structures which it had made in the South and the North as previously described, and the changes, principally increases, which had resulted in the levels of the commodity rates.

The Commission stated that the difference between the level of the first-class basic scale within the South and that within the North, as prescribed in the Commission's class rate investigations, averaged about 139 per cent of that in the North. This relationship, however, should not be accorded weight in deciding the proper levels of the *commodity* rates about which the Southern Governors were complaining. For the investigations had not been con-

[82] Ibid at 315.

cerned with interterritorial differences, and it was generally recognized, when the Southern class rates were prescribed, that they were "on somewhat higher levels, compared with those within the North, than could be justified by considerations of transportation conditions." [83]

Accordingly, in proceedings involving interterritorial *commodity* rates, the Commission had acted "upon the evidence before us," and this "we shall do in the instant proceeding." For commodity rates, even though related to the mileage scales of class rates, could be fixed "on a substantial parity with, or on a lower level than, the rates within the North," if warranted by the facts of the particular case. As examples, the Commission cited the *Coke* case and several others where parity had been prescribed.

(b) Another principal Northern contention was that when tested by usual transportation standards the rates assailed were not unreasonable. As to this the Commission found that the cost differences in transporting the commodities in question in Southern and in Northern territory respectively were not significant.[84]

(c) A third Northern objection was that the northbound rates sought would be somewhat lower than the rates southbound. The Commission replied that this would not necessarily be unfair to Northern interests "so long as the southbound interterritorial rates are on levels no higher than the rates on like traffic within the South, and provided that the rates within the South are on a proper level. Com-

[83] Ibid at 321, 322.

[84] Ibid at 326, 327. Among these factors were "revenues, expenses and operating results" of the particular carriers; "traffic densities, comparisons of rates and revenues, particularly on volume traffic, character of the particular commodities being considered, present and prospective volume of movement of those commodities, routes over which they move either wholly or in part, and the character of equipment and service required by such commodities." The Commission did not go into the question of the over-all costs of transportation, because it held that "the average cost of transportation by all carriers in any given region is not controlling in the fixation of particular rates."

pare *Western-Southern Class Rates,* 232 I.C.C. 81. In the relatively few instances in which the rates within the South are on a lower level than the southbound interterritorial rates on like articles, it may be that the relation of the latter to the former is improper. The propriety of such a rate relation is not, however, an issue in this proceeding." [85]

(d) Another Northern objection was that the Commission could not properly pass on the requested rate adjustments without determining the disputed divisions factors. The Commission disposed of this objection by handing down its decision in *Divisions of Rates, Official and Southern Territories* (discussed supra p. 633) a few months before the decision in the *Southern Governors' Case.*

(e) Finally, the Northern interveners sought to show that wages, taxes and other production costs were lower in the South than the North, but the Commission refused this offer of evidence, pointing out that the Commission had consistently held that the "costs of production of competing producers are not matters which may properly be considered by us in determining lawful transportation charges." [86]

The main body of the Commission's opinion, dealing with the basic questions of whether or not the assailed rates were unjust or unreasonable, or unduly preferential or prejudicial, will now be summarized.

The Economic Factors Favoring Mile-for-Mile Equality, As Described By The Commission

In its opinion the Commission began by pointing out that Official territory constituted "the most densely populated and highly industrialized, and consequently the greatest consuming, section of the United States. The complaint is grounded on the fact that to this great consuming section

[85] Ibid at 330, 331.
[86] Ibid at 320.

of the country, herein referred to as the North, from points in the complaining States, herein referred to as the South, the rail rates on various manufactured or processed articles are on higher levels, distance considered, than the rail rates on like articles moving within and between the three rate territories into which it, the North, is divided. . . ." [87]

The Commission considered the comparative resources and economic development of the North and the South, observing that "industrial development along certain lines and in some sections of the South has proceeded at a remarkably rapid rate during the past few decades. But considering the vast and varied natural resources available and the favorable climatic conditions, and compared with that in the North and in other sections of the country, industrial development as a whole in the South is small. And the articles manufactured there are generally of lower grade or are less finished than those produced in the North." [88]

The Commission did not directly ascribe the limited industrial development of the South to the rate situation, but strongly suggested such a cause-and-effect relationship in the following passage: [89]

> "The desirability of rate structures providing reasonably uniform levels of rates from adjacent producing sections of the country to common markets is not open to serious question. When the important products of one producing section are subjected to a higher level of rates to such markets than are like products of adjacent competing sections less distant to such markets, it generally cannot develop unless, and then only to the extent that, the differences in transportation charges can be offset by lower production costs or absorbed by a reduction in profits. And even though differences in transportation charges can be thus offset or absorbed, this in itself generally tends to retard its growth and prosperity. In these circumstances, it is apparent that the relation of the rates may be of

[87] Ibid at 257, 258.
[88] Ibid at 259.
[89] Ibid at 319, 320.

greater importance than their intrinsic level or measure.

"This is largely the situation here presented."

The Commission went on to say—and the parties agreed—that the Interstate Commerce Act did not authorize the fixing of rates for the purpose of equalizing economic opportunities. On the other hand, it was the purpose of the Act "to insure that differences in transportation charges from competing producing points are based solely on differences in circumstances and conditions surrounding the transportation of the competitive products. It is from this view-point that we approach the issues here presented."[90]

Since the Commission subsequently found that there were no significant differences in the cost of transporting the particular commodities as between North and South, it might have been supposed that in the light of the foregoing economic generalizations the Southern Governors' demands would have been granted with respect to all of the commodities in question. The Commission, however, as previously noted, considered each commodity separately, on a case-by-case basis.

The Commission's Emphasis on a Case-by-Case Approach

The Commission quoted with approval the following passage from its opinion in the *Cotton Textiles Case* (supra p. 641):

"In determining these various controversies our approach has been consistently confined to the particular problem before us. * * * Whether a particular relation is unduly prejudicial to the North or to the South, and what change in the relation is necessary to correct the situation, *is a matter of judgment on all the facts,*" (the emphasis here was supplied by the Commission) "and that judgment will lead to different results as the circumstances shown of record vary, either because of the passage of time or because different commodities are considered."

[90] Ibid at 320.

The Commission then added (in the *Southern Governors' Case*) that in proceedings of this sort the "actual level" of the northbound rates had been determined, as previously stated, in the light of the particular record before the Commission, and that this was "the procedure which we shall here follow." [91]

It is worth noting that in subsequent decisions the Commission again emphasized its case-by-case approach. Thus in *Schoen Bros., Inc.* v. *Erie R. Co.* (1944) 258 I.C.C. 161, 169, the Commission said:

> "The cases cited do not lay down a general rule that any or all rates from the South to Official territory which exceed the level of corresponding rates within the Northern territory are necessarily unlawful to the extent of the excess. We have frequently prescribed the Northern level on traffic from the South, but we have not done so in all instances. The particular conditions surrounding the transportation in and between the two territories may not warrant an exact parity for the establishment of rates which are just to competing shippers and to the carriers which serve them."

The Case-by-Case Approach, as Applied to the Particular Commodities

The Commissioner's trial examiner had recommended that the northbound rates be reduced to the Northern level, mile for mile, on the following 12 articles out of the 20 considered by the Commission: [92]

1. Stoves
2. Stone
3. Cast-iron pipe fittings and service boxes
4. Iron-body valves
5. Fire hydrants
6. Brass pipe fittings
7. Brass cocks and valves
8. Soapstone and talc
9. Plumbers goods

[91] Ibid at 322.

[92] Ibid at 314.

10. Papeteries
11. Excelsior
12. Chinaware

The Southern carriers expressed their desire to join in the proposed reductions on all these articles. The examiner recommended no change in the case of 8 other articles, and apparently the Southern carriers did not except to this recommendation.[93]

The Commission adopted the examiner's report except with respect to excelsior and chinaware (11 and 12 above) whose rates were left unchanged.

By what tests did the Commission determine that particular commodities should receive rate reductions and others receive none? Two tests were used.

The first test, and the easiest to apply, was whether or not the rate situation was such as to divert traffic to competing forms of transportation with resulting loss of railroad revenues. In such a case Section 15(a) of the Interstate Commerce Act was applicable; it provided that in determining "just and reasonable rates" (as required by Section 1(5)(a) of the Act) "the Commission shall give due consideration, among other factors, to the *effect of rates on the movement of traffic* by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the *need of revenues* sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."[94] (Emphasis added)

The second test had to do with the prohibition in Section 3(1) of the Act against the giving of any "undue or unreasonable preference or advantage" to any particular person, locality, region, or description of traffic. In considering this statutory requirement the Commission sought to ascertain whether or not the particular Southern commodity was

[93] Ibid at 314.
[94] 54 Stat. 912, 49 U.S.C. § 15a.

meeting actual price competition in the North, and, if so, whether or not the competition had some substance to it or was too slight or isolated to warrant disturbing the existing rates.

In the case of both tests—freedom of movement, as related to reasonableness, and competition, as related to undue preference or prejudice—the Commission was dealing with questions of degree involving a judgment on all the facts.

In applying the first test the Commission found that the first eight of the twelve commodities which the examiner recommended for rate reductions as set forth on the above list were "not moving freely from the South to the North over all-rail routes and will not move freely at rates higher, distance considered, than those applicable within the North. The total volume of stove traffic now moving from the South to the North is small compared with the volume moving within the North and yet a substantial part of the former has been diverted from the rails and the diversion is increasing. Likewise the volume of stone now moving is small and it, too, is being diverted from the rails in ever increasing amounts."[95] And so on.

Accordingly, the Commission found the rates on the eight articles in question unreasonable under Section 1(5)(a), to the extent that they exceeded rates prescribed by the Commission which approximated mile-for-mile the Northern rates on like articles.

In applying the second test the Commission found that the rates on the first *ten* commodities on the examiner's list of twelve above (all but excelsior and chinaware) violated Section 3(1) of the Act—two more than under Section 1(5)(a). The Commission said that the producers of these ten commodities were "in keen competition in the sale thereof at points generally throughout the North with producers of like articles within the North. Producers of these articles in the South generally have difficulty on account

[95] 235 I.C.C. 255, 327.

of the differences in rate levels in selling at points in the North in competition with Northern producers." [96]

The Northern carriers and interveners urged that because the commodities in question were actually being sold in Northern markets, no section 3 case had been established. The Commission, however, rejoined that:[97]

> "The fact that by means of the devices described above [shrinking of profits, shipment in bulk to warehouses in the North, use of water and truck carriers, etc.] southern producers of these articles are able to do business in the North does not prove that they are not injured by the difference in rate levels; and certainly it does not prove that the rates are not unduly preferential and prejudicial. They suffer a loss of profits in instances where they absorb the difference in rates. They are placed at a disadvantage in instances where they find it necessary to resort to other means of transportation or to other methods of distribution. These clearly are real disadvantages. 'Preference not necessarily injurious in itself, affords opportunity to gain success over and injure the other party.' *Northeast Kentucky Coal Bu.* v. *Chesapeake & O. Ry. Co.*, 206 I. C. C. 445."

Applying this doctrine in the case of stoves, with regard to which a number of Southern manufacturers testified that as a result of the rates prescribed by the Commission in the *Stove Case* (supra, p. 637), they had lost a large amount of business to Northern competitors in the Northern markets, the Commission said:[98]

> "It is clear, of course, that to the extent to which southern stoves are sold in the North they largely displace products of manufacturers therein. And it is evident that to this extent northern manufacturers lose business which they otherwise would secure. Careful consideration of all evidence of record bearing on the matter leads to the conclusion, however, that the dif-

[96] Ibid at 328.
[97] Ibid at 329.
[98] Ibid at 276.

> ference in rate levels to which stoves manufactured in the South and in the North are subjected in reaching northern consuming points constitutes a distinct disadvantage to southern manufacturers and accords a distinct advantage to northern manufacturers."

In spite of the broad language of the foregoing passages, the Commission did not take the position desired by the Southern Governors that whenever Southern commodities encountered any price competition in Northern markets they should automatically be entitled to rate parity on a mile-for-mile basis. For in the case of *excelsior and chinaware*, which, as has been noted, the examiner recommended be given such parity, the Commission withheld relief, although (a) in the case of excelsior a Southern producer at Basic, Miss., and another at Woodland, Ga. testified to loss of business and inability to compete at various Northern points, and (b) in the case of chinaware the northbound rates were about 160 per cent of those in the North for like distances, and a newly formed company with a plant under construction at Gordon, Ga., asserted that under existing rates its product would be unable to reach competitive Northern points.[99]

Moreover, while it is true that in the case of most of the remaining ten commodities which received no rate increases, the evidence failed to show any price competition whatever with Northern products (e.g.: because competition was basically in style or quality, or because the Southern product was nationally advertised and sold freely everywhere at the same price) there was some evidence of price competition in the case of paper cones,[1] and drugs and medicines,[2] in spite of which no rate reductions were granted. In the case of these last-mentioned articles, as in the case of excelsior and chinaware, the evidence of price competition, where it was offered, seems to have been regarded as too slight,

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[99] Ibid at 294-296 (excelsior); 305, 306 (chinaware).

[1] Ibid at 300.

[2] Ibid at 302, 303.

too isolated, or too speculative to warrant a finding of undue preference or prejudice.

The Southern Carriers' Desire to Join in the Reductions Directed by the Commission, and the Bearing of this Factor on the Outcome.

At the close of its opinion the Commission pictured the Southern carriers, though nominally defendants along with the Northern carriers, as really complainants who desired to move the competitive traffic northbound on Northern-level rates, contrary to the wishes of the Northern carriers. The latter were pictured as the real defendants, and the Commission then raised the question whether in such a situation the Northern carriers, or the Northern producers, could justly resist a demand for interterritorial rates on the same basis, mile for mile, as that obtaining within the North. The Commission, relying in part upon its decision in the *Coke Case* supra, concluded that the Northern carriers and producers could not justly resist such a demand. The pertinent passages were as follows:[3]

> "The contention that the northern carriers, which participate in the interterritorial rates, do not control the rates within the North appears to be contrary to the facts. Numerous illustrations of such control from and to certain points by individual carriers are shown in the record. And in addition to this we are persuaded that the northern carriers as a group actually do effectively control the rates within the North and also the north-bound interterritorial rates except to points on and west of the Monon line. The southern carriers are defendants in the title case and respondents in the investigation and suspension proceeding in name only. Their position in these proceedings shows that *the rates sought on many of the commodities named in the complaint, including the commodities before us in the investigation and suspension proceeding, would have been in effect were it not for the position taken by the northern carriers.* The fact is that the northern carriers are the real defendants and respondents in these proceedings."
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[3] Ibid at 329, 330.

"The southern carriers are desirous of maintaining on *competitive traffic* north-bound interterritorial rates on or approximating the northern level. *If the southern carriers are willing to move such traffic at rates on that level it is difficult to conceive of any just reason why northern carriers should not be required to join them.*" (Emphasis added)

The Commission then referred to its holding in the *Coke Case*, supra, that the Northern coke producers "have no just ground of complaint against interterritorial rates from the South to central territory on the same level, mile for mile, as those they pay," and that the Northern carriers "are entitled only to maximum reasonable compensation," which would be afforded by the same rates, mile for mile, as those they charged within the North.

The Commission then added:

"It may be that a shipper is not in position to complain of discrimination under section 3(3) of the act, and in view of our findings herein it is not necessary here to determine that question, *but it appears that, upon complaint by them, the southern carriers would be entitled to relief thereunder.*"

These passages seemed to indicate that regardless of the type of traffic or the transportation conditions, every complaint by Southern carriers of a northbound rate in excess of the Northern rates mile-for-mile on like commodities would *ipso facto* make out a case of discrimination under Section 3 of the Act. However, as previously noted, the Commission did not extend rate relief to excelsior or chinaware, although the Southern carriers had joined in supporting the examiner's recommendation that they be included. In the passages just quoted the Commission spoke of "competitive traffic", and in view of the treatment accorded excelsior and chinaware, it would seem that the Commission meant by that phrase to include traffic confronting something more than isolated, trivial or speculative competition in the Northern markets. Given, however, competition of some fairly tangible sort, the willingness of the

Southern carriers to reduce the northbound rate should preclude the Northern carriers from refusing to join with them.

This interpretation of the Commission's views is strengthened by its opinion in a later case, *Schoen Bros., Inc.* v. *Erie R. Co.* (1944), supra p. 657. In that case a Southern shipper of green salted hides sought northbound rates on a mile-for-mile parity with the Northern rates on the same commodities. He sold his products in Massachusetts and New York in competition with dealers in Official territory, principally at Chicago. The northbound rates ranged from 10-25 per cent higher than the Northern rates for like distances.[4] The Southern carriers, however, as well as the Northern carriers, opposed any reduction, on the ground that the Southern products were moving freely on all-rail routes into the Northern markets and that the desired rate reduction would constitue an unnecessary sacrifice of railroad revenue.[5] The complaining shipper relied on the *Southern Governors' Case*, but the Commission distinguished it, first on the ground that "the southern carriers were desirous of maintaining rates as prescribed, whereas they here oppose the adjustment sought by complainant"; and secondly on the ground that in that case the "producers in the South of the commodities for which rates were prescribed generally had difficulty competing with northern producers on account of the differences in rate levels, and that these commodities would not move freely at rates higher, distance considered, than those applicable within the North. A like adjustment was not prescribed for certain other commodities there considered."[6] The Commission proceeded in the *Schoen* case, in spite of the fact that the hides were moving freely and that the Southern carriers opposed any northbound rate reductions, to grant reductions which left the

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[4] 258 I.C.C. 161, 166.

[5] Ibid at 164.

[6] Ibid at 169. The Division of the Commission which first heard the case distinguished the *Southern Governors'* Case on similar grounds, 255 I.C.C. 501, 506.

rates from one to three cents above the northern level.[7] Significantly, however, the Commission based this action not on the ground that the challenged rates were unduly prejudicial, but that, for various reasons including the wideness of the existing spread, the rates were unreasonable.[8]

The General Effect of the Commission's Action in the Southern Governors' Case

The *Southern Governors' Case* did not lay down an inflexible rule of northbound rate parity in the form desired by the Southern Governors. Nevertheless it represented a major concession to the Southern point of view, and it met the desires of the Southern carriers. For in it the Commission granted rate parity, and not something less as under the "stoves formula", in connection with all of the commodities which were found not to be moving freely northward on all-rail routes or to be encountering substantial price competition in the North; and the Commission made it emphatically clear that whenever in the future the Southern carriers requested northbound reductions to the Northern level in similar instances, the Northern carriers could not justly decline to join in effectuating the reductions. Other portions of the opinion which upheld the Southern point of view and were calculated to dispel further resistance by the Northern carriers to reductions urged by the Southern carriers in aid of Southern industry were those in which the Commission stressed the economic desirability of uniform interterritorial rates to common markets; reaffirmed the doctrine of the *Coke* case; and rejected the various contentions of the Northern carriers, including their demand for the equalization of southbound with northbound rates.

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[7] As noted by the Commission in 1945 in its discussion, in *Class Rate Investigation, 1939*, 262 I.C.C. 447, 604, of the varying manner in which the Commission had adjusted northbound rates to the Northern level, depending on the facts of each case.

[8] 258 I.C.C. 161, 170.

Moreover, even before the *Southern Governors' Case* was decided in November, 1939, the Commission had taken two actions which were designed to reduce the area of interterritorial rate conflicts. The first was the disposition of the *divisions* controversy by the Commission's order of July 25, 1939, already described at p. 633 above. The second was the launching on July 29, 1939, on the Commission's own initiative, of two nationwide investigations, one into freight classifications and the other into interstate class rates. These investigations were interconnected, and (in 1945) were decided together in the case known as *Class Rate Investigation, 1939.*[9] Their object was to bring about nationwide uniformity in freight rate classifications and in the territorial class rate structures—a uniformity which the Commission had long urged upon the carriers. The results of this effort, which among other things reduced the Southern class rates and increased the Northern, will be summarized later in this report; it is mentioned at this point only because it evidenced, at about the time when the decision in the *Southern Governors' Case* was being drafted, the Commission's determination to end one of the basic historical sources of conflict in the adjustment of interterritorial commodity rates, namely, the unequal class rate levels.

4. *Defendants' Evidence Relating to the Decline of North-South Interterritorial Rate Controversies and the Disappearance of the Alleged "Rate Wall" Following the Southern Governors' Case.*

Oliver of the Southern Railway testified that it was in 1932, at the height of the interterritorial rate controversies which have been summarized above, that he made his statement to the I.C.C. about the "rate wall". The statement was made in a case known as *Consolidation of Railroads,* 185 I.C.C. 403, in which the question was whether in a plan

[9] *No. 28300, Class Rate Investigation, 1939; No. 28310, Consolidated Freight Classification;* reported together under the title *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945).

for consolidation of railroads the Monon (Chicago, Indianapolis & Louisville Railway) should be assigned to the B. & O. The Monon was controlled by the Southern Railway and the Louisville & Nashville, and since it served a portion of Northern territory the two Southern roads desired to retain control of it, especially in view of the prior absorption of a number of independent North-South lines by several of the powerful East-West lines.[10] The Southern roads were successful in retaining control of the Monon.

Oliver testified that at the time he made his statement to the Commission "the facts and my experience supported it. However, later on, the Interstate Commerce Commission squarely met the issue and required the Official territory lines to join us in publishing the rates we sought where their necessity, as a matter of commercial competition, was established."[11] He then referred to the *Coke Case*, supra, and to the decision in the *Southern Governors' Case* in 1939 and said that these cases "clearly show the difference between the situation today and what it was when we were in the middle of this wholesale revision of rates back in the early 1930's.

"The picture is different today from what it was at the time I testified in the *Consolidation of Railroads case*.

"Subsequently, most of our northbound rates have been satisfactorily adjusted either by voluntary action of the interested carriers or by decisions of the Interstate Commerce Commission. Of course, differences arise from time to time between the southern and northern lines. That is a normal and quite natural thing in dealing with such a complicated situation as these competitive rate adjustments necessarily present. However, at the same time our northern connections know that the Supreme Court has affirmed the Commission's authority and the way is open for the southern lines and the shippers they serve to invoke the Commission's assistance should the necessity arise;

[10] See Oliver's testimony quoted by Georgia at p. 624, *supra*.
[11] IX, 2632.

therefore, the conditions which I described as a rate wall in 1932 are no longer present, and I would like to add, under these changed conditions the Southern Railway and the Louisville & Nashville do not, in my judgment, now need the Monon. In fact, the shoe is on the other foot. The Monon needs the Southern Railway and the Louisville & Nashville Railroad far more than we need it, and in the somewhat recent proceedings involving the reorganization of the Monon neither the Southern Railway nor the Louisville & Nashville Railroad made any substantial effort to continue their control of that line." [12]

Oliver was then asked whether this was the first occasion on which he or the southern carriers had taken the position that the rate wall had disappeared. He replied that it was not; that in 1942 he had testified generally to the same effect in the Class Rate Investigation which the Commission had launched on its own initiative in 1939, just prior to the decision in the *Southern Governors' Case*, as described at p. 666 above. In this same Class Rate Investigation the southern carriers in their brief made a similar statement as follows: [13]

> "But it is urged that the southern railroads in publishing joint rates to a substantial part of the East must obtain concurrences of the eastern railroads to make the wishes of the southern railroads effective and that resistance is often made by the eastern railroads. Such resistance, however, since the decision in *State of Alabama* v. *New York Central Railroad Co.*, [the *Southern Governors' Case*] has largely abated, but, irrespective thereof, that decision put the eastern railroads on notice, and indeed the whole world on notice, that resistance on the part of the eastern railroads can no longer defeat rates that are necessary to provide a free movement of traffic from the South to the East."

In its decision in this Class Rate Investigation, handed down in 1945, the Commission itself took note of the im-

[12] IX, 2634, 2635.
[13] IX, 2635, 2636.

proved relationships between the southern and northern lines in the adjustment of interterritorial rates following the *Southern Governors' Case*. The Commission stated:[14]

> "During recent years numerous reductions have been made in commodity rates from the South to Official territory. A member of the auxiliary committee, central freight association, who testified for respondent rail carriers, named commodity rates on 97 commodities from specific points in southern territory to specific destinations in Official territory that were reduced in 1940, 1941, and 1942; and compared these reduced rates with rates on like traffic within Official territory. In many instances, the reduced interterritorial rates are lower than rates for the same distances on the basis that prevails generally in Official territory."

D. *Overall Appraisal of the Evidence Relative to the Resistance of the Northern Roads to Southern Rate Demands*

Georgia did not directly controvert the defendants' evidence regarding the origin and alleged disappearance of the so-called "rate wall" referred to by Oliver in his 1932 statement to the Commission.

The defendants on their part did not directly controvert that portion of Oliver's statement in which he ascribed the origin of the "rate wall" to the acquisition by certain east-west trunk lines of certain independent north-south lines in Central Territory and the consequent interest of the trunk lines in the development of east-west, rather than north-south, traffic. That these acquisitions were of some importance appears from allegations made by the complainants in the *Southern Governors' Case* and noted by the Commission in its opinion as follows:[15]

> "Complainants presented an exhibit showing the names of a number of railroads in central territory which have been leased by, merged with, or otherwise

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[14] *Class Rate Investigation, 1939*, 262 I.C.C. 447, 601 (1945).
[15] 235 I.C.C. 255, 309.

acquired by four of the larger northern railroad systems during the past few decades. The record establishes that, aside from such regulatory control as is exercised by us, northern carriers effectively control the interterritorial rates to that part of the North east of the Monon lines; in fact, these carriers freely admit that such is the case. Complainants, therefore, contend that the northern carriers, by cooperation and agreement among themselves *and by absorption of roads in the North which otherwise would have been competitive in making rates from the South*, restrain the freedom of action of the southern carriers in the establishment of interterritorial rates in violation of the antitrust laws . . ." (Emphasis added)

Note should also be taken of Kerr's 1932 statement to the Commission (p. 625 above), that it had been found "impossible to induce the Official Territory lines, such as the Baltimore & Ohio, Pennsylvania Railroad and New York Central Railroad, *whose major interests lie in an east and west direction* and serving the North Atlantic ports, to join in the establishment of competitive import rates . . ." from Southern ports to Official territory points east of the Monon line (Emphasis added). Here, as in their handling of Oliver's testimony, the defendants' evidence consisted only of citations to later I. C. C. action which, according to the defendants, effectively cured the particular Southern complaints.

In view of these gaps in the defendants' proof, and in the light of the evidence noted above, the acquisition by the east-west lines of the north-south lines in question must be taken to have been a factor in their resistance to Southern rate demands as described above. It is difficult to evaluate the degree of importance of this factor because of the scantiness of the record, which among other deficiencies only partially identifies the east-west lines in question and does not identify at all the north-south lines that were taken over.

However, the following passage from the Commission's opinion in the *Southern Governors' Case* indicates that,

during the '20s and '30s, some cause other than disputes over divisions and over the equalization of southbound rates with northbound was rendering more difficult the resolution of differences over the proper level of northbound rates in relation to Official territory rates. After explaining the historical conditions which had produced a higher class rate structure within the South than within the North, the Commission went on to say:[16]

> "A situation somewhat similar to that within the South existed in connection with the rates between the two territories. The class rates were high compared with those within the North; in fact, from and to a large part of the North they were combinations on the river crossings or other border points. The greater part of the traffic which moved at these class rates consisted of high-grade manufactured articles produced in the North and consumed in the South. Only a small part of the north-bound traffic was subject to the class rates, low commodity rates being applicable on the bulk of that traffic. In order to encourage the development of mining and manufacturing in the South the southern carriers early began the practice of establishing from southern producing points to the markets of the North, on articles which were competitive with those produced in the North, rates on or approximating the level of the rates applicable on like articles within the North. Prior to the end of the period of Federal control of the railroads they met little opposition to the establishment of such rates, *but since that time the northern carriers generally have insisted with success, inasmuch as they controlled the rates to most points in the North, that north-bound rates on competitive commodities be maintained on higher levels than the rates on like commodities within the North.* The interterritorial rate structure, for this and other reasons, including the class-rate investigation, also has been subjected to many changes in recent years." (Emphasis added)

It is clear from the foregoing that some factor operated in the period of the '20s and '30s to produce resistance by the northern carriers to rate parity on competitive products

[16] Ibid at 266.

from the South. The defendants, as has been seen, ascribed this factor to the carriers' difficulties in reaching agreements on divisions and on southbound rates. In the foregoing passage, however, the Commission did not mention these difficulties, nor did Oliver nor Kerr in their 1932 testimony. Instead, both Oliver and Kerr stressed the dominant new east-west interest of the Official territory lines, and Oliver specifically testified that it was the absorption of the independent north-south lines by the east-west trunk lines, such as the Pennsylvania, the Baltimore & Ohio, and the New York Central, which had brought about the change in rate policy on the part of the Official territory lines from one of acquiescence in low northbound commodity rates to one of resistance.

Upon the whole, and particularly in the light of the Commission's statement quoted above, it is reasonable to infer: (a) that the northern carriers' further extension of "control" over the rates to most points in Official territory after World War I by the absorption of the north-south lines made it possible for the northern carriers, by non-concurrence in proposed joint through rates from the South, to resist the establishment of northbound commodity rates at or below the northern level; (b) that their dominant new interest in east-west traffic was an active factor in bringing about such resistance; (c) that opportunity for such resistance was afforded in the '20s and '30s on a large scale by the necessity which the carriers faced of jointly reworking many of the northbound interterritorial commodity rates on account of the Commission's class rate revisions and Fourth Section denials. It is unquestionably true also, however, that in the course of this reworking many disputes of a basic character arose over divisions and the equalization of southbound rates with northern, which hindered agreement on northbound rates, and which finally had to be settled by the Commission; and the record affords no ground for concluding that these disputes were not bona fide or that they would not have occurred if the pre-World War I relations between the northern and southern carriers had con-

tinued unchanged. Finally, until the *Southern Governors' Case*, the Commission itself in most instances took the position that it was proper for northbound rates to be established somewhere above the Official territory level and somewhere below the Southern territory level on like commodities, thus representing a blending of the two historically disproportionate rate plateaus. It would be unreasonable to suppose that the attitude of the Commission did not have some effect upon the rate policies of the northern carriers.

Thus during the period of rate readjustments of the '20s and '30s three factors appear to have been operating independently as obstacles to the negotiation of northbound rates on a mile for mile parity with Official territory rates on like commodities:

(1) The new interest of the Official territory lines in east-west traffic and their newly enhanced power to advance that traffic by blocking the effectuation of proposed joint through rates from the South to the North, the renegotiation of which had been compelled by Commission action;

(2) The occurrence of bona fide disputes over divisions and over the equalization of southbound rates with northbound, which arose in the course of the renegotiations; and

(3) The announced policies of the Commission with respect to the basis of establishing northbound interterritorial rates, as generally adhered to up to the *Southern Governors' Case*.

I do not think it is possible to say which, if any, of these three factors was the most important.

As has been seen, the Commission for all practical purposes disposed of the second and third of these factors, and thereby broke the log-jam of obstruction and disagreement which constituted, historically speaking, the "rate wall" about which Oliver had complained in 1932.

As to the continuation and remaining effect, if any, of the first factor, the record is not wholly clear. To the extent that that factor was related to revenue considerations—i. e.,

to the extent that it had to do with building up the volume of east-west traffic at the expense of north-south—there was uncontroverted testimony that the Official territory lines now have every interest in building up the volume of north-south traffic. Thus Franklin of the Pennsylvania testified on direct examination that whatever increased the volume of interterritorial freight was to the advantage of the northern lines.[17] On cross-examination he testified that the northbound movement of freight was much larger than the southbound; that because of the great volume of this traffic the northern roads were tremendously interested in it; and that on some of the northern roads the interchange runs up to nearly 70 per cent of their total traffic. He also testified that "this traffic which comes to the northern carriers from the South is very desirable traffic and they [the Northern lines] would not do anything to deprive themselves of it, because to do so would be against their best interest from a business standpoint."[18]

In the light of this testimony I can only conclude that, whatever may have been the revenue interests of the northern lines in advancing east-west traffic at the expense of north-south in the '20s and '30s, the northern lines today have a positive interest in sustaining and augmenting the flow of traffic from the South. It should be noted in this connection that whereas during the '20s and '30s the southern carriers were demanding a disproportionate share of divisions on northbound traffic, the Commission in 1939 (in *Divisions of Rates, Official and Southern Territories*, supra, p. 633) held that the northern lines were entitled to equal divisions factors on northbound traffic which was carried on rates substantially equal, mile for mile, to the Official territory rates on like commodities.

If Oliver's and Kerr's testimony regarding the new interest of the northern lines in east-west traffic after World War I should be taken to mean that, quite apart from freight

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[17] XI, 3371.

[18] XI, 3501-3504; and 3332, 3333.

revenue considerations, the northern lines sought through the denial of northbound rate parity to protect shippers in Official territory against competitive inroads from southern shippers in the northern markets, the capacity of the northern lines to pursue this policy was severely limited by the Commission's decision in the *Southern Governors' Case*. The evidence, as stated before, shows the effectuation thereafter of numerous northbound rate reductions to and even below the Official territory level.

I find, therefore, that if the Official territory roads still resist northbound rate parity in order to protect northern shippers from competition by southern shippers in northern markets, the existence and extent of that resistance cannot be established by reference to the situation which prevailed in 1932. It can be established only by evidence of what the practices of the northern carriers have been in recent years since the *Southern Governors' Case*.

This evidence, as presented in certain case material offered by Georgia, will now be considered, in Part Two which immediately follows. It seems logical to consider this material at this point, since the portion of it on which Georgia mainly relies, namely, the *Paper Case*, is intimately connected with the history of Commission action which has just been reviewed. In the *Paper Case* most of the alleged discriminatory and coercive activity took place before the decision in the *Southern Governors' Case*, but some of it took place afterwards. Not the least significant feature of the *Paper Case* was the contrast between the relatively unfavorable attitude which the Commission took towards Southern demands before its decision in the *Southern Governors' Case* and the relatively favorable attitude which it took after that decision. In this last respect, the *Paper Case* lends support to the defendants' contentions that the later decisions of the I. C. C., particularly in the *Southern Governors' Case*, had the effect of dissolving the "rate wall" which the earlier actions of the Commission had unintentionally helped to erect.

PART TWO

Case Material Relating to Rate Controversies Between the South and the North (Introduced by Georgia to Illustrate the Defendants' Alleged "Coercive and Discriminatory Price-Fixing")

In Volume Two of this Report, dealing with Georgia's charges of coercion, I considered certain case material of Georgia's which bore upon those charges but which did not involve North-South rate controversies. The remaining case material summarized below involves such controversies, and contains charges of both discrimination and coercion [19] (being captioned in Georgia's Final Brief under the heading quoted above).

I. *Legal Standards to be Applied in Judging the Cases*

A. *As to Discrimination*

In considering the charges of *discrimination* in the cases which follow, the basic question to be determined is one of motive. Georgia's bill, this Court said, seeks to enjoin "a combination which has as its purpose an invidious discrimination against a region or locality." *Georgia* v. *Pennsylvania R. R. Co. et al.*, 324 U. S. 439, 462. The bill

[19] I have not attempted to cover in this report certain inconclusive and fragmentary items which Georgia introduced during the later course of the proceedings but did not rely upon in her Final Brief. These items were seven in number. Only one of them, *early vegetables* from Georgia and South Carolina points to certain Eastern produce markets (S-169, I, 316 and XIV, 4658-4662) could be argued as alleging a refusal by northern roads to grant northbound rate parity. In this case, however, there was no evidence that the rates which the northern carriers were asked to reduce were not already on as low a level as the northern rates; moreover the southern products were to move into northern markets at a time when no competing northern products were on the market. The other six cases had to do with miscellaneous rate matters affecting *cotton linters* (IX, 2749-2778, 2837-2858), *gasoline and fuel oil* (IX, 2859-2871), *textiles* (IX, 2539, 2549), *barytes* (XIII, 4317-4330), *tanning extract* (S-169, I, 316, and XIV, 4662-4665), and *empty beer containers* (S-169, I, 317, and XIV, 4665-4667).

"seeks to put an end to discriminatory and coercive practices." Ibid at 460.

This Court also held that the fact that the rates fixed by the combination "may or may not be held unlawful by the Commission is immaterial to the issue before us." This was because a "'zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself,' *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics." Ibid at 460, 461.

In other words, if in a given case the rate associations acted adversely upon a Southern demand for a northbound rate reduction, the fact that the resulting rates might be held lawful by the Commission, as falling within the "zone of reasonableness", would be immaterial *if* the failure to reduce them to the Northern level were caused by "a conspiracy among carriers who employ unlawful tactics". For if it had not been for the unlawful tactics the Northern carriers might have joined in rates which were lower down in the zone of reasonableness, or at the very bottom of it. To put the matter another way: the Commission (as has been seen at pp. 230-232 above) may hold a rate to be discriminatory or otherwise in conflict with the Act, even though it falls within the zone of reasonableness; but if no such question arises and the Commission approves the rate, there may still be an antitrust law violation arising out of the unlawful tactics of the combination, in spite of the lawfulness of the rate.

What, then, are the "unlawful tactics"? Obviously they are, in the words of this Court quoted above, the alleged "discriminatory and coercive practices" against which the bill is aimed. But what are "discriminatory practices" (leaving coercion aside for the moment), since they are not necessarily practices which produce unlawful *rates*? Clearly, it seems to me, they are practices which have as their purpose

"an invidious discrimination against a region or locality"; specifically, they are practices whose purpose is to protect Northern producers by preventing or hindering competition in Northern markets by Southern producers.

Thus an inquiry into the purpose of the rate action taken by the Northern defendants becomes basic in weighing Georgia's case examples of alleged discriminatory practices. But purpose is not always easy to ascertain, and the character of the rate action taken may shed light upon motivation. Suppose, for example, that in a given case the rate situation produced by the Northern defendants' refusal to agree to a proposal by Southern railroads was one which, had the case been presented to the Commission, the Commission would in all probability, in the light of its prevailing precedents, have held to constitute discrimination (i. e., "undue or unreasonable prejudice or disadvantage" within the meaning of Section 3) against Southern shippers. The refusal to agree could then be properly regarded as arbitrary and unreasonable; and that fact, it seems to me, would constitute some evidence of a purpose on the part of the Northern defendants to discriminate against Southern producers. On the other hand, if the Commission would in all probability have upheld the rates as non-discriminatory, had they been litigated, that fact, while not conclusive, would, it seems to me, constitute some evidence that the Northern defendants' actions were not motivated by any such invidious purpose.

The weight to be given to the probable legal character of the rate action in a given case as shedding light on motivation would necessarily vary according to the particular facts, and particularly according to such other, specific evidence of motivation as there might be.

In the analysis of the cases which follow I shall, for the reasons indicated, first inquire into the probable legal character of the rate action in the given situation, being guided in so doing by the major decisions of the Commission to which I was referred in this proceeding and which

I have summarized above in Part One of this Volume. I shall assume that the constructions of the Act by the Commission are not in issue here.[20]

I shall next inquire in each case into such other, specific evidence of motivation as the record may contain.

B. *As to Coercion*

In considering the charge of *coercion*, I shall take up separately each rate association involved in each given case (including the Southern associations), and inquire whether or not the evidence established, in that particular case, the exercise of any pressure or intimidation or other form of restraint upon the freedom of action of any railroads, including its own members. I shall assume that adverse action by Northern associations upon a Southern rate proposal does not, standing alone, constitute coercion. There might be many valid reasons for non-concurrence, such as a *bona fide* dispute over divisions, or over accompanying southbound rates, or over the description of the commodity; and even though the purpose of non-concurrence might be to benefit Northern industry at the expense of Southern, the mere failure to agree could not, in and of itself, be termed coercion. (The legal aspects of coercion have already been considered in Volume One under Conclusions of Law).

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[20] Georgia's suit, as described by this Court in *Georgia* v. *Pennsylvania R.R. Co. et al.*, 324 U. S. 439, 459, 460, "does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through rates. It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible for individual carriers to perform their duty under the Act. . . ." What the duty of individual carriers is under the Act is a question of law which Congress has committed in the first instance to the Commission. As noted by this Court in *Georgia* v. *Pennsylvania R.R. Co. et al.*, 324 U. S. 439, 454, Section 16 of the Clayton Act provides that no one except the United States shall be entitled to bring injunction suits for violation of the anti-trust laws against common carriers subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction" of the Commission.

II. *The Paper Case (1936 to 1939; 1943)*

A. *Georgia's Charges, and the General Nature of the Case*

This case involved a settlement agreement between the Northern and Southern carriers, acting through their respective associations, which in turn were in continuous touch with the Northern and Southern producers. The rates provided for in the agreement were approved by the Commission. The agreement provided in substance that (1) the northbound rates into Official territory, which were then approximately 125 per cent of the Northern level, and which the Southern carriers and producers wished to reduce to 100 per cent, would be reduced to 110 per cent of that level; (2) that the northbound rates to the very competitive border points, which the Northern carriers and producers wished to maintain at the higher Southern level, but which the Southern carriers in the course of the negotiations had reduced by independent action to 100 per cent of the Northern level, should remain at the Northern level; (3) that the divisions, which had been in dispute from the outset of the rate negotiations, due to the demands of the Southern carriers for a disproportionate share, would be compromised on a certain basis; and (4) that the southbound rates into Southern territory, which the Northern carriers and producers, contrary to the wishes of the Southern carriers and producers, wished to equalize with the reduced northbound rates into Official territory, would be left for determination by the I. C. C.

Georgia's main contention was that there existed a "zone of reasonableness" between 125 per cent of the Northern level and 100 per cent; that within this zone any rates which the railroads saw fit to establish would have satisfied the Commission; that in this case, therefore, as in others, the railroads had a considerable area of discretion within which they were free to fix the rates; and that the "paper adjustment serves as merely one example of the

way that discretion may be abused when entrusted to a *coercive and discriminatory rate mechanism* of the type complained of here."[21] In other words, the Southern carriers' failure to obtain the 100 per cent northbound level was ascribed by Georgia to coercive and discriminatory factors operating within the rate associations.

The facts will be treated at considerable length because counsel for Georgia stated that Georgia's whole suit was "epitomized by this single example."[22]

B. *Detailed Analysis of the Facts*

1. *Necessity of Readjusting the Rates Due to Fourth Section Denials*

In 1926 the Interstate Commerce Commission found that the paper rates within the South, and from the South to the North, violated the long-and-short haul provisions of Section 4 of the Interstate Commerce Act.[23] The Commission, however, upon application, extended from time to time the effective date of its Fourth Section denial order so that the interested carriers and shippers might have ample opportunity to work out a new basis of rates.[24] These extensions continued for a number of years, as will be seen; and during that period the shippers and carriers held many conferences in an endeavor to agree upon the new rates.[25]

In the fall of 1936 the Commission indicated that it was going to make its denial order effective in January, 1937. Thereupon, the southern and southwestern railroads (who faced the same problem as the southern railroads) held an inconclusive public hearing to determine what should be

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[21] Final Brief, p. 19, foot-note 7.

[22] McGovern, XIX, 6722.

[23] *Southern Class Rate Investigation*, *supra*, p. 627; Sheppard, VII, 2204-2206.

[24] *Paper, Official-Illinois Territories to South* (1939) 234 I.C.C. 81, 83.

[25] *Paper from the Southwest to Official Territory* (1940) 238 I.C.C. 136, 138.

done.[26] At that time, and all through this period, the paper rates within southern and southwestern territories, and from those territories to Official territory, were on an average substantially above the rates within Official territory. This situation was unsatisfactory to the southern and southwestern producers.[27]

On December 7, 1936 the Illinois Central announced its intention to publish rates on paper products on the northern level from the South to points on its lines in the St. Louis-Chicago area,[28] and several southwestern carriers indicated their intention to join with it.[29] On December 19, 1936, however, the Illinois Central wired the Southern Freight Association directing that action on this proposal be withheld, since it "now appears Commission will further postpone effective date Fourth Section denial order. . . ."[30] This postponement was granted, and extended negotiations thereafter took place between the

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[26] SD-23, Vol. O, and VI, 1920-1922.

[27] A letter from a southwestern mill to the Southern Freight Association written in 1936 criticized the railroads for "narrow, sectional and reactionary ideas." S-266, I, 373.

[28] S-267, I, 373.

[29] The Gulf, Mobile and Northern, the Mobile & Ohio, the Wabash, and the Chicago, Indianapolis & Louisville (S-268, S-271, S-276, I, 373, 375, 377). Sheppard of the Illinois Central testified that "we had heard at the conferences we had been attending that the southwestern lines were going to proceed independently in this matter to the extent that they could." VII, 2185, 2186; and also, in more detail, 2190-2192. The Southwestern Freight Bureau, however, in response to the notice received from the Illinois Central, replied: "There is no record upon which we can accept this notice, no consideration having been given to the matter by the Executive Committee . . . However, your letter will be brought to the attention of the Advisory Committee and they will no doubt give the subject further consideration in the light of your communication." S-270, I, 374, 375.

[30] S-277, I, 378; Sheppard, VII, 2193. Within a few days thereafter the Illinois Central received a request from Cleveland of the A.A.R. asking that independent action be postponed "until such time as there can be a general discussion of the situation" with the northern lines.

northern and southern interests, during the course of which the Commission granted still further postponements.[31]

2. *The Respective View-Points of the Northern and Southern Roads.*

(a) *Arguments by the Northern Carriers Regarding the Need of Conserving Revenues*

Shortly after the Illinois Central had directed that its proposal for independent action be held in abeyance, Chairman Morris of the Central Freight Association, in a letter to Cameron of the Illinois Central, urged withdrawal of its notice "in the interest of conserving carriers' revenue."[32] He added his belief that "if reductions from the South and Southwest in accordance with Mr. Cameron's announcement should be published and effectuated, demands difficult to withstand will be made by the shippers in Official territory, Western Trunk Line territory and possibly on the Pacific Coast, for a reduction in their rates, not only to Illinois territory . . . but also to points in southern and southwestern territory."[33]

A few weeks after the sending of this letter, on January 27, 1937, representatives of the northern, southern and western lines attended a joint conference in Washington and discussed their respective views.[34] The conference was held under Cleveland's auspices, and he presided. When it was evident that the northern lines would not accept the proposal of the southern lines for rate parity, Cleveland "asked if there was any middle ground on which an agreement could be reached. There being no response, he asked if anyone had a suggestion . . . It was finally agreed that the Illinois Central and southwestern lines would advise Mr. Cleveland in a few days as to whether or not they would be willing to hold the adjustment in abeyance" (i. e., their proposal

[31] S-285, I, 382; S-318, I, 394; S-328a, I, 399; S-333a, I, 401.
[32] S-273, I, 375.
[33] VI, 1922.
[34] S-284, I, 380-382.

to announce rates at the northern level into the territory they controlled) "pending decision of the Commission in *Ex Parte 115* so far as concerns paper."[35]

It will be recalled that all through this period, and beginning in the early '30s, the railroads were experiencing acute financial distress, and had applied to the Commission in 1934 for general rate increases in the proceeding known as *Ex Parte 115*, which was still pending. In that proceeding the Commission had granted the railroads certain temporary emergency increases and had later denied the railroads' request for authority to continue these increases indefinitely. The Commission had been cool to the railroads' request, in part because of the Commission's belief, expressed to the railroads, that they could augment their revenues by avoiding improvident rate reductions and by increasing particular rates where this could be done without loss of traffic. Acting upon the first of these admonitions the railroads had taken certain steps, reviewed at pp. 360-400 above, to discourage unnecessary rate reductions; and acting upon the second they had petitioned for increases upon specific commodities. Included in their petition was a general two-cent increase in paper rates. This petition (in *Ex Parte 115*) was pending at the time when the railroads were engaged in the negotiations here being summarized.

The northern railroads, in these negotiations, argued that the two-cent increase in paper rates would be difficult at best to obtain, and that it would surely be denied if interterritorial rates from the South and Southwest were voluntarily reduced.[36] Ultimately the Commission granted the increase.[37] But this was not till October 19, 1937, and before then much was to take place.

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[35] S-284, I, 381, 382.
[36] Sheppard, VII, 2198, 2199.
[37] 223 I.C.C. 657.

(b) *The Controversy Over Production Cost Factors*

Chairman Morris of the Central Freight Association, in his letter to the Illinois Central referred to above, argued that the southern manufacturers were not equitably entitled to the proposed reduction, because:[37a]

> "The manufacturers of paper and pulp boards located plants in the South with full knowledge of the rate situation and competition with northern producers. They were not so located from the standpoint of rate levels into northern territory mile for mile the same as applicable in northern territory, but were located in the South from the standpoint of available pulpwood and production costs."

The southern manufacturers, however, in spite of any production advantages which they might have had, believed themselves entitled to a reduction of rates to the northern level. One of them, for example, referred at about this time to "the old threadbare idea of rates based on cost of production theory, which is neither justified in principle nor by facts . . . The point is whether or not there is competition between the products manufactured in the South and those made in the North. Are the rates charged to each for a relative service fair and just? Shall those of the South be charged more for the same service than the products of the North?"[38]

This was the same position which the Southern Governors were to take some five months later, when they filed their complaint in the *Southern Governors' Case*. In that case, as set forth at p. 654 supra, the northern interveners sought to show that the lower production costs in the South should be considered in determining the level of northbound rates, but the Commission rejected the evidence.

[37a] S-273. I. 375.

[38] S-283. I, 380.

(c) *The Controversy Over Divisions*

The proper divisions which should govern the paper rate adjustment were in issue between the northern and southern railroads [39] and, as will be seen, were only settled as a part of the hard-fought compromise in which the southern roads accepted a higher mile for mile rate into the northern markets in exchange for the retention of divisional factors more favorable to them than to the northern roads. Two years were yet to elapse before the Commission, by its decision in *Divisions of Rates, Official and Southern Territories* (1939), supra p. 633, measurably set at rest the running series of disputes over divisions which had accompanied the large scale readjustment of interterritorial rates during the '30s.

(d) *The Controversy Over the Equalization of Southbound Rates with Northbound*

In the paper rate controversy the northern roads demanded, as they had done in other instances (e. g., in the *Hosiery Case*, supra) that if rates were reduced to the North to help southern producers, northern producers should be given the same mile-for-mile rates southbound. In the upshot, as will be seen, this demand for southbound equality was left to the Commission, which first (through one of its Divisions) decided in favor of the northern railroads and then (through the full Commission) reversed itself in a 6 to 5 decision. This action showed that the issue of southbound equality was both serious and complex.

3. *Summary of the Negotiations from January, 1937 to and Including the Effectuation on October 3, 1937 of the Southern and Southwestern Rate Revisions.*

On January 12, 1937, the Southern Paper Manufacturers' Traffic Conference, representing most of the producers of

[39] As to this, and the southbound equalization controversy referred to in the next paragraph, Franklin testified at XI, 3316. Both controversies are referred to in *Paper, Official-Illinois Territories to South* (1939) 234 I.C.C. 81, 84.

paper in the South and Southwest,[40] held a meeting at which it was pointed out that the rate associations in Official territory had been "called upon in the usual manner to concur in the application of the northern scale from southern and southwestern producing points," but had declined to do so.[41] The manufacturers therefore urged southern carriers to publish rates at the northern level independently, "wherever the rates are exclusively within their control." They could do so "to a large portion of Illinois Freight Association territory, where lines such as the Monon, Chicago & Eastern Illinois and Illinois Central are generally favorable to the view-point of the southern producers. We also urge that wherever other Official territory carriers signify a willingness to concur that immediate publication be made."

As previously noted, the Illinois Central had been on the point of independent action, as desired by the southern manufacturers, but had withheld its action in view of the further time given by the Commission for negotiations. The other southern and southwestern roads made no move toward independent action, but in March, 1937 the southwestern lines complained to Cleveland about the "dilatory manner" in which the northern lines were treating the whole matter, and indicated that they would withhold independent action only if a joint meeting were called within thirty days "to definitely dispose of this subject."[42] Cleveland accordingly called another meeting.[43]

It was held on April 7, 1937, and proved as fruitless as the one he had previously held on January 27, 1937, which has been referred to above. Immediately following this April 7 meeting, the southern lines proposed to the northern lines that there should be a northbound parity of rates, mile for mile, subject to a certain divisions formula as to the

[40] 238 I.C.C. 136, 137.
[41] S-282, I, 379, 380.
[42] S-286, I, 382.
[43] S-287, I, 383.

nature of which the record is not wholly clear.[44] It appears that there was some reluctance on the part of several of the southern lines to agree to the formula, and that their agreement was due to a "desire to compromise a very difficult situation."[45] On the other hand, Franklin of the Pennsylvania testified that "the southern lines were unwilling to grant an equal division factor if the rate were put at 100 per cent of the Official territory level. This would have meant, in substance, that the northern lines would have had to bear the entire brunt of the reduction."[46]

In any event, on May 14, 1937 the northern lines, through the Traffic Executive Association-Eastern Territory, rejected the proposal of the southern lines, but made a counter-proposal that the northbound rates should be 110% of the Official territory level, subject to a certain basis of divisions.[47]

On May 22, 1937 the southern carriers stated that they were "prepared to concur" in the 110% proposal, subject to a different basis of divisions under which the southern carriers would receive, for the hauls within Official territory, the entire increment over 100%.[48]

On June 10, 1937 the northern lines held a meeting at which they concluded not to yield on the divisions question,[49] but reaffirmed their willingness to agree to northbound rates at 110% of the Official territory level, notwithstanding the protests of the northern producers, who were seeking to establish the rates at 125%.[50] The record indicates that the northbound rates then exceeded the northern by about 125%,[51] so that the northern producers, to that extent, were resisting any northbound reductions.

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[44] S-288, I, 383.
[45] S-289, I, 383.
[46] XI, 3316.
[47] S-290, S-291, I, 384.
[48] S-291, I, 384.
[49] S-292, I, 384.
[50] ND-14, Vol. G.
[51] Sheppard, VIII, 2477.

The protests of the northern producers had first been made when they learned of the action at the May 14, 1937 meeting of the Traffic Executive Association-Eastern Territory referred to above; and the June 10th meeting was held partly to give these producers a chance to be heard. Representatives of southern producers were heard at the same time. The record shows that after the June 10th meeting the Container Corporation of America, with headquarters in Chicago, wrote to the Chairman of the Traffic Executive Association-Eastern Territory referring to the June 10th meeting and to the Corporation's appearance thereat in opposition to the 110% proposal, and saying:

> "We have received no official advice as to the action taken by your Committee, but through certain channels we have been advised that in spite of our protest, your Committee approved 110% . . . on board and boxes northbound only. . . .
>
> "In giving us an audience at your Chicago hearing, you very graciously invited all our southern competitors to be present and it is now our understanding that you are holding conferences with our southern competitors without extending us the same courtesy, an action which, to say the least, is extremely distasteful to us. . . .
>
> "As we view this whole situation, based on the action taken so far by your Committee, it would appear that the only groups who have any interest are the northern carriers and the southern producers, whereas, as a matter of fact, our group of northern producers are very vitally interested. We feel that we are certainly entitled to be fully informed by our northern carriers what is transpiring, and *what overwhelming arguments the southern producers have given you privately that caused you to approve the basis you did.*" (Emphasis added)

The foregoing letter indicates not only that the northern carriers were trying to work out a settlement which would satisfy the southern producers, but that the northern producers had ascribed the 110% proposal to southern sources. This last point was made even more forcefully in a letter to

the Traffic Executive Association-Eastern Territory from the Ohio Boxboard Co. This letter spoke of the representative of the Container Corporation of America, supra, as "the spokesman for the northern mills" at the June 10th meeting, and stated that:

> "We have just learned that in spite of the presentations made at the above meeting that the northern carriers have become a party to the establishment of 110%" of the northern scale on boards and boxes, "northbound only, *which is exactly what the southern carriers and mills were agreeable to.* As the northern mills made a request of you for the establishment of rates on a 125% basis rather than the 110% approved we can only interpret this action as meaning that the *interest of the northern carriers rests with the southern mills in their efforts to market their products in Official territory.*
>
> "With only a fixed amount of board and box business available in the country, it should not be difficult for you to visualize the consequences to the northern mills if through the medium of low rates the southern mills are permitted to capture the market of the northern mills." (Emphasis added)

The American Box Board Company of Grand Rapids wrote:

> "It is understood that your Committee of Executives has again approved a lowering of Paper Box and Board rates from the south to the north.
>
> "Knowing you realize that such action will seriously cripple northern producers and through them reduce tonnage on your own rails, it is borne into our thoughts that some very powerful and extraordinary condition moves you. . . .
>
> "The question:—What is the real compelling reason for reducing the now low rates and *why is the welfare of your own shippers ignored to the extent of preference to southern competitors?* (Emphasis added)

Similar protests were voiced by the Fairfield Paper Company of Baltimore, Ohio and the Waldorf Paper Products Company of St. Paul.

However, the refusal of the northern lines to accept the southern lines' divisional proposal led to an impasse. While various southern and southwestern lines were projecting independent action,[52] Cleveland called another meeting of the interested roads from the different territories, which was held on July 1, 1937.

Again no agreement resulted.[53] Cleveland wrote to the Chief Traffic Officers of the southern lines that he was "very much disappointed in the outcome, as I believe it will result in rates lower than the necessities require and therefore give to the railroad industry less revenue than they might reasonably expect to receive."[54] He suggested that the southern carriers should give serious consideration to the northern carriers' proposal, and that before establishing the flat eastern scale at destination points such as Chicago, St. Louis and Indianapolis, as the southern and southwestern lines had announced at the meeting their intention of doing, they should investigate what Cleveland believed to be the fact, namely, that at those points "the prices today are made by the southern and southwestern producers." If so, he said, "competition certainly does not require a downward revision in those rates regardless of what the rates may be from other producing points. I think you will also find if your investigation is made that your mills are doing the largest business in these commodities in that territory."

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[52] S-294, I, 385; S-295, I, 385 (letter from Oliver of the Southern Railway to Kerr, stating that in view of the Northern position, "it seems to me another meeting of Southern lines is necessary to decide upon procedure. As I see the situation, we are going to be compelled to now do with these paper rates just what we did with the textile products rate, viz: publish our announced bases to the territories where we can control the adjustment, and at the same time publish the basis demanded by the Central Freight Association and Eastern Trunk Lines, letting the Commission, on petition, suspend the tariff, *and thus ultimately secure what we are after*. This was accomplished on textiles, and I can see no reason why it cannot be accomplished" with respect to paper); S-296, S-299, I, 385, 386.

[53] S-301, I, 387, 388.

[54] S-300, I, 386, 387.

Cleveland concluded his letter by saying:[55]

> "This letter is written with some hesitancy, and I hope you will extend to me the charity of believing that it is only sent with the object in view of retaining revenues which I think the conditions warrant you to expect and is not to be construed as any intention or effort on my part to substitute my judgment for yours. I believe that if you will make the investigations suggested you will reach the same conclusions that I have in regard to this situation."

The Missouri-Pacific, however, rejoined that the southern and southwestern producers did not determine the prices in the northern markets, but that on the contrary "the industry in the South and the Southwest lets the North fix the price and then proceeds to meet that price, but on a narrower margin of profit. . . ."[56] The Gulf, Mobile made a similar rejoinder.[57]

In spite of the lack of results at the July 1, 1937 meeting, Cleveland, on August 10, 1937, suggested the calling of another one. The southwestern lines replied that they were "very much interested in your offer to arrange another joint conference and to assist in every way possible to promote cooperation and effect a compromise in the interest of conservation of revenue." However, they sharply criticised the northern lines for not having "dealt with the problem in a spirit of cooperation. On the contrary, on every basis discussed, we have been confronted with what we considered an arbitrary position both as to rates and divisions. The last communication from Mr. Lawrence [Chairman of the Traffic Executive Association-Eastern Territory] was in the nature of an ultimatum on the part of the northern lines, setting forth the rates we must apply and the divisions thereof. His notice insisted that the 110 per cent basis must be applied both to I.F.A. [Illinois Freight Association Territory] and Official terri-

[55] VI, 1924 (portion supplied by defendants).
[56] S-320, I, 395.
[57] S-312, I, 391, 392.

tory. So long as the Official lines persist in this arbitrary position, it would appear manifestly impossible to reach a mutually satisfactory conclusion." [58]

The northern lines, as shown by the above letter, were insistent that the same northbound rate be established into Illinois Freight Association territory as into the rest of Official territory. The southern and southwestern lines could have reached a portion of Illinois Freight Association territory through the Illinois Central by independent action, and the Illinois Central stood ready to effectuate northbound shipments into that portion at 100 per cent of the northern rate level; indeed, its notice of willingness to join independently with southern and southwestern roads in such action was never formally withdrawn.[59] Nevertheless in the ultimate settlement the southern and southwestern roads agreed to the 110 per cent level northbound into Illinois Freight Association as well as into the rest of Official territory. The reason for this, as the evidence shows, was that there was a very small movement of paper into Illinois territory and that, with two exceptions, the southern and southwestern paper interests preferred to make a total settlement of the northbound controversy rather than to win "an empty victory . . . just to get into the Illinois territory." [60]

Accordingly the southern and southwestern shippers agreed in mid-August of 1937 to separate out, from the various rate adjustments to be made, the northbound rates into Official territory (including Illinois), and to seek from the I.C.C. one more extension of time with regard to the adjustment of these northbound interterritorial rates in the hope of effectuating a settlement.[61] At that time the

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[58] S-319, I, 394, 395.

[59] Sheppard of the Illinois Central testified on cross-examination: "The Master expressed it in the right way—it just withered away. It is there yet. The notice is there for one hundred per cent of the scale, but it got no nourishment and it just withered away." VII, 2379.

[60] Sheppard, VIII, 2379; S-317, I, 393, 394.

[61] S-317, I, 393 and VI, 1925, 1926.

carriers faced a deadline of October 3, 1937, for curing all the Fourth Section violations.[62] The Commission granted the desired extension as to the northbound interterritorial rates, and this action enabled a settlement of those rates to be worked out in January, 1938, as will appear.

Meanwhile the roads faced the necessity of readjusting the remainder of the rates effective October 3, 1937. Events moved swiftly in August and September toward this end. The southern and southwestern lines announced that, effective on that date, they would publish rates from the Southwest to Southern territory, and within Southern territory, at the prescribed class rate level, which was higher than the Official territory level; but to St. Louis and Ohio river crossings and to Virginia and Maryland gateways they would publish rates at the Official scales.[63]

This latter step was taken, with the approval of all the southern and southwestern carriers and producers involved,[64] because of "intense competition" faced by these producers in and around the border points.[65] Some of the northern producers objected very strongly to this action.[66] They also objected to the cancellation by the northern lines, at about the same time, of certain special commodity rates within Official territory which had been lower than the class rates. The effect of this cancellation was to apply the full classification southbound.[67] Because of these objections, a petition for suspension was filed with the I.C.C., challenging the action taken by both groups of carriers.[68]

In the ensuing proceedings before the I.C.C., the southern carriers accused the northern carriers of having "arbi-

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[62] The deadline had been August 3, 1937, but had been extended on application to October 3. SD-23E, VI, 1924; SD-23F, VI, 1926.

[63] *Paper from the Southwest to Official Territory* (1940) 238 I.C.C. 136, 140, 141.

[64] *Ibid* at 141.

[65] Oliver, IX, 2557.

[66] *Paper from the Southwest*, etc., *supra* note 63 at 141; S-319, I, 394.

[67] S-325a, I, 397.

[68] S-322, I, 396.

trarily" cancelled the commodity rates and asserted that the northern carriers had "all along been advised of the willingness of southern carriers to join in rates to southern destinations" on the southern level.[69] The southern carriers further asserted that the northern carriers had proposed the application of the full classification basis southbound "for the express purpose of producing a partial adjustment so obnoxious as to try to influence the Commission to suspend the entire adjustment." Accordingly, they urged, "if the Commission in its wisdom should see fit to suspend the southbound rates, such decision should not in fairness carry with it suspension of rates from the southern producing points."[70] Kerr, acting as spokesman for the southern carriers, in his capacity as Chairman of the Southern Freight Association, had been urged by the Southern Paper Manufacturers' Commission not to content himself with a "routine statement from your Atlanta Offices," but to "join with shippers in a show of force as well as logic in an endeavor to avoid suspension."[71]

In the upshot the Commission did suspend the southbound rates, while allowing the southern and southwestern revision (including the controversial rates to the border points) to become effective October 3, 1937.[72] This left both the northbound and the southbound interterritorial rates to be worked out.

4. *Settlement of the Northbound Interterritorial Rate Controversy in January, 1938*

On October 15, 1937, on the initiative of the southern and southwestern paper producers, a representative committee of carriers and producers met with the Commission and obtained a postponement till January 18, 1938 of the hearing on the suspended southbound rates.[73]

[69] S-325a, I, 397.
[70] *Ibid*, 398.
[71] S-324, I, 396.
[72] S-326a, I, 398; *Paper, Official-Illinois Territories to South* (1939) 234 I.C.C. 81, 82, 84.
[73] ND-15, Vol. G.

The southern and southwestern producers then invited the northern producers to meet with them in Chicago on October 28, 1937, in the hope that "when we got together and discussed our differences we could probably agree on both a southbound and northbound adjustment on paper and thus avoid litigation."[74] The plan was, if such an agreement were reached, to press for its adoption by the carriers.[75]

The meeting was held, and lasted for two days, but no agreement proved possible. According to a report to the northern carriers by the spokesman for the northern producers,[76] the southern producers "offered us practically the same basis which they have advocated"—namely, on northbound shipments, 110% of the northern level; and on southbound shipments, substantially the higher intraterritorial southern level (not the 100% to the border gateways which they had put into effect, as previously described).

The northern producers held out for 122½% both northbound and southbound. They also insisted that, failing agreement, the northbound and southbound adjustments be consolidated and determined by the Commission at one and the same time. Following the meeting they reported to the northern carriers that no agreement had been reached, and that "it is *vitally* important to you as well as to we northern shippers to have the northbound and southbound hearings consolidated in one hearing, and we urge you to bend every effort to accomplish this end, and you may rest assured that you will have full cooperation from we northern shippers." This letter showed how much importance the northern shippers attached to the issue of southbound rate equality. An official of the Illinois Central, who attended the meeting, reported that the insistence

[74] *Ibid.*
[75] S-324-D, VI, 1929.
[76] ND-15, Vol. G.

of the northern producers on the same rates southbound as northbound had "created an impossible situation." [77]

The southern shippers, after the meeting, wrote to the Traffic Executive Associations in the three territories that "it is with regret that we report our differences to be still so far apart as to make a proposal satisfactory to all quite impossible.

"We, therefore, withdraw our request for a public appearance and take this opportunity to thank all carriers for their cooperation." [78]

Thus the deadlock continued. As matters then stood, the I. C. C.'s deadline for revision of the northbound rates was January 3, 1938, at which time the Fourth Section relief was due to expire.[79] The southbound rates, as previously described, had been suspended by the Commission and the issues regarding them were to be heard on January 18, 1938.

In this situation the southern and southwestern producers asked the Missouri-Pacific, the Cotton Belt, the Rock Island and the Illinois Central to publish, effective January 3, northbound rates to Illinois Freight Association territory at 100% of the northern scale.[80] Mr. Law, the traffic manager of the Illinois Central, in a memorandum report of this meeting, said, with regard to this request by the producers: [80a]

> "They asked the railroads what their position would be.
>
> "They knew of the efforts being made by Mr. Cleveland to have further negotiations between the railroads. I told the paper people we, of course, would join in any conference that is arranged and that we would advocate the adjustment on the 15,879 scale [the Official territory scale] but, under existing conditions, we could not predict in advance the outcome

[77] VIII, 2391.
[78] SD-23-L, VI, 1930.
[79] VIII, 2391.
[80] VIII, 2391, 2392.
[80a] Ibid.

of any further conferences. I understand the desperate need of the railroads for revenue and the necessity for as complete harmony as possible to further our efforts to get additional revenue."

Mr. Law further reported that the representatives of the other railroads had "strongly endorsed" his statement and that "the paper people seemed reasonably well satisfied with our explanation."

Mr. Law's memorandum needs to be considered in the light of the existing efforts of the railroads to obtain rate increases from the I. C. C. His memorandum was dated November 8, 1937. The meeting with the shippers to which it referred, at which the railroads had stressed their financial needs and their efforts to obtain additional revenues, apparently took place immediately following the abortive meeting of the southern, southwestern and northern paper producers in Chicago on October 27-28, which has previously been described. The railroads' relations with the I. C. C. then stood as follows.

On October 19, 1937, in the last of its decisions in *Ex Parte 115*, the Commission had granted the particular commodity rate increases (including the 2¢ increase on paper products) which the railroads had asked for, while at the same time criticizing the railroads, as it had done in the earlier decisions in that case, for not having done more by concerted efforts to augment their revenues by increasing the numerous rates which had been depressed by competition. At the same time the Commission found that "the net earnings of the railroads are now inconsistent, in general, not only with constitutional standards as to the rights of the private owners, but also with the conditions necessary for the proper conduct of the public service of railroad transportation by private enterprise."[81] That was on October 19.

On October 29, 1937 the member roads of the A. A. R., convinced that the commodity rate adjustments permitted

[81] *Supra*, p. 358.

by *Ex Parte 115* would not suffice, met and voted to petition the I. C. C. for a general 15% permanent increase in freight rates.[82] On November 7, 1937, the day before Mr. Law's memorandum report of his meeting with the paper producers, the petition had been filed accordingly with the Commission (in the proceeding which became known as *Ex Parte 123*).

Judged in the light of the prevailing situation Mr. Law's memorandum reveals, on the one hand, sympathy on the part of the southern and southwestern carriers with the desire of their paper producers to ship into Illinois Freight Association territory on the northern level of rates, and, on the other hand, the desire of the railroads to protect their revenues and to avoid anything which might adversely affect their position before the I. C. C. in the crucial general rate increase case upon which they had just embarked. The memorandum also indicates that the paper producers understood the railroads' situation.

Mr. Law further reported in his memorandum that after the meeting with the producers "the railroads got together and, it is understood, in the event a meeting with the Official Lines is arranged, we will first make a strong effort to sell the idea of the 15,879 scale, but if put under strong pressure we will accede to the 110 basis beyond the border points, with rates divided by use of existing divisions."[83]

Mr. Law's reference to 110% "beyond the border points" implies that on shipments to the border points the rates, which had already been effectuated on October 3, 1937, at 100% of the northern scale, would be left unchanged, despite the opposition of the northern producers and carriers who, as previously noted, had unsuccessfully tried to persuade the I. C. C. to suspend this adjustment. This implication is borne out by a letter written by Oliver of the Southern Railway to Kerr of the Southern Freight Associa-

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[82] *Supra*, p. 359.

[83] VIII, 2392.

tion in June, 1938 in which, referring to the settlement that was finally reached with the northern roads, he said that:[84]

> "The southern manufacturers, at the original suggestion of Mr. Ratliff [general traffic manager of the Champion Fiber Company, a large mill in North Carolina] approached certain northern and southern lines in an effort to reach a compromise. Mr. Ratliff suggested to me that to close the adjustment out he would be willing to accept the 110 per cent basis, but there was always coupled with it maintenance of 100 per cent basis to the gateways, and to St. Louis and Washington."

Oliver testified that this was the origin of the agreement which was finally reached with the northern roads.[85]

Georgia contended that Mr. Law's reference in his report to "strong pressure" implied a fear of coercion, but the record does not justify the inference that coercion was either threatened or practiced. In the context of the events, and particularly in the light of the fact that at the October 27-28 meeting of the southern, southwestern and northern paper interests, the southern and southwestern interests had themselves proposed the 110 per cent figure, the Law memorandum can most reasonably be interpreted as meaning simply that if the northern roads should continue to object very strongly to the 100 per cent basis, the southern and southwestern carriers would be willing to go to 110

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[84] IX, 2564. The occasion for this letter was the fact that there had been some committee discussion in the South after the final settlement with the northern lines on the 110 percent northbound basis, of increasing the rates to the border points to 110 percent, and Oliver agreed in his letter to Kerr that "it does look all wrong to have 110 percent to points in official territory generally and 100 percent to the gateways, including St. Louis and Washington"; however, he argued, since the 100 percent rate to the border gateways had been regarded as a part of the compromise, it should stand. He testified that: "It would have been a breach of faith if we had taken any other action . . . and the adjustment of rates that I have described remains in effect today, to this very day." IX, 2564, 2565.

[85] IX, 2564.

per cent, subject to the favorable division factors on which they were insisting.

On November 30, 1937 a meeting of the southern, southwestern and northern lines, called by Cleveland, was held in Washington. At that meeting, according to Kerr's record of it,[86] the southern lines made a proposal which broke the existing impasse. They proposed, (1) 110 per cent of the northern scale to all destinations in Official and Illinois Freight Association territory; (2) a formula under which something less than the entire 10 per cent excess over the northern scale would accrue to the southern carriers (they had previously demanded the entire excess)—this to be without prejudice to either side in the *Southern Divisions* case then pending before the Commission; and (3) continuation of the previously established 100 per cent of the northern scale on southern shipments to the border points.

The southwestern lines joined in this proposal, except as to the divisions. The reason for their refusal to agree to the divisions will be discussed later.

The northern lines said that they would take the new proposal under advisement. It was then agreed that the southern and southwestern lines, with Cleveland's assistance, would try to obtain from the I.C.C. a further extension of its Fourth Section denial order (due to expire in January) in the hope of effecting a complete settlement.

After the meeting, therefore, Kerr, on behalf of the southern and southwestern lines, applied to the Commission for an extension till April, 1938. In his application he explained that:[87]

> "Circumstances and conditions incident to the *Ex Parte 115* and *Ex Parte 123* proceedings have so engaged the time and attention of many of the responsible traffic officers of the carriers in the several groups that it has not been possible for them to devote all the time necessary to dispose of this paper rate adjustment."

[86] S-324-G, Vol. C, 788, 789.
[87] S-324-H, Vol. C, 791, 793, 794.

He then referred to the November 30 meeting just described and stated that its result, "while not conclusive, was such as to give renewed hope that an amicable settlement may soon be made without resort to litigation, provided additional time is granted in which the interested parties may negotiate and work out a solution."

The Commission granted the application.[88]

On December 17, 1937 the northern carriers made a counter-proposal to the southern and southwestern lines in the matter of divisions, assuming northbound rates of 110 per cent beyond the border points.[89] This was rejected.

On January 17, 1938, at a final meeting of representatives of the three groups of carriers, the southern lines (but not the southwestern) offered to settle the divisions question by splitting the difference between the southern lines' proposal of November 30, 1937 and the northern lines' proposal of December 17, 1937.[90]

The northern lines accepted this offer, without waiving their right to seek southbound rates on the same basis, and without prejudice to the claims of either group in the pending *Southern Divisions* case.[91] The compromise was then unanimously approved by the southern and northern lines, and the rates were subsequently effectuated with the approval of the Commission.[92] The Commission found that the rates agreed upon complied substantially with the Fourth Section; that they had been under consideration for a number of years; and that the proposed bases were "finally adopted as a compromise between northern and southern carriers and shippers."[93]

The compromise seems to have been reasonably satisfactory to the southern producers, though they would have preferred the 100 percent basis. One of them, with four

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[88] S-324-I, Vol. C, 797.

[89] S-324-J, Vol. C, 798.

[90] S-324-J, Vol. C, 798.

[91] S-324-L, Vol. C, 803, 804.

[92] *Paper from Southern to Official Territory* (1938) 229 I.C.C. 587.

[93] *Ibid* at 588.

plants in Tennessee and one each in North Carolina and Florida, wrote Kerr on January 19, 1938, stating that:[94]

> "I am greatly pleased to have your telegram today advising me that an agreement has been reached with the official territory carriers permitting the establishment of northbound interterritorial rates on paper and related articles on the basis of 110% of the Appendix E-15879 scales. This, I believe, will bring about a final and satisfactory solution to the problem that has given us a great deal of worry for nearly ten years, and I hope that you will make every possible effort to bring about the publication of the new rates at the earliest possible moment."

At a meeting of certain southern producers with an executive of the Southern Freight Association, called a month later to discuss some questions incident to the method of publishing the new northbound rates, one of the producers, from Tuscaloosa, Alabama, said that "when we go along and accept rates made 110% of Official level we think we have gone a long ways, we feel 100% basis was proper."[95] On the other hand, the report of this meeting showed that the southern producers were anxious to raise no questions with the northern lines which might lead either to a reopening of the controversy or to possible action on the part of the Commission.[96]

As previously stated, the northern shippers had sharply objected to the earlier acceptance by the northern lines of the 110% basis, representing as it did a reduction in the existing northbound rates.

The compromise left two issues undisposed of: the rates and divisions between the Southwest and the North; and the rates southbound from Official territory to Southern territory. The outcome of these two controversies, both of which had to be decided by the I. C. C., must now be traced.

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[94] SD-23-W, VI, 1933.
[95] S-324-P, Vol. C, 809.
[96] *Ibid* at 812, 813.

5. *Settlement of the Southwestern-Official Territory Controversy Over Rates and Divisions.*

It was noted above that while the Southwestern and Official territory lines were willing to agree on the 110% basis of northbound rates, the southwestern lines were not willing to accept the compromise proposal on divisions which the southern roads had put forward and the northern roads had accepted. Consequently, since divisions and rates were interdependent, no settlement could be arrived at. The southwestern lines insisted on a particular basis of divisions which the Commission had prescribed a year and a half before in *Southwestern-Official Divisions* (1936) 216 I. C. C. 687.

In that case the southwestern lines had contended that they were more in need of revenue than the official lines, while the official lines had asserted the contrary. The official lines, according to the Commission, had also objected "to low joint rates from the Southwest into their territory on products that compete with similar products originating in the East, because the southwestern products displace eastern products on which they receive the entire haul at local rates. They feel that they should be compensated by being allowed higher divisions on the products of the Southwest than would otherwise be justified. They regard many of the rates from the Southwest as less than reasonable and seek divisions equal to what they would get under what they would call reasonable joint rates."[97] This passage from the Commission's opinion shows how inextricably interwoven rate levels are with divisions of rates. The Commission, after noting that the parties had "spent several years in making studies, gathering facts, and presenting these cases," observed that "the record contains no one fact nor any particular group of facts leading to a specific conclusion . . ." and that "all we can do is to exercise our best judgment on the basis of all the facts before us."[98] So proceeding, the Commission had pre-

[97] 216 I.C.C. 687, 708.
[98] *Ibid* at 717.

scribed a formula for dividing the rates on any given joint haul by inflating the short-line distance from points of origin and destination within southwestern territory to the border gateways by 25%. Three of its members had dissented on varying grounds.

This was in March, 1936. In December, 1936 the Commission had reopened the proceedings on the petition of the southwestern and other lines,[99] and the case was still pending when the paper rate controversy came up for settlement. The formula previously laid down was continued in effect, subject to retroactive adjustment if any change were made as a result of the reconsideration. With matters in this posture, it was understandable that the southwestern lines should be unwilling to commit themselves to the particular divisions formula which the southern and northern lines had agreed to.

The southwestern and northern lines being thus deadlocked over divisions, no agreement on the northbound interterritorial rates could be reached. The northern lines thereafter proposed to cancel the existing rates, which would have resulted in the application of rates on the full class basis or on combinations of local rates (where lower than the class rates)—in either case effecting substantial increases.[1] Upon protest by the southwestern carriers and manufacturers, the Commission suspended the effectuation of the new schedules. The southwestern carriers and manufacturers then petitioned the Commission to establish northbound rates at 110% of the Official level ("while they believe that their rates to Official territory should be on the same level as rates within that territory, complainants are willing to accept a basis 10% higher").[2] The northern carriers and manufacturers contended in favor of a wider spread. The Commission having finally disposed of the

[99] 234 I.C.C. 135, 136.

[1] *Paper from the Southwest to Official Territory* (1940) 136 I.C.C. 136, 137.

[2] *Ibid* at 139.

pending divisions controversy,[3] upheld the petition and prescribed the 110% basis.[4]

Thus ended the last remaining differences between the southwestern carriers and producers on the one hand, and the northern carriers and producers on the other.

6. *Settlement of the Controversy Over Equalization of Southbound Rates with Northbound*

As has been seen, the settlement between the southern and northern groups left dangling in the air the demand of the northern carriers and producers for equality of southbound rates, which the southern interests were unwilling to grant.

In the absence of an agreement on this point, the northern carriers had cancelled the southbound commodity rates, leaving the higher class basis to apply; but this action had been suspended by the Commission, as previously noted, upon the protest of northern manufacturers. Thus the matter came before the Commission for decision.

The Commission rendered two decisions, the first by Division 4, which granted the demand of the northern carriers for southbound equality of rates, and then, following a petition for reconsideration, by the full Commission, which reversed the former decision and granted the demands of the southern carriers for southbound rates at the southern destination level. In between these two decisions the *Southern Governors'* case had been decided, and the second of the two decisions reinforced the favorable view taken toward southern rate claims in the *Southern Governors'* case.

These two contrasting decisions may be briefly summarized as follows.

(a) *The Decision by Division 4 of the Commission*

In considering the desire of the northbound interests for equality of rates from the North to the South with those

[3] In 234 I.C.C. 135 (1939).
[4] In 136 I.C.C. 136, *supra*.

from the South to the North, Division 4 of the Commission (consisting of Commissioners Porter, Mahaffie and Miller) took into account among other things the conditions in the paper industry. They found that as a result of the growth of the lighter pulpboard made in the South, as compared with that in the North, "the competition which the producer in Official territory must meet has become acute." [5] The southern board, being from 19% to 33% lighter than the northern, could be shipped even at the prevailing rates at relatively lower transportation costs. "The new pulpboard mills built in southern territory since 1936 represent an added capacity of approximately 900,000 tons per year, equivalent to one-third of the entire production of boards in the United States in 1937. * * * Prior to the development of the industry in the South, the mills in official territory furnished all the board required by the independent box-manufacturing plants in that territory. The loss of that business, since 1925, to manufacturers in the South has resulted in the closing in official territory of certain mills having an annual output of 240,000 tons of paperboard. With two exceptions those closed mills were not obsolete but were well equipped and efficiently managed." [6] The Division also noted that "the consumption of pulpboard and paperboard is largely within official territory. As a result the competition for the markets of that territory is keen. Approximately 95 percent of the pulpboard produced in the South is shipped to points in official territory." [7]

The northern producers complained that the rates from the South were too low but that if the Commission should find them to be reasonable, the same level of rates should be prescribed for southbound application. The Division noted that the northbound rates were "not entirely satisfactory to the southern producers, who contend that they are entitled to rates on a mile for mile equality with the

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[5] *Paper, Official-Illinois Territories to South* (1939) 234 I.C.C. 81, 88.

[6] *Ibid* at 89.

[7] *Ibid* at 93.

producers in official territory."[8] The Division, however, found that the northbound rates at 110 percent of the northern level were "on a maximum reasonable basis."[9]

In support of their claim for southbound equality, the northern producers argued that:[10]

> "Paperboard producers in official territory have been unable to sell practically any of their products to manufacturers of containers in the South. With the present industrial development in that territory, the consumption of containers and board in southern markets normally will increase. Manufacturers in official territory desire to be in a position to compete for that business. * * * They consider it almost impossible to sell their products in the South in competition with the southern producers, unless accorded rates on the same mile for mile basis as those which apply northbound on the same commodities."

The southern carriers expressed their willingness to join in southbound rates on the southern basis but contended that the establishment of any lower basis "would lead inevitably to reductions in the rates within the South, with resulting loss in revenue to southern respondents."[11]

The Division, following the philosophy of the *Stoves* case, which the full Commission subsequently declined to apply in the pending *Southern Governors'* case, found that interterritorial rates should be "somewhat higher than the level in official territory and somewhat lower than that applying generally in the South. * * * The present record is persuasive that the present northbound rates are on a maximum reasonable basis. That level, northbound, supports the finding that the same level is a maximum reasonable level for application southbound."[12]

The result of this decision was, therefore, that southern producers shipping North paid rates which were 10 per-

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[8] *Ibid* at 94.
[9] *Ibid* at 95.
[10] *Ibid* at 89.
[11] *Ibid* at 90.
[12] *Ibid* at 95.

cent above the northern level, while the northern producers, being accorded the same 110 percent rate southbound, which was lower than the southern level, were able to reach the southern markets on a lower mile for mile basis than the southern producers.

This decision was on July 18, 1939, four months before the decision in the *Southern Governors'* case.

(b) *The Decision of the Full Commission in March, 1940.*

The southern carriers petitioned the Commission for a reopening of the decision handed down by Division 4, and the Commission granted the petition.

The Commission handed down its decision in the reopened case on March 29, 1940, about four months after its decision in the *Southern Governors'* case. It found that "both the northbound and southbound rates definitely favor shippers in official territory . . ." [13] and that there was reason to believe that "the establishment of rates southbound lower, mile for mile, than the level of rates in southern territory, in conjunction with the approved northbound rates, would seriously handicap southern shippers . . . and thus have a tendency to discourage further development of the industry in the South to the disadvantage of consumers in both territories." Furthermore, the Commission said, "to turn the northbound rates around and apply them southbound to southern territory, in which higher rates on the same commodities are maintained, would, in our opinion, be unjust to southern carriers and southern producers, unduly preferential of official territory producers, and unduly and unreasonably prejudicial and disadvantageous to producers located in southern territory. We cannot, therefore, sanction such a rate adjustment." [14]

The Commission squarely adopted the position of the southern carriers in favor of the "destination level" of rates. The Commission declared that even though the ap-

[13] *Paper, Official-Illinois Territories to South* (1940) 238 I.C.C. 104, 106.

[14] *Ibid* at 110.

plication of this principle resulted "in different rates over the same lines of railroad in reverse directions," nevertheless it would place all shippers "on as nearly an equal basis, from a practical and realistic point of view, as existing conditions will permit. *We can perceive no other feasible method of according equal treatment to all shippers, receivers, and carriers in both official and southern territories so long as different intraterritorial rate levels are maintained.*" [15]

Five Commissioners, led by Eastman, then Chairman of the Commission, dissented. In his opinion Mr. Eastman challenged the destination level principle; urged that "transportation conditions" should alone be considered in rate making; that under such a test "the rates between the territories must be fixed at some intermediate level, its exact location varying with the proportions in which the through haul is divided between the two territories; and between any two points the rates must be the same in both directions;" [16] and stressed the "phenomenal growth in recent years" of the southern paper industry.[17]

It might be thought that the Commission, having adopted the destination level principle, would proceed to fix the northbound rates at the northbound level instead of leaving them at 110 percent. The Commission, however, stated that those rates were not directly in issue; that findings with regard to them were not essential to the proper disposition of the case; and that therefore such findings would be "of doubtful propriety." [18] Nevertheless, the Commission made some sharp comments upon the northbound rates. The Commission pointed out that because of certain commodity and other special rates within official territory, which were below the regular class rates, the rates from the South "in many instances" exceed the rates within the North on a mile for mile basis "by amounts much

[15] *Ibid* at 110. Emphasis added.
[16] *Ibid* at 114.
[17] *Ibid* at 116.
[18] *Ibid* at 108, 109.

greater than 10 percent of the official scale."[19] The Commission stated that the northbound rates "definitely favor shippers in official territory . . ."[20] The Commission also stated that the northbound rates were "(a) 10 percent higher than the southern carriers are willing to establish, (b) 10 percent higher than the highest rates applicable on the same commodities within official territory, and (c) substantially higher, mile for mile, than rates on the same commodities from points in western trunk-line territory to points in official territory. * * * The foregoing facts do not necessarily indicate that the north-bound rates are reasonable. On the contrary, *such facts properly might be accepted as proof of excessiveness*, for we have prescribed rates on many commodities from southern origins to official territory on a level as low as that reflected in rates on similar traffic within official territory."[21]

In this passage the Commission, while not referring directly to the *Southern Governors'* case and to the *Coke* case and others in which it had prescribed northbound rates at the northern level, clearly had them in mind. In the following passage the Commission expressly reaffirmed the doctrine of the *Coke* case, saying:[22]

> "In order to place shippers in the South on a competitive basis with those in official territory, the southern carriers have expressed a desire, in the case of many commodities, including those involved in the instant proceeding, to maintain interterritorial rates, mile for mile, on a parity with the rates prevailing in the territory of destination. This policy was followed

[19] *Ibid* at 105.

[20] *Ibid* at 106.

[21] *Ibid* at 107. Emphasis added.

[22] *Ibid* at 109. It might also be noted that Commissioner Alldredge, in a concurring opinion, stated that: "If there is any just criticism to be leveled at the decision in this case on the basis of bounty or preferential treatment, it will have to rest, in my judgment, upon the fact that the northern producer will have a 10-percent freight-rate advantage, distance considered, over his southern competitor in the markets of official territory." *Ibid* at 112.

by them in establishing rates on paper and paper articles from southwestern origins to destinations in southern territory. In *Coke from Alabama and Tennessee to Central Territory*, 208 I.C.C. 281 and 215 I.C.C. 384, we expressed the opinion that the 'producers of coke in official territory have no just ground for complaint against interterritorial rates from the South to central territory on the same level, mile for mile, as those they pay' and that the 'carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by prescription of the column 2 rates.' "

The Commission seems thus to have gone out of its way to suggest to the southern carriers that, if they chose to make an issue of it, they could probably secure an order prescribing northbound rates at 100 percent of the northern level. So far as the record shows, the southern carriers made no attempt to act upon this suggestion. In fact, far from desiring to lower the northbound rates, it appears that by the time of the Commission's decision the southern carriers actually would have preferred to increase them. Thus Commissioner Eastman in his dissenting opinion stated that the southern carriers had asked a reconsideration of Division 4's finding regarding the reasonableness of the 110 percent northbound basis, on the ground that this was *below* the maximum reasonable basis.[23] He also stated that the Southern Paper Manufacturers' Traffic Conference (which, as previously noted, represented most of the southern and southwestern producers) had stated to the Commission that the "uncontradicted evidence of record shows conclusively that the northbound basis . . . is a maximum reasonable basis and level . . ." Finally he stated that no other party to the proceeding had indicated any disagreement with the finding of Division 4 regarding the northbound rates.

Thus, at the time of the Commission's decision, the practical situation seems to have been that the southern producers,

[23] *Ibid* at 112.

notwithstanding the favorable attitude taken by the Commission in the *Southern Governors'* case regarding northbound rate equality on competitive products, were not endeavoring to bring about a reduction in the northbound paper rates and that the southern carriers would have liked to increase the basis above 110 percent. Under these circumstances it is perhaps not surprising that no move was made by the southern producers, after the Commission's opinion was handed down, to obtain a reconsideration of the northbound basis. The attitude of the southern producers may well have been due to the flourishing state of their industry, which Division 4 had commented upon in its opinion and which Commissioner Eastman had also noted. In his opinion he spoke of the "phenomenal growth" of the southern industry in recent years and said further: [24]

> "Their supply of raw material is such that they produce a relatively cheaper and better product than the northern mills, and they are able to market 95 percent of their output in official territory, in the very backyards of their competitors."

Tilford of the Louisville & Nashville Railroad Company testified to the same effect. He stated that: [25]

> "There has been a regular and free movement of paper and paper products from southern producing points to destinations in the North and East. Since the present adjustment of rates . . . there have been tremendous quantities of paper northbound."

Similarly, Oliver of the Southern Railway testified that since the 110 percent rates had become effective, the business of the southern paper industry "has tremendously increased. New mills have been constructed since this tariff became effective; others are in course of construction and still others are in prospect." [26]

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[24] Ibid at 116.

[25] VI, 1789, 1790.

[26] IX, 2560.

The record shows that in 1943, three years after the Commission's decision, the southern paper interests did ask for a reduction to the northern level, which the southern carriers declined to make. This incident, which was relied upon by Georgia, deserves a special word.

7. The Request of the Southern Producers in 1943 for a Reduction in Northbound Rates to the Northern Level

On August 19, 1943 the Chairman of the Southern Paper Manufacturers' Traffic Conference wrote to the Chairmen of the Southern Freight Association and the Southwestern Freight Bureau, drawing their attention to the comments on the northbound rates which had been made by the Commission three years earlier, as described above, and saying that:[27]

> "We express the fervent hope that conditions have now sufficiently changed as to cause the Official carriers to concur voluntarily in rates on the involved products on basis of the Official levels and that you gentlemen will promptly transmit to your principals this request and ask their prompt approval and immediate transmission to the other interested rate jurisdictions."

The letter stressed the desire for expedition and reiterated the policy of the Conference, namely, "that we favor now as vigorously as ever the making of interterritorial rates on basis of the destination level and rates within the various regions which differ, one region versus another, according to the needs of each."

On October 12, 1943 the paper manufacturers appeared before the Executive Committee of the Southern Freight Association and were told, according to a report by Kerr to Burgess, the Chairman of the Traffic Executive Association-Eastern Territory, that "inasmuch as the present rate adjustment was the result of a compromise, the southern carriers did not feel that they should make any decision one way or the other without first conferring with their

[27] S-361a, I, 414.

northern and eastern connections—the other parties to the compromise. The subject was, therefore, postponed pending action following such a conference." [28]

Some months went by without action; the southern manufacturers renewed their request; and on April 14, 1944 Kerr reported again to Burgess, referring to a previously arranged conference with the northern lines which had had to be called off and suggesting that the matter be taken up at a meeting scheduled for May 2, adding: [29]

> "The southern paper people are pressing us for action but we have told them that we did not care to issue a proposal until we have conferred with your people, this for the reasons set forth in my letter of October 22, 1943. * * *"

Following the meeting of May 2, 1944 Kerr advised the southern manufacturers of the adverse decision of the carriers, saying: [30]

> "I was requested to advise you that the carriers do not feel that your group has made out a case justifying at this time the heavy reductions involved, but if and when competitive and other conditions change with the ending of the war in Europe they are prepared to consider the matter further. The latter should not, however, be regarded as a commitment on the part of either group to then support the reductions requested. If, notwithstanding the foregoing, you feel that the carriers should at this time proceed with the public docketing of the proposal, upon advice to that effect we will proceed accordingly."

Ultimately the public hearing was held at the request of the southern manufacturers.[31] Georgia's evidence stops at that point.

Tilford in his testimony explained that in the conference with the southern railroads the southern manufacturers "stressed the competition which they would face after the

[28] S-362a, I, 415.
[29] S-365a, I, 416.
[30] S-366a, I, 416.
[31] S-367a through S-372a, I, 416-418.

war with Swedish pulp which would be imported through the North Atlantic ports, thus affording relatively short rail hauls to northern paper manufacturing points. At that time, the war was not over and the paper products were moving freely from the South. *There was no commercial reason or other competitive reason why the rates should have been reduced at that time.* * * * This did not mean that they could not make a case later on in the event Swedish importation should impinge on their ability to ship goods to the North."[32] (Emphasis added.)

Tilford further testified that after the public hearing referred to above, the matter had been postponed several times "at the request of the southern and southwestern paper manufacturers who presented the proposal, and now the matter is held in suspense because the southern paper manufacturers and the southern carriers view the adjustment as a postwar proposal that should be held up awaiting further developments. * * *

"*When the time does arrive when commercial conditions require or justify a reduction in the rates,* I will be the first to champion the cause of the southern producers."[33] (Emphasis added.)

The italicized passages in Tilford's testimony expressed a point of view which runs all through the record, namely, that the southern carriers, for revenue reasons, do not wish to seek to bring about rate reductions into Official territory, even where they are above the northern level, except where in the southern carriers' judgment the reductions are needed to move the freight and to enable the southern producers to compete freely in the northern markets. It is clear that in the *Paper* case the southern carriers saw no need of reducing the rates below 110 percent. And Tilford's testimony, which was uncontroverted by anything in the record, indicated that the southern producers, while concerned in 1943 about postwar competition from Sweden, did not ac-

[32] VI, 1791, 1792.
[33] VI, 1798, 1799.

tively press their request for a reduction to the northern level.

C. *Georgia's Allegations Regarding the Paper Case, Considered in the Light of the Evidence Analyzed Above*

1. *Discrimination*

The northbound rates at 110 percent of the northern level were, of course, lawful because the Commission approved them in 1938, after the settlement, as constituting a maximum reasonable basis. And at the time of the negotiations the northern defendants, it seems to me, could reasonably have assumed that if the northbound rates had been litigated by the southern defendants the Commission might not have prescribed a greater reduction than the northern defendants were offering, for this was two years before the *Southern Governors'* Case and the Commission was still in some cases applying the "stove" formula with its prescription of northbound rates substantially above the northern level. The Commission's criticism of the unfairness of the northbound rates in the *Paper* Case came in the southbound rate proceeding of 1940, after the decision in the *Southern Governors'* Case; but the northbound rates, which the Commission had approved in 1938, were not then in issue, the southern producers having taken the position before the Commission that they were on a maximum reasonable basis.

From the foregoing consideration of the legal character of the northbound rate settlement, I do not think that it can be held up against the northern defendants as evidence of a discriminatory purpose, in spite of the criticism of the rates by the Commission two years later.

On the other hand, the fact that the Commission approved the rates as agreed to in 1938, and might have prescribed them at 110 percent if the issue had been litigated, does not, it seems to me, under all the circumstances of the case help affirmatively to establish a non-discriminatory purpose. For it is clear that the Commission would have approved a settlement agreement at 100 percent of the northern level,

as well as at 110 percent, and that all parties knew this; and the real question remains to be answered: why did the northern defendants refuse in all their negotiations to go below 110 percent?

Was it to conserve revenue? Revenue questions were certainly involved, because from the outset the southern defendants demanded a disproportionate share of the divisions of the joint rates, and in the final settlement the northern defendants yielded something of their position on divisions, to their financial detriment. Moreover the negotiations occurred at a time of serious financial crisis in the railroad industry, when the railroads were seeking general rate increases from the Commission in *Ex Parte 115* and then in *Ex Parte 123*, and the Commission was resisting their applications and seeking a solution through increasing particular rates and admonishing the carriers against the making of improvident rate reductions. At the very outset of the negotiations, when the Illinois Central had indicated its willingness to reduce northbound rates into Illinois Freight Association territory to 100 percent of the northbound level, the northern opposition to this course was based on fear of the adjustment spreading throughout Official territory and to points in Southern territory, to the detriment of the carriers' revenues and to the prejudice of their pleas to the Commission for general rate increases. And toward the end of the negotiations, when the southern shippers again urged independent action upon the Illinois Central, Mr. Law of that road told them of the "desperate need of the railroads for revenue and the necessity for as complete harmony as possible to further our efforts to get additional revenue."

Given these facts it is clear that revenue considerations were very much in the northern defendants' minds when they declined to reduce the northbound rates all the way down to 100 percent. Were these the exclusive considerations which motivated them?

It is difficult to believe that they did not also take into account the competitive difficulties and desires of their

shippers. The Chairman of the Central Freight Association, at the start of the negotiations, argued that the southern producers were not equitably entitled to northbound rate parity because they had located in the South on account of lower production costs and the availability of pulpwood, and with full knowledge of the rate situation. Moreover, the northern producers under the existing rates were encountering severe and growing competition from the southern producers, and they protested vigorously to the northern carriers against aiding the southern producers any further by granting them northbound rate reductions.

The facts warrant a finding that the northern carriers were never willing to discuss northbound rates of lower than 110 percent (a) partly because of revenue considerations, and (b) partly because of the vigorous opposition of their shippers to any rate reductions. How much of a part each of these two factors respectively played in their motivation it is impossible to tell from the record.

To the extent that they were motivated by the second factor the motivation lacked the invidious character of which Georgia basically is complaining. Georgia basically is complaining about a conspiracy whose purpose is to protect northern producers by preventing or hindering competition in northern markets by southern producers, with the result that the growth and development of southern industry is impeded. Here the southern paper industry was already well established; it was marketing 95 percent of its product in the North, and was rapidly growing. The northern carriers, instead of standing pat on the existing rate relationships, were willing to join in substantial northbound reductions, the only question being how far down they should go. Far from slavishly following the dictates of the northern producers, the northern carriers, in proposing a reduction to 110 percent, stood in opposition to them and were accused by them of giving the southern producers exactly what the latter had found to be acceptable. It is abundantly clear from the evidence that the compromise agreement was objectionable to the northern producers and

reasonably satisfactory to the southern producers. The southern producers, even though they would have preferred a reduction to the northern level, took a leading part in shaping the compromise; they sought to keep the controversy from being litigated before the Commission; and with minor exceptions they welcomed the compromise when it was achieved.

Under these circumstances the *Paper* Case cannot be regarded as typifying the invidious discrimination of which Georgia is really complaining.

2. *Coercion*

(a) As to the A.A.R., Georgia suggested that the failure of any southern road to join with the Illinois Central in effectuating rates at 100 percent of the northern scale into Illinois Freight Association territory may have been due to the realization that "the Board of the A.A.R. could always prohibit the contemplated action of the South."[34] Georgia cited as the only authority for this suggestion the *Citrus Fruit Case* of 1936—the only instance in the record in which the Board of the A.A.R. recommended against a proposed rate reduction.[35]

The evidence in the *Paper Case* does not lend any support to this suggestion. It is true that the Official carriers, during the progress of the settlement negotiations, made clear their desire that no such independent action be taken, and insisted that the rates into Illinois Freight Association territory and into the rest of Official territory should be settled together at the same figure; and it is also true that Cleveland at one of his meetings with the carriers expressed his hope that independent action would not be taken; and further expressed his concern lest railroad revenues be needlessly sacrificed. On the other hand, southern producers and carriers used the threat of independent action on two occa-

[34] Final Brief, p. 169.

[35] Supra, p. 482.

sions to prod Cleveland into further efforts to bring about a settlement; and there is nothing in the evidence to show that they were apprehensive of any restrictive action by the A.A.R. The movement into Illinois territory was comparatively small, and so long as there were prospects for an over-all settlement the southern producers and carriers did not wish to jeopardize it by independently establishing rates into that territory. After the settlement the southern roads refrained from effectuating rates at 100 percent into Illinois Freight Association territory because the agreement specifically provided that the rates into Illinois territory, as well as into the rest of Official territory, would be at 110 percent of the northern level.

There was no evidence that Cleveland in his several conferences acted otherwise than as a mediator, or attempted directly or indirectly to exert any pressure on the southern roads.[36]

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[36] Georgia noted in S-104, I, 222, 223, Cleveland's report to the A.A.R on the activities of the Traffic Department, dated October 11, 1938, detailing "some of the matters of large moment where we know substantial savings in revenue have been secured," among which he listed as item (5) the following: "The Southern and Southwestern lines undertook to reduce their rates on paper and pulpboard into the northern markets. This would have probably resulted in a reduction in the rates on the entire paper group and paper-board group from the North. This controversy was finally adjusted by increasing by 10 per cent the level of rates which had been proposed by the Southern and Southwestern carriers." This item was the only one of the 21 listed in Cleveland's report in which he failed to preface the achievement by recitals such as that the adjustment had been "largely through cooperative efforts of this department," or that the department had been "instrumental" or "successful" in "persuading" or "inducing" carriers to make particular adjustments, etc. The absence of any such claim for credit in connection with the paper adjustment seems to reflect the very minor role which the evidence shows Cleveland to have played in that case.

Georgia introduced an unexplained exhibit, S-316, I, 393, which shows that the paper rate adjustment had at one time been on the docket of the Traffic Advisory Committee (supra, p. 334) attached to Cleveland's Traffic Department, but had been struck from the docket on July 21, 1937, in the midst of the negotiations between the Southern and Northern roads described above, "in view of

I find no coercion on the part of the A.A.R.

(b) As to the Official territory associations, there was no showing that in their negotiations with the southern carriers they or their members coerced the southern carriers into accepting the settlement, or into staying away from the Commission. On the contrary, the southern roads showed quite as much initiative in the matter of effectuating a settlement as the northern roads did, and the final form of the settlement was largely shaped by them. Moreover the southern producers were instrumental at one point in obtaining a further extension of time from the I.C.C. and appeared anxious to work out a settlement. And the southern roads insisted, over northern opposition, that the strongly contested southbound rate issue be left for Commission decision.

The northern associations' unwillingness, as spokesmen for the northern carriers, to join in effectuating the northbound rates at 100 percent of the northern level cannot be regarded as coercion; as previously stated, a mere failure to agree is not coercion. Moreover the negotiations took place some two years before the Commission's decision in the *Southern Governors' Case*, at a time when the Commission was still, in some cases, applying the "stove" formula with its prescription of northbound commodity rates which were substantially above the northern level. Hence there is no basis for an argument that the northern carriers were attempting to deprive the southern carriers of something to which the law entitled them.

As to the Official territory associations in their relations with their own members, there was no showing that any of the northern roads wished to effectuate northbound rates

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the fact that the complaint of the Eastern lines filed with the Association of American Railroads had been withdrawn" and that "no mutually satisfactory decision could be reached at this time." There is nothing in the record that indicates the nature of the complaint, or with whom it had been filed, or why it had been withdrawn.

at the northern level; and therefore it could not be contended that these roads were restrained by association action from proceeding independently. It is true, of course, that the Official territory associations, through their appropriate committees, recommended against acceptance of the 100 percent proposal, and that there *may* have been roads which but for the views of the majority would have effectuated the proposal independently with their southern connections (if any of the latter had been willing to join with them). However, such action would not only have been contrary to the wishes of their shippers but contrary to their own revenue interests, and the record permits no inference that any of the northern roads were disposed to take a course so opposed to their natural inclinations.

I find no coercion in the case of the Official territory associations.

(c) As to the Southern Freight Association, it acted on behalf of and, so far as the record discloses, not in opposition to, any of the southern carriers. There was no showing that any southern carriers opposed the settlement that was arrived at, or wished to seek Commission determination, or wished to press for rate reductions in 1943 when the southern shippers reopened the question in the light of the I.C.C. decision inviting such action.

It is true, as already stated, that the Illinois Central remained willing to join with other southern roads in independently effectuating northbound paper rates into the portion of Official territory served by it, at 100 percent of the northern level, and that this offer was never taken advantage of by any of the southern roads. There was no showing, however, that the Southern Freight Association as such, or any of its committees, took any formal action or adopted any resolutions to deter other roads from joining independently with the Illinois Central in effectuating its proposal. Moreover the Illinois Central originally

made its proposal just before the expiration of the I.C.C. deadline for curing the Fourth Section denials, then set for January, 1937; and when the Illinois Central learned that the Commission would further extend the period, the Illinois Central on its own motion asked the Southern Freight Association to withhold action on the proposal. So far as the record discloses these instructions were never countermanded, and the Illinois Central never pushed its proposal. Upon several occasions, when it looked as though no settlement could be effected, the southern producers urged the effectuation of independent action into Illinois, but the weight of the evidence indicates that they preferred to settle than to precipitate an action which, because of the bitter opposition of the northern producers, undoubtedly would have thrown the whole adjustment into litigation before the Commission.

The evidence reasonably permits the inference that the interested southern roads were informally kept aware of the progress of the rate association negotiations, and of the views of their negotiators, who did not wish to jeopardize an over-all settlement with the northern roads by taking independent action with respect to a small portion of the territory. It may be further inferred from the evidence that the periodic meetings of the southern roads, with shippers' representatives and without, afforded occasions at which the roads and the negotiators exchanged opinions and developed policies and tactics; and that the common interest which the southern roads had in the outcome of the negotiations naturally disposed them toward unanimity of action and toward acceptance of the view that piecemeal action in Illinois would be detrimental to them. But all this falls short of coercion.

On the basis of all the evidence, I find in the *Paper Case* no coercion, either in the ordinary sense of the use of some form of force or intimidation, or under Justice Brandeis's

definition in *Horning* v. *District of Columbia*, 254 U.S. 135, 139, which Georgia characterized as "classic" :[37]

> "He does coerce when, without convincing the judgment, he overcomes the will by the weight of his authority."

There is nothing to indicate that in the *Paper Case* the will of any carrier, either nothern or southern, was overcome by the weight of any authority, while its judgment remained unconvinced.

D. *A Comment on Georgia's Proposed Decree Prohibiting Interterritorial Rate Negotiations and Agreements Between Territorial Rate Associations*

Georgia's proposed decree, set forth at p. 21 above, would among other things prohibit, as in violation of the anti-trust laws, negotiations and agreements between territorial associations over interterritorial rates.[38] It would seem desirable, while the facts in the *Paper Case* are fresh at hand, to consider how in such a case this portion of Georgia's decree, if it had been in force, might have been expected practically to operate. For simplicity I have omitted below any references to the southwestern roads or to the intraterritorial adjustments. Had the southwestern roads, with their differing position on divisions, and the intraterritorial adjustments involving the controversial rates to the border points, been included in the suppositious cases discussed below, the complexities and difficulties involved in any attempt to work out an adjustment under Georgia's proposed decree would have been much increased.

Under the proposed decree the first step, when the I. C. C.'s Fourth Section orders had compelled a readjustment of the paper rates between the South and the North, would presumably have been for a southern carrier serving a southern paper mill to make a rate proposal to its northern

[37] Final Brief, p. 19, foot-note 7.
[38] See p. 185 supra.

connections. At about the same time, however, other southern carriers serving other mills would similarly be making proposals to their particular connections. Georgia envisages a series of simple negotiations of this sort between individual roads in which, freed from the restrictive influences of the rate associations, there would emerge a bargain more likely to be favorable to southern interests than any that could be negotiated collectively between the rate associations. Any bargain thus resulting would be docketed for public discussion at a single southern rate conference and at a single northern rate conference, after which the parties to the bargain could file the proposal with the Commission, regardless of any views expressed at the conferences.

It is scarcely likely that matters could have been worked out in this simple fashion in the *Paper Case* if Georgia's decree had been in effect. To begin with, each northern carrier, upon receipt of a proposal from a southern carrier, would have had to consult each of its connections with regard to the proposal, in order to avoid preferences forbidden by the Interstate Commerce Act; and the proponent southern carrier would similarly have had to consult each of its connections. These connections, in turn, might and normally would have found it desirable to consult with their respective shippers as to the effect upon the latter of the proposed rate change. The ramifications of this process would soon have reached such a point as to make the working out of a proposal by piecemeal conferences quite impractical. Divisions, as well as rates, would have been in the hopper, and there would have been not one proposal from one southern road but separate (and not necessarily identical) proposals from each of the southern roads serving southern paper mills; and these proposals would have crisscrossed and overlapped each other so that soon most, if not all, of the northern carriers and most, if not all, of the southern carriers, would have been involved in a maze of discussions with each other and with their respective shippers. When it is remembered that between Atlanta, Georgia and

Buffalo, New York alone there are 23,251 different rail routes available for shippers to choose between, each carrying joint through rates which are the same for any given class or commodity, involving 61 different railroads,[39] it can readily be seen that it would be a practical impossibility to work out a readjustment of rates on a basic commodity like paper through the medium of separate road-by-road and road-by-shipper conferences.

As a practical matter, therefore, in the *Paper Case*, before any set of joint through rates could have been established, it would have been necessary under Georgia's decree to consider the various southern proposals at the single public conferences which Georgia's decree would permit, one in the South and one in the North, at which all shippers and roads involved one way or another in the proposals could have stated to one another what the effects upon them of the proposals would be.

If such conferences had been held in the *Paper Case*, we may assume that the northern producers would have vigorously protested any northbound reductions and would have insisted upon the equalization of southbound rates with any new northbound rates, just as they did in the case as it actually occurred. We may similarly assume that each southern proposal, however varying in detail, would have provided for southbound rates at not lower than the southern level, since any lesser proposal would have run squarely contrary to the interests of the southern roads and to the position which they had been taking before the I. C. C. We may also assume that each southern proposal would have called for a disproportionate share of the revenues for the southern proponent, since this was the traditional policy of the southern roads, growing out of their higher rate structure and their asserted higher operating costs. We may then assume that none of the northern carriers would have favored such a basis of divisions, and that thus the same basic deadlocks would have occurred as did occur in the

[39] Supra, p. 218.

actual case. The situation, however, would have been much more complex than in the actual case, because instead of a single proposal on each side at one time, representing the then consensus of the views of the respective groups of carriers, there would have been a large number of proposals varying in details; and instead of spokesmen for the two groups, authorized to negotiate with each other in an endeavor to bring about a mutually acceptable settlement, there would have been a multitude of individual railroads permitted by the decree to negotiate and agree in groups only insofar as the components of the groups were actually going to participate in proposed joint through rates. In view of the overlapping and criss-crossing of groups arising out of the multiplicity and variations of the separate southern proposals, it may well be doubted whether as a practical matter it would have been possible to negotiate any single settlement involving the participation of less than all the northern carriers and less than all the southern—a state of affairs which obviously could not have been handled without organized collective bargaining through spokesmen, of the sort which took place in the actual case. In the absence of such bargaining, which Georgia's decree would inhibit, it is likely that the deadlocks could not have been broken.

An additional impediment in the way of breaking the deadlocks without organized collective bargaining would have been the natural reluctance of any particular grouping of northern roads to be the first to break away from the crowd and to court the united disfavor of the northern producers by granting concessions favorable to the southern producers. It seems clear that in the actual case the northern roads, by standing together, were in a better situation to stand up against the pressure of northern producers and to make a compromise settlement which their shippers strongly opposed, than they would have been in if they had been cut up into separate groups. Looked at from this point of view, it seems to me that Georgia's decree, by fragmentizing northern carriers, would have been less likely to

produce from them the desired concessions in favor of southern producers than the existing system. Georgia's decree would also prevent the united support of the southern carriers as a whole in favor of some particular proposal upon which all could agree.

If, for the reasons stated, the deadlocks over the various southern proposals for paper rate reductions could not have been broken without organized collective bargaining, which the decree would have prevented, it would then have been necessary for the southern carriers to throw the whole rate readjustment into the lap of the Commission.

The same end result would almost certainly have occurred if in spite of all the practical obstacles a northern carrier and its connections had succeeded in agreeing upon rate changes with a southern carrier and its connections, and had then published the changes and filed them with the Commission for approval. For in such an event northern producers, or other northern carriers, or both (and perhaps southern producers or other southern carriers or both) would in all likelihood have protested to the Commission, since it is almost inconceivable that a fraction of the northern and southern carriers should succeed in working out a compromise which would commend itself to all the competing and conflicting interests involved. And, in the event of such protests, it is scarcely conceivable that the Commission would not have suspended the proposed rates, because piecemeal changes, involving less than the whole industry, could not have been effectuated *seriatim* without creating preferences forbidden by the Act. Thus all the complex issues would again have been thrown into the lap of the Commission.

The consequences of Georgia's decree, if it had been in effect at the time of the paper rate controversy, would therefore almost certainly have been to produce, first, a jumble of proposals; secondly, a series of deadlocks; and thirdly, either a petition to the Commission to prescribe the entire readjustment, or a fragmentary agreement followed by a petition for suspension and a suspension order, with the

Commission again having to face the task of prescribing the rates.

A decree which would thus inevitably throw upon the Commission the responsibility for prescribing major interterritorial rate adjustments (the *Paper Case* being basically no different from any other case involving an important industry) would not be in accord with the scheme of the Interstate Commerce Act, which, while giving the Commission power to prescribe rates, places upon the carriers themselves (in Section 1(4)) the primary duty of establishing rates. Nor would such a decree be calculated to benefit southern producers in quest of northbound rate reductions, for there could be no assurance that the Commission in any given case would prescribe rates at the bottom limit of the "zone of reasonableness," or closer to that limit than the rates which might result from free collective bargaining between spokesmen for the southern roads as a group and spokesmen for the northern roads as a group; and, as I have said, there would seem to be less likelihood that a fraction of the northern carriers engaged in negotiating with a fraction of the southern carriers would be able to withstand the pressure of northern producers as successfully as the entire group.

If the southern carriers were not free agents, and were coerced by the northern carriers into taking positions adverse to southern shippers, of course the latter would gain by a decree which would in effect turn over to the Commission the job of shaping interterritorial rate changes. But no such coercion has been shown. The *Paper Case*, on the contrary, shows the southern carriers bargaining with full independence of action; they established rates at the northern level to the major border points, over the vigorous objections of the northern carriers and shippers; and they refused to yield on the southbound issue and insisted on fighting it out before the Commission, just as the southwestern carriers refused to yield on the divisions question and insisted on fighting that out before the Commission. And the record contains numerous other examples of the

vigor with which the southern carriers through their associations have supported before the Commission, and in negotiations with the northern associations, positions antithetical to those of the northern carriers.

Considering all the evidence bearing on the nature of the steps involved in effectuating interterritorial rate changes between the South and the North, I find that that portion of Georgia's proposed decree which would prohibit negotiations and agreements over such changes between spokesmen for the southern roads as a group and the northern roads as a group would, if effectuated, present serious practical difficulties; would tend to increase discriminations by encouraging fragmentary rate adjustments; would in all likelihood force the Commission to assume a larger role in the prescription of interterritorial rates than was contemplated by the Interstate Commerce Act; and would on the whole be less beneficial to southern producers than some form of interterritorial collective bargaining. In making this finding I do not pass upon other aspects of Georgia's decree or upon the precise form of interterritorial collective bargaining which should be allowed.

III. *The Wine Case* (1943-45)

A. *Analysis of the Facts*

This case involved a refusal by the northern associations to agree to rates on wine in packages shipped by a single producer, the Monarch Wine Company, from Atlanta, Georgia to Official territory, on the same mile-for-mile basis as the northern rates.[40]

The facts may be chronologically summarized as follows. In the fall of 1939, at the instance of a winery in North Carolina, and of the Monarch Wine Company in Atlanta, the southern lines succeeded in negotiating with the northern lines through their respective associations rates on wine in tank cars from the North Carolina points and from Atlanta, Georgia to New York, which were at the time actu-

[40] Georgia's Final Brief, p. 160.

ally lower than the Official territory rates on a mile-for-mile basis.[41] From the railroad point of view these low commodity rates were justified by the water competition which was a potent factor along the Atlantic seaboard.[42] The representative of the Monarch Wine Company, Mr. Hart, stated at the time of the adjustment that all the company was interested in was the movement in tank cars from the company's plant in Atlanta to another plant which the company operated in Brooklyn, New York.[43]

The reduced rate on tank cars granted to the Monarch Wine Company on its shipments to New York were 47 per cent of first class on the Official scale as against the general basis of 55 per cent then obtaining in Official territory.[44] At that time the Official territory lines were faced with severe truck competition and were contemplating rate reductions to meet it, and sometime afterwards (the record does not show the date) the Official rates were reduced for that purpose on wine in packages to 44 per cent, the general basis of rates on wine in tank cars remaining at 55 per cent.[45] The next thing that happened was that in November, 1942 Mr. Gilsten, the sales manager of Monarch Wine Company, appeared as a witness for the Southern Governors in the proceeding known as *Class Rate Investigation, 1939*. As has previously been noted, this was a dual investigation launched by the Commission on its own initiative in 1939, just prior to the decision in the *Southern Governors' Case*. In this proceeding the Commission undertook a nationwide study of freight classifications and of the relationships of interstate class rates, with particular reference to the relationships between the North and the South.[46] It will be recalled that the *Southern Governors' Case*, decided in November, 1939, had dealt with the rates into Official territory

[41] Dervin of the New York Central, XV, 5140 to 5144.
[42] Ibid, 5144.
[43] Ibid, 5142, 5143.
[44] Dervin, XV, 5143, 5144.
[45] Dervin, XV, 5141.
[46] Supra, p. 666.

from the South on particular commodities picked out by the Southern Governors as suffering from northern competition and adverse freight rates. That case, in other words, dealt with a limited number of commodity rates; whereas the purpose of the new nationwide proceeding initiated by the I. C. C. was to inquire into the whole relationship of the territorial class rate structures to one another. In this new proceeding, *Class Rate Investigation, 1939*, the Southern Governors contended for the equalization of the southern and northern class rate structures. They produced eight shipper witnesses, one of whom was Mr. Gilsten of the Monarch Wine Company.[47] Mr. Gilsten complained about the rates on wine in packages from Atlanta to Official territory. In the Commisson's report, which was not completed and issued until 1945, the Commission had this to say about Mr. Gilsten's testimony:

> "A shipper of wine at Atlanta complained of the rates on wine from that point to Official territory. The witness knew little about rates, and an exhibit prepared by his traffic man was erroneous. The applicable rates to most of the points shown on the exhibit are combination rates, one factor of which are exception rates from Atlanta to border points. His principal competition comes from New York City, but he also operates a winery at Brooklyn, New York. His product is nationally advertised and he does a nation-wide business. A larger plant has recently been constructed at Atlanta, indicating that the business has made substantial progress at that point."[48]

The Southern Governors also called as a witness Mr. Hart, formerly of the Monarch Wine Company, as indicated above, and then secretary of the Atlanta Freight Bureau.[49] Subsequently Oliver of the Southern Railway testified in the proceedings, and on cross-examination he was questioned by counsel for the Southern Governors with regard

[47] Dervin, XV, 5145; *Class Rate Investigation, 1939* (1945), 262 I.C.C. 447, 615-618.
[48] 262 I.C.C. 447, 617.
[49] Dervin, XV, 5145; 262 I.C.C. 447, 618.

to the Monarch Wine Company's rates.[50] It is necessary to discuss this incident because the record as presented to me in the *Wine Case* indicates that political motivations of a sort may have affected the actions which, following this incident, the southern roads were to take on behalf of the Monarch Wine Company. In the proceedings before the Commission there was a sharp difference in position between the southern carriers and the Southern Governors. The Southern Governors advocated a uniformity of class rates throughout the territory east of the Mississippi River.[51] They argued that the existing class rate structure discriminated against the South and retarded its industrial development.[52] The southern carriers on the other hand, and the northern carriers also, took the general position that the existing class rates had been prescribed by the Commission as the result of many years of investigations directed to adjusting rates to meet the needs of commerce; that the present rates adequately met those needs;[53] and that there was no proof of changed conditions of reasonable permanency, the changes which had occurred being temporary ones brought about by war conditions.

In taking this position the southern carriers were in accord with the views expressed to the Commission by large organizations of southern shippers, including the Southeast Shippers' Conference, "a voluntary organization of manufacturers, shippers, commercial organizations, and receivers of freight located in the South," and the Southern States Industrial Council, "composed of the major manufacturing

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[50] Dervin, XV, 5146.

[51] 262 I.C.C. 447, 559.

[52] Ibid at 560.

[53] Ibid at 557. It might be noted in passing that the northern carriers in addition added that if the Commission should nevertheless find that the differences between rates in other territories and Official territory were prejudicial, the northern carriers would not oppose establishing interterritorial class rates on the Official territory level if they were made subject to uniform classifications applied equally in both directions and were subject in their division to equal bases of pro-rating factors.

interests in thirteen southern states. . . ."[54] These organizations stated that the present class rate structure within the South and between the South and Official territory "has proven generally satisfactory and that the reductions in class rates sought by the Southern Governors' Conference would result in substantial railroad revenue losses, which would require, as an offset, increases in southern commodity rates that would seriously injure southern industry."[55] There were other shipper organizations which joined in the position taken by the Southern Governors' Conference, but it would seem from the Commission's description of them in the report that they were if anything less inclusive than the groups which opposed a general revision of the class rate structures.[56]

Oliver of the Southern Railway testified that the Southern Governors "had gotten Mr. Gilsten—and he was one of the very few southern shippers who went to this hearing—to testify about his rates on wine, so, when I came on the witness stand, Mr. Van Norman [representing the Southern Governors] asked me about the rates on wine . . . I told Mr. Van Norman that I would be glad to look into the situation and see what we could do about these particular rates . . . and, on my return to Washington, I undertook to carry out that engagement and I did find that we had had this complaint from Mr. Gilsten, so we put up a new proposal to make his rates to points in the North and the East on the level of rates obtaining in those territories."[57]

The proposal which the Southern Railway filed, and which was duly adopted by the Southern Freight Association and forwarded to the Official territory associations for approval, was adopted as an "emergency proposal"[58] calling for the reduction of rates on wine in packages, not only from the South to New York but to all points in Official territory.

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[54] Ibid at 561, 615.
[55] Ibid at 615.
[56] Ibid at 560, 561, 614, 615.
[57] IX, 2726.
[58] Which meant that it was given the expedited form of procedure in the Southern Freight Association described at p. 277 above.

Immediately upon the adoption of the proposal by the Southern Freight Association in February, 1943,[59] Tannehill, of the Central Freight Association, wrote to the Trunk Line and New England associations and to several of the important northern carriers, commenting upon the proposal and asking them for information about the wine situation.[60] In this letter, after referring to Gilsten's testimony and to Oliver's cross-examination in the hearing before the I. C. C., Tannehill stated that "a peculiar thing has developed since the hearing" by the filing of the emergency proposal in question, asking for the establishment of the Official territory level from Atlanta "to all points in Official, including I. F. A., territory. The filing of this proposal as an emergency proposal so soon after the Columbus hearing [the I. C. C. hearing] is the peculiar feature I have in mind. In fact, the situation which it is proposed to correct has been before the carriers for some time and is one of long standing." (The reference to the "carriers" is evidently to the southern carriers, as will appear below.)

Then, with an obvious reference to the differences in views between the carriers on the one hand and the Southern Governors and the shippers allied with them on the other, Tannehill went on to state that the proposal appeared to be "hardly one of emergency nature and might have been filed with the idea of getting from the Official territory carriers prior to the next hearing [before the I. C. C.] an expression of views either for or against the proposal, which could be used by the southern shipping interests in further rebuttal testimony. This is only a surmise on my part, but it will be recalled that there was some side discussion as to whether such a proposal had ever been submitted to the Official territory carriers contending for the Official level, and it developed such proposal had not been submitted."

The only reply to Tannehill's letter which was put in evidence was one from the Baltimore & Ohio Railroad Company stating in substance that the proposal, regardless of

[59] S-238, I, 359.
[60] ND-47, Vol. M.

its merits or lack of merits, ought not to be given emergency consideration. Such consideration should be reserved for articles essential to the prosecution of the war. "This certainly cannot be said to fit the handling of wine, and, as a matter of fact, restrictions are being placed on the sales of wines and liquors for beverage purposes." [61]

The Official territory associations declined to concur in the proposed reduction, assigning two main reasons for their refusal.

The first was that the Official territory rate had been artificially depressed due to truck competition and that there was no good ground for reducing the interterritorial rate to the North to the level of these depressed rates.[62] To this the Southern Railway replied that the depressed rates applied generally in Official territory and covered hauls as great as or greater than those from Atlanta to destinations in the North and East.[63]

The second objection was that no sufficient showing had been made that the Monarch Wine Company needed the reduction in order to enable it to compete successfully in the northern markets. The evidence on this point may be summed up as follows:

(a) The Southern Railway in a communication to the Trunk Line Association cited three companies "in the New York area" whose products competed with those of the Monarch Wine Company (the products were unfortified fruits and wines).[64] The Southern Railway also stated it was advised that wines produced in Atlanta from North Georgia apples could not possibly compete under existing rates with wines produced from apples in New Jersey and Virginia. The Trunk Line Association in a later communication to the Southern Freight Association stated that insufficient justification had been shown to warrant a reduction; "you have rates in effect to Brooklyn, New York where

[61] ND-48, Vol. M.
[62] S-241, I, 360.
[63] S-246, I, 361, 362.
[64] S-240, I, 360.

the Atlanta shipper has a plant which seems to have taken care of the traffic involved."[65] No reply to this point appears in the record.

(b) With regard to Central Freight Association territory, Tannehill's letter referred to above, addressed to the other Official territory associations and to several of the northern railroads, stated that upon investigation it was found that no products competitive with those of the Monarch Wine Company were made in Central Freight Association territory; and that the Chicago distributors secured their fruit wines, which were competitive with those of the Atlanta winery, from California, although Gilsten had testified that his product did not compete with California wines. The Southern Railway in reply cited a producer in Chicago and another in Sandusky, Ohio,[66] although Tannehill's letter had stated that the production in the Sandusky area was in fortified wines, which did not compete with the unfortified Atlanta product. The Southern Railway also stated that there were other producers whose names were not readily available.

(c) After the Official territory associations had recommended non-concurrence in the proposed reduction, the Southern Railway, at the urging of the Monarch Wine Company, persuaded the Illinois Central to announce the reduction independently into the northern area which it served, including Chicago and Indianapolis. Shepperd of the Illinois Central testified with regard to this (on cross-examination) that at first he did not think there was enough involved to justify an independent action; that subsequently Oliver of the Southern Railway had talked to him personally about it, and "I told him the same thing, that I did not think there was anything to it, but he was strong for it and said we would get the business if he got the business. Afterward, I arranged to file the notice and we did file the notice and joined in issuing the rate, and we have not gotten any wine

[65] S-245, I, 361.
[66] S-240, I, 360.

yet."[67] Oliver of the Southern Railway testified that after this independent action had been taken "the northern lines decided to come in and participate in those rates to Chicago, Illinois and to Indianapolis, Indiana," but that from April, 1945, when the reductions became effective, to April, 1946 (a few months before Oliver's testimony), there had been "no movement whatever of this wine" to the Illinois and Indiana destinations.[68] On cross-examination he testified that during the same period "Mr. Gilsten has shipped some sixty carloads of wine over the Southern Railway and I notice that thirty cars of this wine went to destinations in the East to which his rates have not been reduced, but he shipped no wine to Chicago and Indianapolis where his rates were reduced. So, I do not think Mr. Gilsten is suffering at the moment."[69]

I have noted the fact that the proposed reduction was sought in 1943, during wartime. Oliver testified on cross-examination that when Mr. Gilsten discussed the requested reduction with him, "he frankly told me that at the moment his competition was not the compelling force as far as that territory [Official] was concerned, but in the future he would need the rates. . . ."[70] Oliver admitted the lack of immediate urgency, at the time the rate proposal was under consideration, in a letter to the New York Central on December 10, 1943, in which he said that:[71]

> "Because of limitation on production there may be the feeling that competition is not a factor which should

[67] VIII, 2236.

[68] IX, 2641.

[69] IX, 2724. It appeared that during the first ten months of 1942, prior to the reduction in rates to Chicago, six cars were shipped there from Atlanta, plus one to Cleveland, Ohio, one to Silvertown, Ohio, and three to Brooklyn, New York, making a grand total of eleven carloads shipped in that period to destinations in Official territory. S-237, I, 359. It is interesting to note that whereas only three carloads moved to the East in the 1942 period, thirty cars moved to the East in the April, 1945-46 period. Of the thirty, Oliver testified that seventeen went to Pittsburgh and thirteen to Philadelphia; apparently none to New York. IX, 2728.

[70] IX, 2726.

[71] S-246, I, 361, 362.

be given weight under present-day conditions, *but I hope this proposition will be considered from the standpoint of normal conditions which will prevail after the end of the war.*" (Emphasis added)

When the proposed reduction, through a process of appeals, had reached the Buffalo Conference of Freight Traffic Managers of all three Official territory rate associations,[72] and their adverse recommendations had there been affirmed, the Southern Railway informed Kerr of the Southern Freight Association that:[73]

"Under the circumstances, there is no further action we can take at this time. We have in mind reviving the proposal when normal times return."

This was on March 7, 1944. The record contains no evidence of any later request by the Monarch Wine Company for action or of any later attempt by the Southern Railway to revive the request. Oliver on cross-examination, when asked if he did not regard the Monarch Wine Company's complaint as a serious one, replied that he did not think so; "that is just a minor proposition, and I think the experience indicated the complaint has not been serious because of the developments I have just described"[74] (referring to the large shipments during the previous year to the North and the lack of shipments to the Chicago and Indianapolis areas where the rates had been reduced).

This completes the evidence.

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[72] This Conference has been described at pp. 265-269 above. Appeals lie from the Buffalo Conference to the Traffic Executive Association-Eastern Territory and thence to the Presidents' Traffic Conference (see p. 267 above); but no such appeals were taken in this case. Georgia stressed the fact that fourteen months had elapsed from the presentation of the proposal to its final rejection by the Buffalo Conference. The record shows that the initial rejections of the proposal within the several Official territory associations were announced reasonably promptly and that the chief consumption of time was in the appeals from those rejections. S-238-247, I, 359-362.

[73] S-249. I, 363.

[74] IX, 2729.

B. *Georgia's Allegations Considered in the Light of the Evidence Analyzed Above*

1. *Discrimination.*

Georgia contended that the refusal of the northern lines to concur in the proposed reduction in 1943-44 constituted "gross discrimination".[75]

First: did it constitute discrimination within the meaning of the Interstate Commerce Act? The refusal to concur took place several years after the decision in the *Southern Governors' Case*, and not before it as in the *Paper Case*. The northern carriers were therefore on notice that, in the Commission's view of the law, they could not justly refuse a request by the southern carriers to join in northbound rates on "competitive traffic" on a mile-for-mile parity with northern rates on like traffic. Had it not been for the *de minimis* qualification which the Commission attached to the phrase "competitive traffic", the northern carriers would clearly have been chargeable with rate discrimination.[74a] But under all the facts it may be doubted whether this was the sort of case which the Commission, on the basis of the rulings which it made in the *Southern Governors' Case*, would have regarded as presenting any real competitive need for a rate reduction.

Certainly there was no question as to the northbound movement in tank cars. The rate relationships here remained undisturbed, the northbound rate being actually slightly below the Official territory level.

So far as wine in packages was concerned, no movement into the central portion of Official territory occurred after the rates had been reduced by independent action of the Illinois Central. This fact, while not conclusive, supported the northern defendants' contention that there was no competitive need for a rate reduction into the central territory. With regard to the East, the evidence was deficient and shadowy. It showed substantial shipments to the East,

[74a] See pp. 661, 663.
[75] Final Brief, p. 160.

after the rate reduction had been refused, but the shipments were not identified; they may or may not have been in tank cars. Except for the response that the Monarch Company's plant in Brooklyn "seems to have taken care of the traffic involved," the northern lines did not specifically answer the Southern Railway's contention that wines produced in Atlanta from North Georgia apples could not possibly compete under existing rates with wines produced from apples in New Jersey and Virginia. The record fails to show what the Brooklyn plant produced or in what quantities.

Facts indicating that the company's complaint lacked a substantial character were that the Southern Railway had not acted on the complaint until prodded to do so by Gilsten's appearance as a witness for the Southern Governors; that the complaint was not of present urgency because of war-time restrictions on wine production; that, so far as the record discloses, the complaint was not renewed after the war; that the company did a national business, with a nationally advertised product, and had recently erected a larger plant in Atlanta.

Under the circumstances, including the comments of the I. C. C. on the complaint voiced by Mr. Gilsten, it seems to me more likely than not that the I. C. C. would have treated this case, if it had been formally brought before it, as falling within the same category of cases in which the I. C. C. denied relief in the *Southern Governors' Case,* for want of an adequate showing of competitive need for a rate reduction. There can be no certainty about this, and the result might have been the other way; but at least it seems to me that the probability of an affirmative case of discrimination within the meaning of the Act has not here been made out, and I so find.

In declining to concur in the reduction, were the northern carriers motivated by a purpose to prevent or hinder competition in northern markets by the Atlanta producer?

Again the facts presented seem to me to fail to make out an affirmative case, and I so find. The northern defendants may well have concluded in good faith that the southern

shipper did not need the reduction in order to compete without difficulty in the North; that the I. C. C. would have so found; that in line with the *Southern Governors' Case* they were under no legal obligation to join in the reduction; and that they were justified under the circumstances in not sacrificing further revenue under the already truck-depressed rates on wine in packages.

2. *Coercion.*

The northern associations acted as a unit in opposition to the southern proposal, but there was no showing that any particular northern road desired to act favorably upon that proposal, or that there was any coercion within the northern associations.

There was also no showing that the northern associations, in disapproving the proposal, exercised any pressure or intimidation upon the southern roads; on the contrary, these roads through the Illinois Central effectuated the rate reduction independently into a portion of Official territory.

Finally, there was no showing that after the northern lines had refused concurrence the Southern Railway, as the proponent of the reduction, thought sufficiently well of the proposal to wish to take it to the I. C. C.; on the contrary, the evidence points in the opposite direction; and therefore there is no basis for contending that the Southern Railway was restrained by the Southern Freight Association, or by northern pressure, from going to the I. C. C.

I find no coercion in the *Wine Case.*

3. *A Comment on the Attitude of the Southern Carriers Toward Northbound Rate Reductions.*

The *Wine Case* shows, in the failure of the Southern Railway to process the shipper's request until after he had complained about it to the I. C. C., the same policy which was displayed by the refusal of the southern carriers in the *Paper Case* to seek northbound rate reductions requested in 1943 by the southern producers [76]—namely, the policy

[76] Supra, p. 714.

of conserving revenues by not acting on rate reductions requested by southern shippers where in the judgment of the southern carriers the southern shippers do not need the reductions in order to move their products freely northward and to compete successfully in northern markets.

This same policy manifested itself in the position taken by the southern carriers in the *Southern Governors' Case*, and it constitutes a definite part of the *mores* of the railroad world.

IV. *Agricultural Implements (1929-31; 1941)*

On June 24, 1941 the Louisville & Nashville Railroad filed a proposal with the Southern Freight Association to reduce the rate level on agricultural implements from various points in the South, including Atlanta, Georgia, to various points in Official territory. The existing rate was 37 per cent of first class, although 40 per cent of first class was applicable on certain descriptions of traffic. The reduction proposed was to substitute 32 per cent of first class to apply on all agricultural implements. The 32 per cent rate was about 110 per cent of the existing level in Official territory.[77]

The Southern Freight Association approved the proposed reduction [78] but, as will be seen, it was rejected by the northern lines.

Georgia's comment on the case was as follows: [79]

> "Thus, the evidence discloses, culminated a twelve-year struggle on the part of Southern manufacturers of agricultural implements to market their product in the North—a struggle which David E. Lilienthal, while Director of the Tennessee Valley Authority, was moved to describe as an example of the economic handicaps the unequal freight rates impose on the South."

The case divides into two periods, 1929-31, and 1941. Georgia's reference to a "twelve-year" struggle was arrived at by calculating the time between the two periods.

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[77] S-251, I, 365.
[78] S-252, I, 365.
[79] Final Brief, pp. 161, 162.

A. *The Action Taken in 1929-31*

The I. C. C.'s decisions in *Southern Class Rate Investigation*,[80] handed down in 1926 and 1927, which became effective early in 1928, revised the entire structure of class rates within Southern territory and between Southern territory and Official territory. It then became necessary for the carriers to revise the commodity rates on agricultural implements and parts between Southern and Official territories, in order to remove Fourth Section objections and to harmonize the rates with the new class structure.[81]

Early in 1930 the new rates were set at 37 percent of first class on the main items, after the Southern Freight Association had unsuccessfully proposed 36 percent.[82] The Northern lines had contended that the rate should not be less than 40 percent, on the ground that the I. C. C. had approved a 40 percent rate to, from, and within Southwest territory.[83] Several months after this compromise of 37 percent had been effected, the Southern lines apparently sought but failed to obtain a reduction to 30 percent on minimum weight carloads of 24,000 pounds.[84]

The equivalent rates within Official territory were about 29 percent, as will appear below.

There is nothing in the record to show what happened between 1930 and 1941, when the actions of which Georgia specifically complains in this case occurred. The evidence is too fragmentary to support the allegation of a "twelve-year struggle" by Southern manufacturers "to market their products in the North."

B. *The Action Taken in 1941*

The next step, as stated above, was the Louisville & Nashville's proposal in June, 1941 for a reduction to 32 percent

[80] 100 I.C.C. 513, 109 I.C.C. 300, 113 I.C.C. 200, 128 I.C.C. 567.
[81] Dervin of the N. Y. Central, XV, 5156, 5157.
[82] S-253, I, 365-367. The rate was put at 40 percent on certain minor items described by Dervin as traction engines, cane mills, dump carts, etc. XV, 5158.
[83] Ibid at 366; and Dervin, XV, 5158.
[84] S-253, supra at 367.

(on northbound rates only). This proposal was made as a result of an address by David E. Lilienthal, then Chairman of the T. V. A., at Lincoln, Nebraska on April 7, 1941. In that address Mr. Lilienthal stated that: [85]

> "Chattanooga, Tennesse, and Auburn, New York, are the same distance from Fort Wayne, Indiana. But for the amount of transportation charge which will carry a carload of agricultural implements weighing 24,000 pounds from Auburn to Fort Wayne, a carload from Chattanooga will get only to Lexington, Kentucky."

The Louisville & Nashville, in its proposal for a reduction to 32 per cent, after referring to this criticism, stated that: [86]

> "*In order to forestall further criticism of this kind* and to enable Southern manufacturers to reach Official territory consuming points on a more favorable basis than now available, rates reflecting 32 percent of the current first class rates are herein proposed from known shipping points. While the proposed basis is considerably higher mile for mile than the Official territory level (reflecting approximately 110 percent thereof), it is believed that it will be of some assistance in enabling Southern shippers to serve Official territory." (Emphasis added)

Tilford, of the Louisville & Nashville, testified flatly that in actual fact his road, in filing the request, had had no complaint to make about the existing rate, nor had there been any "request from any shipper of agricultural implements in the South for a reduction in the rate." [87] On the contrary, the proposal was filed because of the "public criticism of the rates" by Mr. Lilienthal. After the proposal was filed "practically no interest" had been shown in it by the Southern producers. And after it had been rejected by the Northern carriers as described below, no Southern shipper, so far as Tilford knew, had made any complaints of the rates.[88]

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[85] S-251, I, 365.
[86] Ibid.
[87] VI, 1817.
[88] Ibid.

The political considerations which surrounded the handling of the proposal are illustrated by the following documents. After the Northern committees had recommended disapproval of the proposal the Contact-Fourth Section Committee of the Southern carriers, to which the proposal had been "referred for special handling", met on January 14, 1942, and in its proceedings, introduced in evidence by Georgia,[39] there was a statement that:

> "The submittal was initiated by Southern Carriers *for protective reasons* following an address made by Mr. David E. Lilienthal. . . ." (Emphasis added.)

The minutes then went on to say that nearly all of the existing traffic went to destinations in Illinois and to Eastern Port Cities to which the rates were 30 percent of first class, as against rates of 37 and 40 percent to the interior section of Official territory. Presumably, although the record does not contain the full rate history, the rate of 30 percent into Illinois territory had been established by independent action of the Southern roads with the Illinois Central and the Monon; and presumably, also, the 30 percent rate to the Eastern Port Cities reflected water competition. In any event, the Northern destination level was the equivalent of 29 percent. Consequently a reduction to that exact level would result in a loss of revenue to the Southern carriers on the very considerable traffic going to Illinois destinations and to Eastern Ports. This loss the Southern carriers wished to avoid. The minutes frankly stated that the Louisville & Nashville's proposal of a reduction to 32 percent would avoid any such loss:

> "The publication of rates made 32 percent of first class will not occasion a loss in carriers revenue because to the territory to which it is proposed [i.e., the interior section of Official territory] there is practically no movement at present."

At the same time, the 32 percent proposal, involving as it would a considerable reduction into the interior section,

[39] S-262, I, 369.

might, if accepted, stave off a possible complaint to the I.C.C., which probably "would be similar to that of the so-called [Southern] Governors Case in which the Interstate Commerce Commission prescribed the destination level of rates. This is equivalent of approximately 29 percent of first class. If what we fear should happen [i.e., a reduction to that level] it would reduce the revenue on hundreds of cars now moving [i.e., to Illinois and the Eastern ports] which would amount to considerable in the course of a year."

The record of the proceedings concluded with the remark that "32 percent was the highest level that the Southern carriers felt they could publish and hope to forestall the ultimate publication of something lower with the consequent loss of revenue on presently moving traffic."

After these proceedings the proposal was considered again by the Trunk Line Association and the Central Freight Association, and the previous adverse action was reaffirmed. In each of these Associations the action was taken at the level of the General Freight Agents and no appeals were taken to the Freight Traffic Managers or higher.[90]

The second document indicating the political nature of the proposal was a memorandum from the Chairman of the Central Freight Association to the General Committee of that Association, dated February 19, 1942, following the meeting of the Southern Freight Association Contact-Fourth Section Committee described above. This memorandum referred to the report of the Southern Contact-Fourth Section Committee (the one quoted from above) and then stated that this report "fully explains where this subject originated, and it appears to us that the Committee has gone a long way in trying to find some reason why the rates on agricultural implements from the South to Official territory should be reduced, even in face of the fact that it is admitted that 'the publication of rates made 32 percent

[90] S-263 and S-264, I, 370. In the Trunk Line Association the action was by the Southern and Southwestern Committee which, as described at p. 258 supra, is a specialized committee on the same hierarchical level as the General Freight Committee.

of first class will not occasion a loss in carriers' revenue because to the territory to which it is proposed there is practically no movement at present.' "[91] The memorandum then stated that no Southern manufacturers had shown any interest in the reduction and that it seemed "ridiculous to say that a group of carriers should pick out a certain portion of a speech made by an individual that doesn't represent shippers and is probably not qualified in any respect to talk about transportation matters or rate matters and suggest a reduction in rates from the South to Official territory. Furthermore, in the portion of the speech that is quoted, the following sentence appears: 'The largest national market is concentrated in Official territory.' * * * The largest national market for agricultural implements is not concentrated in Official territory but is located in the territory where most of the agricultural products are produced, i.e., Southern territory and west of the Illinois-Indiana state line."

The memorandum recommended that the proposal be not concurred in, and the Committee acted upon that recommendation shortly afterwards, as noted above.

With regard to the extent of the market in Southern territory, which was referred to in the foregoing memorandum, Tilford of the Louisville & Nashville testified that there were three plow manufacturers located in Georgia, who sold their products primarily in the South and secondarily in the Southwest; that they made no effort to sell in Northern territory and had no plans for doing so; and that the quantity of agricultural implements produced in the South was much less than the quantity used in that section. "For example: in 1941 the class I railroads in the Southern region originated 59,928 tons of agricultural implements and those same railroads terminated or delivered to consignees on their railroads 107,627 tons.

"It would seem that there is ample opportunity for an expansion of the agricultural implements industry in the

[91] ND-50, Vol. M.

South to supply the local trade, and with substantial rate advantage as compared with producers in the North."[92]

One other reason was assigned in the Central Freight Association memorandum, referred to above, for not reducing the rates, and that was that there would then be demands for a downward revision in rates from Western Trunk Line territory into Official territory, which would also be unnecessary. Dervin testified that agricultural implements were produced "at numerous points in Colorado, Nebraska, Kansas and the Dakotas."[93]

C. *Georgia's Allegations, Considered in the Light of the Evidence*

1. *Discrimination*

(a) The facts set forth above, furnishing no evidence of shipper need or of shipper interest in a rate reduction, place this case in the category of those in which the Commission in the *Southern Governors' Case* found no rate discrimination within the meaning of the Act.

Was the non-concurrence of the northern railroads motivated by a purpose to protect northern manufacturers at the expense of southern?

The only evidence offered by Georgia to indicate that it was were statements contained in two letters[94] by Garte, the Chairman of the Trunk Line Association, Southern and Southwestern Freight Committee. The first of these letters, dated August 28, 1941, to the members of the Committee, stated that "the only justification offered" for the proposed reduction was "commercial competition, that is, competition with producers in Official territory at markets in Official territory." That being the case, Garte stated, it was his opinion that the Northern lines should not concur in a reduction lower than that which would be arrived at under the so-called *Stove Formula*.

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[92] VI, 1818.
[93] XV, 5166.
[94] S-254, I, 367 and S-258, I, 368.

In the second letter, written shortly after the first one, Garte stated to the Chairman of the Southern Freight Association that "in cases where a reduction is sought from Southern territory to Official territory merely on the grounds of market competition; i.e., to compete with the situation within our territory, we usually match the proposed rates against those arrived at on the basis of the so-called Stove Formula. . . ." The application of that formula, Mr. Garte said, would result in a northbound rate of 36 percent as against the prevailing 37 percent, and the Trunk Line Committee "saw no necessity for making a reduction of one percentage point; . . . and it was their opinion that the proposal was not justified."

Mr. Garte's letters were written some two years after the Commission in the *Southern Governors' Case* had in effect, although not explicitly, rejected the Stove Formula in favor of northbound reductions to the northern level in cases where substantial competitive difficulty in marketing southern products in northern markets had been established. If in such cases the northern lines, after the decision in the *Southern Governors' Case,* insisted as a matter of policy in continuing to apply the Stove Formula, that would constitute evidence of an intention on their part to discriminate against the southern producers.

There is nothing, however, in the record, apart from the one statement by Garte quoted above, to show that any such policy of fixed adherence to the Stove Formula had been adopted or acted upon. The force of Garte's statement is moreover weakened by the fact that, as the evidence clearly demonstrates, the real ground for non-concurrence in the proposed reduction of the rates on agricultural implements was the lack of any showing of competitive need for the reduction and the knowledge of the northern roads that the proposal had been put forth for political reasons of the sort described above.

Taken as a whole, the evidence does not warrant a finding that the northern carriers' unwillingness to concur in a re-

duction was motivated by a purpose to protect northern manufacturers at the expense of southern.

As to the conduct of the southern carriers in the agricultural implements case: the proposal was not put forward to aid southern producers and was actually intended to bring about as little change in the rate situation and in the revenues of the southern carriers as possible. The real motive was to forestall a complaint to the I.C.C. which might have resulted in a lower reduction than that proposed. This lower reduction, which the southern carriers envisaged as a danger in consequence of Mr. Lilienthal's speech, would have adversely affected their revenues without being called for by the needs of southern shippers. In other words, the proposed reduction which the southern roads decided upon seems to have been made with tongue in cheek, and, while they no doubt wished the northern roads to concur in it, the purpose was not to help southern shippers, who neither suggested nor supported the proposal, but to discourage other and more distasteful reductions. Whatever the criticism which could be directed against the southern carriers' want of frankness in so acting, however, it would not be relevant to Georgia's charges of discrimination.

2. *Coercion*

There is nothing in the evidence to suggest that any of the carriers, northern or southern, or any of the rate associations, northern or southern, were subjected to any form of intimidation or pressure or acted in any way other than as free agents, and I therefore find that no coercion has been established in this case.

V. *Iron and Steel Articles (1939-40)*

A. *Georgia's Charges, and the General Nature of the Case*

This case differs from the *Paper*, *Wine* and *Agricultural Implements* cases analyzed above, in that here the Southern roads were not seeking rate reductions on behalf of Southern

producers shipping northbound into Official territory, but were proposing reductions on shipments southbound to Gulf ports from Southern and border points in order to meet water competition. Georgia's allegation in the *Paper, Wine* and *Agricultural Implements* cases was that the Northern roads discriminated against Southern products by refusing to concur in the northbound reductions desired by the Southern roads. In the *Iron and Steel* case Georgia charged coercive and discriminatory interference by Northern steel interests and by the A.A.R. in the proposed southbound rate reductions, which were wholly within the jurisdiction of the Southern roads. These proposed reductions, Georgia said, "were under the exclusive control of the Southern rail carriers *and were in due course approved by the Southern price-fixing machinery.* The question posed by the State of Georgia is: WHY DID THE SOUTHERN ROADS NOT UNDERTAKE TO EFFECTUATE THESE SOUTHERN-CONTROLLED RATES WHICH HAD BEEN APPROVED BY THE SOUTHERN PRICE FIXING MACHINERY? THE FACT THAT A CURSORY ATTEMPT WAS LATER MADE WITH THE CONSENT OF THE NORTHERN ROADS TO EFFECTUATE DIFFERENT RATES, INJURIOUS TO GEORGIA, DOES NOT MITIGATE THE INJURY TO GEORGIA RESULTING FROM THE FAILURE TO PROCEED WITH THE RATES ORIGINALLY APPROVED."[95] (The emphasis is Georgia's).

Georgia proceeded to answer the question thus put by alleging that the rates originally approved threatened the basing-point system established by the Northern steel interests, and that when these interests realized what was under foot, "the matter was abruptly taken out of the South's hands. Acting on complaints both from Northern carriers and Northern steel interests (State 326), Cleveland took

[95] Final Brief, p. 171.

jurisdiction . . ."[96] And thereafter the Southern roads' proposal was substantially altered, to Georgia's alleged injury. The nature of the alteration, and of the alleged injury was as follows.

The proposal in question, Submittal 20597-W, called for a reduction of 15 cents (from 37 cents to 22)[97] on shipments from Birmingham to New Orleans, in order to retain for the interested railroads traffic which was threatening to move by water. This reduction was 59 percent of the normal iron and steel scale between those two points. Similar percentage reductions were included in the proposal from other producing points to New Orleans. Thus the proposed reduction from Atlanta, Georgia to New Orleans, on the 59 percent basis, was 19 cents, from 47 cents to 28. However, Georgia charged, after "interference by the A.A.R. and the Northern interests, the proposal just described was abandoned," and revised rates were adopted, which provided for maximum reductions of 15 cents (the Birmingham reduction) from all points. The result was that Atlanta producers received reductions of 15 cents instead of 19. Why?

Because, Georgia charged:[98]

> "The Northern interests were prepared to tolerate a reduction of not more than 15¢ and a *flat reduction could more readily be absorbed into the Northern steel basing point price system than percentage reductions designed to maintain the existing relationships in the South between Atlanta and Birmingham* (State 336, 337)." (Emphasis added)

I shall now review as much of the evidence as is necessary to show the circumstances under which the Northern carriers and producers were drawn into discussions of the proposed Southern action; the nature of their representations with regard to that action; and the role played by Cleveland.

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[96] Final Brief, p. 172.
[97] SD-24-KK, Vol. O.
[98] Final Brief, p. 172.

B. *The Case More Fully Examined*

(1) *The Original Proposal (Submittal 19697-W) Which Preceded the One Discussed by Georgia (Submittal 20597-W)*

On June 29, 1939, in Submittal 19697-W,[99] the Louisville & Nashville and the Southern Railway proposed reductions to the Gulf ports from Birmingham and from other origin points in Alabama, Georgia and Southeastern Tennessee. The purpose of the proposal was to induce the Tennessee Coal & Iron Company to use rail service from Birmingham to New Orleans instead of shipping its products in its own barges. Even prior to the proposal the Tennessee Company had made use of its own barge service but it was planning to build additional barges in order to take care of such traffic as it was still sending by rail. The proposed rates were arrived at after negotiations with the traffic manager of the Tennessee Company, who stated that rail service would continue to be used if the proposed rates were put into effect.[1]

Despite this limited purpose of the proposal, the two roads in question considered it necessary, in order to avoid unlawful discriminations, to cover other points of origin in the South, as indicated above.

Their coverage, however, proved to be too narrow. For shortly after the proposal was issued to the members of the Southern Freight Association, two of the members objected that the proposal would upset existing rate relationships:

> "Ashland, Ky., and other points in Southern Ohio group are located on Ohio River and water competition from these points is as great, if not greater than from Birmingham, etc."[2]

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[99] SD-24-A, VII, 1963.
[1] S-336, I, 425, 426.
[2] SD-24-C, VII, 1964.

"We are interested in the rates from Southern Ohio group and we have same water competition from those points as from Birmingham. The same thing is true of Cincinnati and Louisville. It will readily be seen that if the reductions proposed in this submittal are approved similar reductions will follow from other producing points, including all points along the Ohio River and *in all probability other producing points in Official Territory.*"[3] (Emphasis added)

On August 14, 1939 the Executive Committee of the Southern Freight Association recommended that the proposal be referred to a special committee "for study of the whole situation, including rates from Ohio River crossings, St. Louis group and from Southern Ohio." The special committee reached certain conclusions at a meeting held on September 26 and 27, 1939. The evidence does not clearly show what its recommendations were but the minutes show that the committee was aware of the fact that later on it might become necessary "to give consideration to relative rates from Chicago and other interterritorial origins."[4]

(2) *The Revised Proposal (Submittal 20597-W)*

On October 24, 1939 Submittal 19697-W was superseded by Submittal 20597-W. This revised proposal extended the contemplated reductions (i) to additional producing points in the South, including Alabama City near Gadsden, where Republic Iron and Steel Corporation had a plant, and Atlanta, Georgia; (ii) to certain border points between Southern and Official territory, including Louisville and Newport, Kentucky, and Cincinnati; and (iii) to certain points in Official territory, namely, Portsmouth, Ohio and St. Louis and East St. Louis.[5]

Thus the record shows that the Southern territory lines themselves, before any of the Official territory carriers or

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[3] SD-24-D, VII, 1965.
[4] SD-24-G, VII, 1965.
[5] SD-24-D to SD-24-I, inclusive, VII, 1965-66, 1980-81; Tilford of the Louisville & Nashville, VI, 1799-1802; SD-24-CC, Vol. O.

shippers knew of the proposal, determined that the desired rate reduction between Birmingham and New Orleans, in order to avoid unlawful discriminations, would have to be broadened to cover other origin points, including certain points in Official territory, and that the Southern carriers recognized the possibility that still other Official territory points, including Chicago, might later have to be included.

(3) *The Reactions of the Northern Steel Shippers to the Revised Proposal.*

After the revised proposal had been formulated, the Youngstown Sheet and Tube Company, on October 27, 1939 wrote to Kerr, Chairman of the Southern Freight Association, stating that for competitive reasons the Company was "vigorously opposed to this contemplated reduction from Birmingham and St. Louis unless the proposal is extended to include relative reductions from Pittsburgh, Mahoning and Shenango Valleys, Chicago and other producing districts in C.F.A. and Trunk Line Territory."[6] Nothing was said in this letter regarding the effect of the proposal on delivered prices resulting from Birmingham being a basing point. Nor was anything said about price in a letter from the Bethlehem Steel Company to Kerr, dated November 4, 1939, which protested against the failure to give Northern producers the benefit of any corresponding reductions.[7]

The Weirton Steel Company raised the price question in a letter to Kerr dated November 13, 1939:[8] "These reductions only tend to reduce the delivered price by reason of Birmingham being a base, and if the reductions are made we feel certain that the water carriers will reduce their rates so that the relationship now existing will continue. . . ."

Tilford of the Louisville & Nashville, reporting on a conference arranged by Cleveland in Chicago on November

[6] S-325, I, 422.
[7] S-328, I, 423.
[8] S-331, I, 424.

29, 1939, which will be discussed later, stated that the objections of the Official territory carriers had "originated with the Northern shippers now using water service to the Mississippi River crossings and Gulf ports since the delivered prices would be affected by a reduction in the rates from Birmingham, the sales practice being to use Birmingham base price, plus rail rate from Birmingham."[9]

On the other hand, at a later conference of carriers and shippers held on January 16, 1940, which Cleveland called, Kerr reported that the U. S. Steel Company representative "stated his position was neutral" but "he indicated quite clearly that he could not find fault with the southern carriers in their effort to establish rates that might enable them to meet water competition." With the exception of the Andrews Steel Company and a Kokomo, Indiana producer, however, "practically all, if not all, of the other iron and steel shippers strenuously opposed any reduction."[10]

A letter from the Republic Steel Corporation to Kerr, dated February 15, 1940, referred to the fact that "Birmingham is used as a base point in figuring delivered prices."[11]

The foregoing is all there is in the record regarding the attitude and activities of the Northern steel companies. It appears that not all of them joined in the objections, and that at least some of them were concerned about the competitive advantages which would accrue to Southern producers under the proposal rather than about the effect on delivered prices.

In any event, the proposed 15 cents reduction from Birmingham remained intact and was agreed to by all the carriers, so that the objections based on price did not in fact prevail. The modifications which the Southern roads agreed to as the result of the discussions with the Northern shippers and railroads were in the rates from points other than

[9] S-336, I. 425, 426.
[10] S-377, I. 429, at 430.
[11] SD-24-Z, Vol. O.

Birmingham. There was much controversy as to the way in which reductions from other origin points should be related to the Birmingham reduction but there was nothing in the record to show that these controversies had to do with delivered prices or involved the basing point system.

(4) *The Reactions of the Northern Railroads to the Revised Proposal.*

On November 8, 1939, shortly after the formulation of the revised proposal, Chairman Lawrence of the Traffic Executive Association-Eastern Territory wrote to Kerr that:[12]

> "Your Submittal 20597-W is stirring the animals up very vigorously in our territory. I fear if you should do what this proposal suggests it would cost the Eastern carriers more revenue than the Southern carriers get on all of their manufactured iron and steel articles. Mr. Cleveland has this down for discussion at Chicago on November 16. I urge you to see that no action is taken in the meantime."

This communication I interpret as meaning that if the proposed reductions should be effectuated, the Northern shippers would succeed in establishing their right to so many additional reductions in Official territory that the revenue loss to the Northern railroads would exceed the aggregate revenues of the Southern roads on iron and steel shipments. This question of the over-all effect of the proposal on railroad revenues loomed very large in the case, and, as will be seen, in the end the Examiner of the I.C.C., who recommended disapproval of the proposal, based his objections on the principal ground that the gains to the few carriers operating from Birmingham would be small in comparison to the revenue losses of the carriers serving other origin points in Southern and Official territory.

Tilford's account of a conference of Northern and South-

[12] S-330, I, 424.

ern railroads arranged by Cleveland in Chicago on November 29, 1939, set forth the objections of the Northern railroads as follows:[13]

"1. That no additional tonnage would be obtained by the railroads, with the possible exception of the business of the Tennessee Company from the Birmingham District to New Orleans, and the *net result of the whole revision would be to merely reduce the delivered prices.*" (Emphasis added)

In this objection the Northern carriers were expressing the point of view of those steel interests who would be affected in the prices of their products by the change in rate from Birmingham. The remaining objections of the Northern carriers related to their own loss of revenues. Thus:

2. That the proposal "would compel reductions from Chicago, Pittsburgh and other northern manufacturing points to the South."

3. "That the proposed rates are below the iron and steel scale applied in Official territory and the extension of the reduced level to apply from northern manufacturing points would threaten the level of the rates in Official territory. . . ."

4. That the reductions in revenue to the Northern carriers from Northern manufacturing points to the South would "more than offset" any gains to the Southern carriers.

5. That the Northern lines were under pressure to apply to coastwise movements to Gulf ports their relatively low export rates from inland producing points to the North Atlantic ports; and that, if the reductions sought by the Southern lines were made, the Northern lines "were doubtful if they could longer resist" this pressure. They also felt that it would be "difficult to confine the application of such proportional rates to the Gulf ports. . . ."

The Southern carriers disputed all of these contentions.

[13] S-336, I, 425-427.

Whatever the merits of the contentions may have been, it is clear that the Northern carriers were seriously concerned about the effect of the proposed reductions on the Northern rate structure and on the revenues of the carriers.

(5) *The Compromise Settlement Between the Northern and Southern Railroads*

At this same conference of November 29, 1939 (the first between the two groups of carriers) the Northern lines urged that, in order to avoid the rate repercussions described above, the Southern roads should "confine their proposal to the rates from Birmingham to the Gulf where there is actual water competition and not reduce the rates from interior southern points or from the Ohio River Crossings and St. Louis." [14] Tilford's report states that the "southern carriers were unwilling to do this but, after a side conference among themselves, offered to amend the proposal" in several respects, of which the most important were (a) to limit to seven the southern origin points which would enjoy the reductions (Atlanta was among these and, of course, Birmingham); and (b) to provide for a maximum reduction of 15 cents from Ohio River crossings, St. Louis and Northern producing points to New Orleans, "that being the amount of the reduction proposed from Birmingham to New Orleans." [15]

The Northern lines rejected this compromise proposal, and stood firm on their original position. "They insisted that the proposal of the southern carriers, even as amended, threatened the whole iron and steel adjustment, not only from the North to the South but within the North, and they were satisfied the iron and steel industry would not want these changes, nor a general disturbance of the iron and steel rate adjustment." [16]

This impasse was broken at the succeeding conference

[14] Ibid at 427.
[15] Ibid at 428.
[16] Ibid at 429.

of January 16, 1940—the one referred to above at which the U. S. Steel Corporation expressed itself as neutral but the other steel producers, with two exceptions, opposed any reductions. At this conference the Northern railroads accepted the substance of the Southern carriers' compromise proposal as presented at the previous conference, with one addition requested by the Northern railroads. This was that the 15 cent limit on reductions (the amount of the Birmingham-New Orleans reduction) which the Southern lines had proposed to apply to shipments from border and Official territory origin points, should be applied also to interior Southern points.[17] The record does not state the reasons for this counter-proposal. If it had to do, as Georgia suggests, with the basing-point system, the record does not disclose that fact. For all that appears the motive may have been simply to avoid giving a competitive advantage to those interior Southern points, like Atlanta, which on a percentage reduction basis would have received a reduction of more than 15 cents.

In any event, the Southern carriers, after discussion, and "with a view of composing the differences," accepted this counter-proposal, which ended the controversy.[18] There is nothing to show that they were put under any pressure in so doing.

(6) *The Complaint of the Atlanta Freight Bureau Regarding the Effect of the Settlement on Atlanta Producers; and the Curing of this Complaint.*

Georgia introduced in evidence a letter written by Hart, traffic manager of the Atlanta Freight Bureau, on January 31, 1940, in which he asserted that the Atlanta manufacturers had not been advised of the January 16 meeting, and in which he objected that "the relationship of Atlanta as compared with Birmingham, Alabama, Chattanooga, Tennessee, and other Southern manufacturing points was given

[17] S-337, I, 429, at 430, 431.
[18] S-338, I, 431.

very little, if any, consideration, as the disadvantage of the Atlanta manufacturers is very much increased under the revised rates, particularly at Mobile, Alabama. For instance, the proposed reduction from both Birmingham and Chattanooga [to Mobile] is 12 cents, whereas from Atlanta the proposed reduction is only 8 cents." [19]

The defendants introduced evidence to show that Hart's letter was acknowledged by the chairman of the Southern Freight Association on February 9, 1940 saying he had brought Hart's views to the attention of the members;[20] and that subsequently the rate proposal was amended so as to correct the unfavorable situation complained of by Hart.[21] After Hart was notified of this amendment, he wrote to the Southern Freight Association on March 26, 1940 stating "the revised rates proposed from Atlanta to Mobile, Alabama seemed to meet the principal objection of the Atlanta manufacturers with respect to rate relationship with Birmingham, Ala. and Chattanooga, Tenn. apparent in the original proposal, and referred to more specifically in my letter of January 31." [22]

(7) *Application for Fourth Section Relief, and Report by the I.C.C. Trial Examiner Recommending Denial of the Proposed Reductions.*

After the compromise agreement had been arrived at as described above, application for approval of the proposed reductions, with accompanying Fourth Section relief, was filed with the I.C.C. From the beginning the Southern carriers' proposal had contemplated Fourth Section relief, since they did not intend to give to intermediate points the benefit of the reductions from origin points to the Gulf ports.[23] The Northern railroads joined in the application,

[19] S-340, I, 432.
[20] SD-24-T, VII, 1970.
[21] SD-24-U to Z, VII, 1970-1972.
[22] SD-24-AA, VII, 1972.
[23] In Tilford's report of the first conference the Southern lines explained (S- 336, I, 425, at 427) that "the southern carriers' proposal

which they had agreed to do.

On April 14, 1941 the Trial Examiner assigned to the case filed his report recommending denial of the application.[24]

The report showed that the only opposition came from water carriers, from certain New Orleans interests, and from producers in the St. Louis and East St. Louis districts, and at Memphis, Tennessee, Newport, Kentucky, and Huntington, West Virginia.[25] The ground of the shippers' opposition was that the flat 15 cent reduction from these points was improperly related to the reduction from Birmingham and should be higher. The Examiner found that the flat reduction gave the short-haul shippers from Birmingham an advantage over more distant shippers.[26]

The Examiner's principal objection, however, was that the revenue gains which the carriers might expect from Birmingham would be far less than the losses which the carriers serving other origin points would experience. This objection was stressed repeatedly in the report,[27] and the Examiner cited prior decisions of the I.C.C. to the effect that Fourth Section rate reductions should "be no lower than necessary to meet existing competition," and "not be so low as to threaten the extinction of legitimate competition by water carriers";[28] and that the proponents were under "the positive burden of showing that their action in reducing the rates is at least likely to produce more net revenues than would be earned under the present rates, upon the

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contemplates fourth section relief just as the northern lines obtained fourth section relief from manufacturing points in Central Freight Association territory to the Texas ports and that intermediate points in southern territory would not be affected."

[24] SD-25, Vol. O.

[25] Ibid at Sheets 14 to 21.

[26] Ibid at Sheet 13.

[27] E.g.: "From the above, while the carriers handling the traffic from the Birmingham district would have an annual revenue gain of $45,855.80, the annual revenue loss on the traffic from other points would be $86,091 or nearly twice as great." (Ibid, Sheet 24) To the same effect see Sheets 27, 29.

[28] *Trans-Continental Cases of 1922*, 74 I.C.C. 48, 71.

amount of traffic which can be expected in the future if the present basis of rates is maintained. They have no right to expect relief from the provisions of Section 4 merely to take traffic away from the water lines, if the result will be no net gain to the railroads, but loss certainly to the water lines, and in all probability to both." [29]

The Examiner found in this case that if the railroads should obtain all the traffic they expected between Birmingham and the Gulf ports as a result of the rate reductions, the revenue losses from all the other points would be nearly twice as great, and that the proposed rates to New Orleans were lower than necessary to meet existing competition and might seriously threaten legitimate competition by water carriers, exclusive of the private barge operation at Birmingham, which would be discontinued.[30]

Finally, the Examiner pointed out that in cases where the more circuitous rail lines obtained Fourth Section relief to meet rates over the direct lines between the same points, the general level of the rate structure was not disturbed by the grant of relief because the rates were maintained on the prescribed basis over the direct routes. "But here," the Examiner found, "it is proposed to reduce the rates below the approved level [31] over all routes. This would have a tendency to break down the present basis of rates which has been arrived at by the compromise agreement of the many conflicting interests of competing carriers and shippers and which has been approved by this Commission. It is clearly shown on this record that the grant of the relief here requested would not tend to foster sound economic conditions among the several carriers and would not be

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[29] *Trans-Continental Westbound Automobile Rates*, 209 I.C.C. 549, 560, which in turn relied on *Tin-Plate to Sacramento*, 140 I.C.C. 643.

[30] SD-25, Vol. O, Sheets 25, 26.

[31] Earlier in the report the Examiner noted that the present rates from Southern producing points were those which had been approved in *Iron and Steel in the South*, 195 I.C.C. 255, and that the rates from Official territory points were based on *Iron and Steel Between North and South*, 222 I.C.C. 174 (SD-25, Vol. O, Sheet 4).

in accord with the declared National Transportation Policy."[32]

It is clear from the Examiner's report that if the proposed rates from producing points other than Birmingham had been reduced in percentage relationship to Birmingham, as the Southern carriers had originally proposed, which would have resulted in larger reductions than those permitted by the flat 15 cent limitation in the compromise proposal, the Examiner's objections to the proposal would not have been cured. It is true that the more distant shippers, including those from Official territory, would have obtained reductions more fairly related to those from Birmingham and that this would have removed one of the Examiner's objections; but on the other hand the aggregate revenue losses, the injury to legitimate water competition, and the upsetting effects on the rate structure as previously shaped by the Commission's decisions, would have been more serious and extensive. From this point of view the flat 15 cent limitation, to which the Southern roads had agreed in their compromise with the Northern roads, may actually have helped the application.

Moreover, if the Southern roads by that compromise had not obtained the Northern roads' approval of the application, its chances of success before the I.C.C., with the opposition of the Northern roads added to that of particular shipper interests, would presumably have been diminished.

(8) *I.C.C.'s Denial of the Application in July, 1941*

Following the Examiner's adverse report the Southern lines determined to withdraw the application.[33] As a result of war conditions the barge movement from Birmingham to New Orleans had greatly decreased, so that the need of relief had largely disappeared; and the Southern lines were anxious to avoid a denial of the application on the merits, because they wished to be in a position to renew it after

[32] Ibid at Sheet 30.
[33] S-361 to S-372, I, 446-451.

the war if relief should again become necessary. They accordingly asked the Commission for permission to withdraw the application without prejudice. The Commission, however, in its order, after reciting this request, also recited the fact that the relief prayed for had not been "justified"; and the Commission's order took the form of a denial.[34]

(9) *Other Features of the Case: The Role of the A.A.R.; the Proposed Reductions to Memphis*

Georgia presented the *Iron and Steel case* primarily as an example of interference by Northern interests with rate reductions in the South. Georgia, however, also implied (in the passages quoted at p. 753 above) that the A.A.R., through Cleveland, had taken the matter out of the hands of the South, and that had it not been for this coercive intervention the Southern roads would have proceeded with their original proposal.

The record showed that Cleveland did initiate the several meetings between the Northern and Southern lines which eventuated in the compromise proposal. On the other hand, there was no evidence of any pressure by him or of any activity on his part in favor of any particular form of proposal. In his first letter, written on November 3, 1939 to the Chairmen of the Southern, Western and Southwestern rate associations, he stated that information about the proposed reduction had come to him "from the industry as well as the railroads," and that:[35]

> "In view of the heavy production from Official and Western Trunk Line territory and the competitive situation as between producing points, as well as between carriers serving other producing sections, I sincerely trust that in advance of docketing any such proposal that you may find it agreeable to have a conference with representatives of interested carriers in other producing sections, to the end that each group may

[34] S-373, I, 451.
[35] S-326, I, 422, 423.

have the benefit of the view of the roads in the other groups."

The next day he wrote to the same gentlemen, referring to the foregoing suggestion, and saying that further complaints had reached him and that he thought it would be desirable to "discuss this suggestion" at a forthcoming meeting of his Traffic Advisory Committee.[36] At that meeting (about which no details appear in the record) the representatives of the Southern lines agreed to discuss the proposed reduction at a joint conference in Chicago on November 29, 1939 (described at pp. 760, 761 above).[37] The conference was to consider not only the proposed iron and steel rates, but also certain rates on composition roofing material.[38] Writing to the various rate association Chairmen shortly before the conference, Cleveland said:[39]

> "As I understand the situation, the question of rates on iron and steel which the Southern lines have in contemplation comes to me on protest of the Eastern railroads; also the question of rates on composition roofing material comes to me on protest of the Southern group. I therefore feel that I should be present at the conferences on these two subjects."

Cleveland's role as a mediator, equally accessible to the Southern and Northern railroads, appears clearly from this letter.

The detailed description of the November 29th conference written by Tilford of the Louisville & Nashville, which Georgia offered in evidence, contained only two references to Cleveland. One noted that he had arranged the conference,[40] and the other that if a further meeting were to be held (which the Southern lines were to consider, and which would include representatives of the industry) it would like-

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[36] S-327, I, 423.
[37] S-333 and S-335, I, 425.
[38] S-334, I, 425.
[39] S-332, I, 424.
[40] S-336, I, 425.

wise be arranged by Cleveland.[41] So far as is revealed by Tilford's minute account of the discussions at the conference, Cleveland took no part in them.

A further meeting was held, on January 16, 1940, at which the compromise proposal was agreed upon (as described at p. 762 above). Apart from the fact that Cleveland called this meeting, there was no reference, in the detailed description of the discussions by Kerr, Chairman of the Southern Freight Association, to his having played any part in it.[42] Cleveland's role therefore, apart from his original request for a conference, appears to have been no more than that of a presiding officer.

If he had not requested a conference, would the Southern roads, as Georgia suggests, have proceeded with their rate proposal in the form desired by them? The probabilities are in the negative. Certainly the objections of the Northern railroads and shippers, whose interests were directly involved by the terms of the proposal, would have been brought to the attention of the Southern roads through the several rate associations. And, since the Southern roads were going to have to justify the proposal in hearings before the I.C.C. on Fourth Section relief, it seems reasonable to suppose that they would have wished, through joint discussions, to have removed in advance as much opposition to the proposal as possible. The adoption of such a course would seem to me to have been at least more likely than the contrary one suggested by Georgia. But whether any joint discussions had been held or not, the outcome before the I.C.C. would clearly not have been any different.

One other aspect of the case must be briefly noted. The Southern roads' proposal at first was in two parts; it included not only Gulf Port destinations, but also Mississippi River destinations above New Orleans, particularly Memphis. At the first of the joint conferences the Southern

[41] Ibid at 429.

[42] S-337, I, 429-431. Cleveland's own summary of the meeting likewise contains no reference to any proposal by him. S-338, I, 431, 432.

railroads agreed to drop this latter part of the proposal, with the understanding that they might later revive it.[43] All that I have discussed above relates to the other part of the proposal, namely, the adjustments incident to reducing the rate from Birmingham to New Orleans. The proposed reduction to Memphis and other river points was in substance a separate proposal, and it had a separate history, which was confused in Georgia's brief with the history of the main Birmingham-New Orleans proposal.

The history of the Memphis proposal was relatively simple. Some time after they had dropped the proposal, the Southern railroads revived it with certain modifications.[44] Kerr, for the Southern roads, so notified Cleveland.[45] Cleveland, in response, wrote the territorial rate association chairmen that "I am requested to call joint conference earliest possible date as the situation is urgent insofar as southern lines are concerned."[46] Such a conference was duly held on July 30, 1940,[47] including shippers' representatives. At this meeting Cleveland's role was clearly that of a mediator; he stated to those present:[48]

> "Why is the proposition before a joint meeting of this nature? It goes back to a protest received from several of the territories to the original proposal of the Southern lines and we are here through the courtesy of the Southern lines in bringing it back, as they stated they would do in the event they saw fit to revive the proposition. I think we should have a free discussion this afternoon as to the situation, and that you should strive to reach a conclusion, if such a thing is possible, on a basis that will be mutually satisfactory to all. You all have an interest in the adjustment of the iron and steel rates. *You all have sympathy with any territory that is losing business to other forms of transportation. The question is*

[43] S-339, I. 432.
[44] S-344, I. 434.
[45] S-345, I. 434.
[46] S-346, I. 435.
[47] S-347, I. 435-437.
[48] Ibid at 436.

whether you can get on some common ground where each and everyone of you will be satisfied. That is what I would like to see as the result of this meeting.'' (Emphasis added)

At the conclusion of the meeting the Northern lines requested the Southern lines to hold the proposal in abeyance until the Northern lines had had a meeting on September 12, 1940, at which time certain needed data then being assembled would be ready for consideration.[49] The Southern roads agreed, upon condition, however, that the Tennessee Coal and Iron Company, a United States Steel Company subsidiary, would meanwhile refrain from entering into a contract with a truck line between Birmingham and Memphis—a threatened action which apparently had been the principal cause of the proposed rate reduction.[50] Kerr, for the Southern roads, suggested that the Northern roads "might see what could be done towards having the T.C.I. people" postpone their action.[51] A committee of the Northern roads was appointed and obtained the desired postponement.[52] The Southern roads accordingly held their proposed reduction to Memphis in abeyance. It was considered again at a joint meeting on September 19, 1940 in Chicago, at which Cleveland presided.[53] At that meeting the Southern lines announced their intention to go ahead with the proposal, *without change*, and the Northern lines, notwithstanding the previous objections of various Northern shippers, agreed to join with the Southern lines in applying to the I.C.C. for Fourth Section relief, as they had done in connection with the rates to New Orleans.[54]

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[49] Ibid at 437.

[50] S-354, I, 439-444. S-439, I, 452 indicates that where Northern plants controlled Southern plants, as in the case of the T.C.I., it was cheaper for them to ship down river to Southern points like Memphis than to ship from Birmingham to Memphis by rail; hence the proposed use of trucks by the T.C.I. to reach Memphis.

[51] S-354, I, 444.

[52] S-349 and S-350, I, 437, 438.

[53] S-358, I, 445.

[54] Ibid at 446.

That completes the history of the proposal.[55]

The evidence regarding the Memphis proposal thus shows merely that the Southern roads, upon conditions satisfactory to them, agreed to a short postponement of action at the request of the Northern roads in order to give the latter an opportunity to study the effects of the proposal more thoroughly, and that the Southern roads went ahead with the proposal thereafter as they wished to do.

C. *Georgia's Allegations, Considered in the Light of the Evidence Analyzed Above*

1. *Coercion*

I find no evidence of coercion in this case. The proposal put forward by the Southern railroads affected Official territory points; hence the Official territory roads, in stating their objections to the Southern roads, did not act as interlopers. There is no showing that in stating their objections they exerted any pressure upon the Southern railroads. In fact, the Southern roads proceeded with their basic objective, the rate reduction from Birmingham to New Orleans, without making any change in the rate, despite the objections of the Northern railroads and the objections of certain Northern steel companies. The only substantial concession which the Southern railroads made to the Northern railroads was in limiting the reductions from Northern and Southern origin points to 15 cents, the same amount as the reduction from Birmingham. In return for this concession the Northern railroads agreed to support the entire proposal before the Interstate Commerce Commission.

Since the Southern railroads had framed their proposal in such a way as to require Fourth Section relief from the Commission, the proposal was destined from the outset to be publicly heard by the Commission, and the Southern

[55] S-359 and S-360, I, 446, 447 reveal the emergency publication on October 3, 1940 of reduced rates on certain articles from Birmingham and several other Southern points to Memphis.

railroads had every reason therefore to try to work out a common understanding with the Northern railroads so that the proposal might be presented to the Commission with a united railroad front. In the compromise which the Southern roads proceeded to work out with the Northern roads, there is no evidence that either group exercised any coercive pressures on the other.

So far as the intervention of the Northern steel companies was concerned, there is no showing that they did anything more than to express their respective points of view, which even under Georgia's proposed decree all shippers would have a right to do. The opposition of the Northern steel companies was not uniform; the United States Steel Company, for example, expressed itself as neutral. The opposition was to any rate reduction at all and particularly to the reduction from Birmingham, which was a basing point. As stated, the Southern roads went ahead with the reduction from Birmingham unchanged, and the only concession they made was to limit the reductions from other points to the extent of the Birmingham reduction. Certain Northern shippers objected to this limitation in the hearings before the Interstate Commerce Commission's Examiner.

An inference of coercive interference cannot be spelled out from this evidence.

With regard to Cleveland, while he initiated the first conference between the Northern and Southern railroads as a result of the objections made by the former, the evidence depicts him as acting only in the role of a mediator and as taking no active part in the several meetings over which he presided. So far as the record discloses, the compromise between the Northern and Southern roads was worked out entirely between themselves without any pressure or suggestions from Cleveland.

2. *Discrimination*

The Interstate Commerce Commission's Examiner found that the flat 15 cent reduction from all origin points worked

competitively to the disadvantage of the more distant points, including points in Official territory.[56] In this sense it can be said that the Southern and Northern rate associations under whose procedures the compromise proposal was formulated participated in requesting approval of reductions, some of which might have been found to be discriminatory under Section 3 of the Interstate Commerce Act. However, the type of discrimination of which Georgia is complaining is one whose object is to keep freight rates from the South to the North at a level higher than the rates within the North, in order to benefit Northern industry at the expense of the Southern economy. In the *Iron and Steel Case* there was no evidence of any purpose to injure particular localities or shippers, least of all to injure Southern localities or shippers for the benefit of Northern ones. Indeed, the effect of adopting for all origin points the same reduction *in cents* as the reduction from Birmingham to New Orleans, in lieu of the same reduction *percentagewise*, was to give less of a reduction, proportionately, to the more distant shippers—i.e., the further they were from Birmingham, the less their reduction proportionately. In the hearings before the I.C.C.'s Trial Examiner shippers in Official territory at St. Louis and East St. Louis, as well as Southern shippers at Memphis and at the border points of Newport, Kentucky and Huntington, West Virginia, objected to the proposed reductions on the ground that they would give the Birmingham producers, with whom they were in competition, an advantage. I find, therefore, that the *Iron and Steel Case* does not constitute an example of the use of rate associations to impose or to maintain discriminations of the invidious sort complained of by Georgia.

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[56] The Trial Examiner found discrimination in the rates proposed for St. Louis, East St. Louis, Newport, Kentucky, Huntington, West Virginia, and Memphis. The I.C.C. denied the railroads' application but without indicating upon which of the grounds set forth in the Examiner's report it had acted. The Examiner, as has been noted, stressed the over-all loss of revenues and the interference with legitimate water competition as major grounds of objection.

D. *Some General Comments on the Case*

The *Iron and Steel Case* illustrates the ramifying effects of an apparently simple proposal for a rate reduction between two Southern points, Birmingham and New Orleans. The proponent railroads in their very first proposal deemed it necessary, in order to avoid discriminations under the Interstate Commerce Act, to include certain other origin points and to give them the same proportionate reductions, even though the roads were concerned only with keeping rail traffic from the barges at Birmingham. This first proposal, when brought to the attention of the other Southern railroads through the Southern Freight Association procedures, had then to be amended and broadened so as to take in still other origin points, including certain points on the edges of Official territory. The southern roads themselves recognized at the time that more distant Official territory points might be affected, and this turned out to be the case. The result was that general discussions took place between the Northern and Southern roads and the proposal was still further amended to meet Northern objections.

The ramifications of the proposed reductions were further revealed by the report of the I.C.C.'s Trial Examiner, who had to consider not only the effects on particular localities in Official and Southern territory but also the over-all effects on the revenues of the railroads, both North and South, and on legitimate water competition.

The case further illustrates the working out of a compromise proposal at conferences between representatives of the Northern and Southern railroads. Under Georgia's proposed decree, as I have already noted, any agreement of this sort between Northern and Southern railroads would be prohibited. It is worth noting here that if the Southern proposal had gone to the Commission without the modifications introduced in it as a result of the discussions with the Northern roads, the Northern roads would have opposed the proposal before the Commission and would have

made still more difficult the task which the Southern railroads faced of overcoming the major objection, namely, that in order to save some revenue on shipments of steel from Birmingham to New Orleans, the Southern roads' proposal would cause the railroads revenue losses from other points which would far exceed what might be gained from Birmingham.

VI. *Miscellaneous Cases*

A. *Gums and Resins*

This case involved a dispute between Southern and Northern lines over a proposed rate covering synthetic gums and resins from a new plant in Pensacola, Florida to the North. The controversy, however, turned mainly upon the proper description of the commodities involved. The Northern roads claimed that the proposed description for the synthetic gums and resins was so broad that it would include a more valuable group of products, and particularly synthetic rubber. These more valuable products, which the Florida shipper proposed to manufacture, were not entitled to as low a rate as the one requested. The difficulties involved in working out the appropriate description, upon which the rate determination largely depended, were very real, as Georgia's own evidence shows, and the controversy was a *bona fide* one.

In addition, the evidence involved a dispute over the proposed divisions, which the Northern lines contended were not in accord with the I.C.C.'s decision in the *Divisions Case* of 1939 (supra, p. 633).

In the end a rate higher than the Florida shipper desired was established. There was no evidence on which to base a finding that the establishment of this new rate at the level finally arrived at was discriminatory under the Act or was due to a desire by the Northern roads to hinder the product from competing in the Northern markets. Moreover, after the establishment of the rate the plant in question expanded.

I find neither coercion nor discrimination in this case. All this is so clear from the record that I have not thought it necessary to analyze the case in detail at this point. A complete analysis is contained in Appendix "F" (infra, pp. 887-897).

B. *Tin Plate—Decoration-in-Transit—At Savannah*

This case involved a proposal by three Southern railroads to establish decoration-in-transit privileges[57] at Savannah, Georgia upon tin plate shipped from the Birmingham, Alabama district to Tampa, Florida. The case did not concern the Northern carriers in any way, but the General Traffic Manager of the Acme Steel Company in Chicago and a Vice-President of the Weirton Steel Company of Pittsburgh, each of whom as shippers using the Illinois Central Lines had been notified of the proposal by the Illinois Central, wrote to the Illinois Central objecting to the proposal on certain grounds which need not here be described. The Illinois Central, as a Southern carrier and a member of the Southern Freight Association, reported these objections to the membership and they were taken note of in the Southern Freight Association proceedings. Georgia cited the case as demonstrating "the insidious fashion in which Northern industrial influences insinuate themselves into rate discussions in an effort to perpetuate the historical economic tribute from the South to the North. As a result, rail management, itself a captive of non-rail influences, undertakes to dictate to industrial managers where products should be fabricated, to the end that the industrial status quo shall not be disturbed."[58]

There is nothing in the evidence to show, or even to suggest, that the objections of the two Northern steel com-

[57] The right accorded to a shipper, for which he pays a small extra charge, to stop a shipment at an intermediate point and then resume it, while retaining the benefit of the through rate, which is lower than the combination of the local rates.

[58] Final Brief, p. 159.

panies were accompanied by any pressure, or that the Southern carriers in their disapproval of the proposed privilege were improperly influenced by those companies. Even under Georgia's proposed decree (supra, p. 21), which would permit in each territory public discussion by shippers and carriers of every rate proposal, there would be nothing to prevent interested Northern manufacturers in a similar case from stating their objections to a particular proposal which, though affecting at the moment only some particular operation in Southern territory, might have consequences adverse to them in the future. The only difference between such a situation and the one presented by Georgia in the *Tin Plate Case* is that in the former the objections would be made in public, while in the latter they were contained in correspondence between the two shippers and the Illinois Central. However, the record shows that there was nothing secret or concealed about these objections; they were promptly distributed to the Southern carriers, and there is no reason to suppose that the two steel companies would not have been willing to state them in a public meeting had that been necessary. There is nothing in the case which shows either coercion or discrimination. I have summarized the evidence in Appendix "F", pp. 900-907 infra.

VII. *Import and Export Rates (1932-1934)*

A. *Kerr's Statement Relied on by Georgia*

As noted at p. 625 above, Georgia cited, in connection with its allegations about the Northern "rate wall", certain testimony by Kerr before the I. C. C. in 1932, which I reserved for subsequent treatment because it was not a part of the main stream of the North-South controversies which led up to the alleged "rate wall".

The proceeding before the I. C. C. in which Kerr testified concerned a proposed plan of consolidation under which the Chicago, Indianapolis & Louisville Railway, commonly called the "Monon", was to have been allocated to the

Baltimore & Ohio.[59] The Monon was jointly owned by the Southern Railroad and the Louisville & Nashville. Kerr, now Chairman of the Southern Freight Association, was then Vice-President of the Louisville & Nashville Railway Company. The Louisville & Nashville and the Southern Railroad opposed the proposed allocation, because the B. & O.'s "chief interests were in an east and west direction, whereas the Monon's chief interest was in a north and south direction, or the same as the interests of the Louisville & Nashville and the Southern lines."[60]

The portion of Kerr's testimony in opposition to the allocation, which Georgia relied upon in discussing the alleged "rate wall",[61] and which I set forth earlier at p. 625, was as follows:

> "Import traffic from the Gulf and South Atlantic ports to the territory east of the Chicago-Indianapolis-Cincinnati line [the "Monon" line] has generally moved on basis of the domestic class rates, to the extent that there was any movement at all in such traffic, it having been found impossible to induce the Official Territory lines, such as the Baltimore & Ohio, Pennsylvania Railroad and New York Central Railroad, whose major interests lie in an east and west direction and serving the North Atlantic ports, to join in the establishment of competitive import rates in line with those applicable from the North Atlantic ports to the same points."

B. *The Background of Kerr's Testimony; History of the Export-Import Rate Controversy*

Kerr's testimony was given on February 29, 1932.[62] At that time, and for several years past, the Southern and Eastern roads, interested in carrying import and export traffic between various interior points and the Southern and North Atlantic ports, had been engaged in a con-

[59] Pp. 666, 667 supra.
[60] Kerr, V, 1413.
[61] Final Brief, p. 90.
[62] Kerr, V, 1412.

troversy over the appropriate export and import rates. This controversy, like others in the same period which have been traced above, had been precipitated by the necessity of conforming the Southern rates to the long and short haul provisions of the Fourth Section of the Interstate Commerce Act. This necessity caused some recasting of the rate structures, and brought the whole question before the Commission in a proceeding known as *Export and Import Rates*, 169 I. C. C. 13 (1930).

That case ended inconclusively. Thereafter, by schedules filed to become effective March 3, 1932 (note that Kerr's testimony quoted above was given at the end of February, 1932) the Southern lines proposed to establish a new basis of export and import class and commodity rates between the South Atlantic ports (including Savannah and Brunswick, Georgia) and the Gulf ports, and various points in the interior territory. These points were on or west of the Monon Line (roughly Chicago-Indianapolis-Cincinnati), and could be reached by the Southern roads or their connections without the concurrence of the Eastern lines. The Southern roads designated the territory embraced by these points as "Territory B",[63] and it was so styled by the Commission when the case came before it. The proposed rates to and from Territory B were substantially lower, mile for mile, than the rates on like traffic from the same points to the North Atlantic ports.[64] On protest by the Eastern lines, the I. C. C. suspended these proposed rates. The I. C. C. then had to decide what the rates between Territory B and the Southern ports should be.

Coincidentally there was presented the question as to what the rates should be between the Southern ports and

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[63] I am omitting for simplicity certain other Western territory involved in the case.

[64] This and each succeeding reference to the rate situation and the action of the I.C.C. with respect thereto, except where otherwise specifically indicated, are taken from the opinion of the I.C.C. in *Export and Import Rates To and From Southern Ports*, 205 I.C.C. 511 (1934).

various points in that portion of Official territory designated as Territory A, which lay east of the Monon line and which with few exceptions the Southern roads could not reach with their own rails. The Eastern lines were unwilling to join with the Southern lines in rates to and from Territory A except upon a particular basis which was unacceptable to the Southern lines. Failing agreement, the Eastern lines cancelled their participation in the existing joint rates with the Southern lines, leaving the domestic class rates as the applicable basis to and from Territory A. On the protest of the Southern lines the Commission suspended the schedules resulting from this action of the Eastern lines.

Thus the whole export and import rate structure affecting the north Atlantic and Southern ports was up for Commission determination at the time when Kerr testified in opposition to the allocation of the Monon railroad to the B. & O.

C. *Summary of the Commission's 1934 Decision Settling the Export-Import Rate Controversy*

The Commission's decision in 205 I. C. C. 511, handed down in 1934, was in two parts. In the first part the Commission approved, with minor qualifications, the rates desired by the Southern roads between Southern ports and Territory B. In the second part the Commission found not unreasonable the rates which the Eastern lines were willing to join with the Southern lines in effecting between Southern ports and Territory A.

The first part of this decision was a victory for the Southern lines. The nature of the decision was as follows. Historically, ever since an arbitration award favorable to the Southern lines had been handed down in 1907, the Southern lines had enjoyed rate differentials under the rates established by the Eastern lines between the Gulf ports and Territory B. These differentials had been granted by the arbitrators in recognition of the disadvantages

faced by the Southern ports in competing with the Nort
ern ports—disadvantages which included longer ocean haul
and sometimes higher ocean rates, from the major tran
Atlantic ports; inferior dock and banking facilities; and th
long-established custom of shippers to use the Norther
ports. The differentials were widened, percentagewise, i
favor of the South as a result of the general rate increase
granted in 1920.

After 1920 the Eastern lines began negotiations with th
Southern lines for rate readjustments, seeking to restor
at least the relationships which had existed prior to 1920
These negotiations dragged on unsuccessfully till the pro
ceedings before the I. C. C. began. In those proceedings
the Eastern lines argued, among other things, that changed
conditions, including particularly the equalization of ocean
rates, the growth of South American trade, and improve-
ments on the Mississippi, had greatly aided the Southern
ports, and that the rates proposed by the Southern lines
were materially lower than called for by competitive needs.

However, the Commission found, as to the rates pro-
posed by the Southern lines for movements to and from
Territory B, that "differentials under the rates over the
northern routes are necessary to permit the southern routes
to participate in the movement of this traffic." [65] And the
Commission approved the rates proposed by the Southern
lines as justified under all the circumstances. These rates
were based in part on the differentials derived from the
1907 arbitration and in part on the import and export rates
to and from Baltimore (a port which enjoyed differentials
under New York and other North Atlantic ports).

In the second part of the decision, the Commission con-
sidered the propriety of the import and export rates which
the Eastern lines were willing to join with the Southern
lines in effectuating between Southern ports and points
in Territory A. At the time of this case, the import and

[65] *Export and Import Rates To and From Southern Ports*, 205
I.C.C. 511, 553, 554 (1934).

export rates between the interior and the North Atlantic ports were generally the domestic rates (chiefly class rates), subject to differentials in favor of Baltimore (and lesser differentials in favor of Philadelphia). The Eastern lines proposed that the export and import rates between the interior territory (including both B and A) and Southern ports should be on a certain basis considerably *lower* than the domestic rates prevailing between that territory and the North Atlantic ports, but higher than the rates proposed by the Southern lines between the Southern ports and B. As to the B portion of the territory, the Commission, as already noted, approved the Southern proposals and rejected those of the Eastern lines. But as to the A portion, which the Southern lines did not reach with their own rails, the Commission approved the proposals of the Eastern lines. The Commission's rationale as to the A portion was as follows.

First, the Commission noted that:

> "Each group of carriers desires to retain the traffic which it now enjoys and ultimately to secure more.
>
> "The act recognizes the right of competing carriers to adjust their rates, subject to the requirement that such rates be reasonable, non-discriminatory, and non-prejudicial, so as to retain or to increase the amount of the competitive traffic handled by them. *Texas & P. Ry. Co.* v. *U. S.*, 289 U. S. 627, 31; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I. C. C. 691; *Galveston Commercial Assn.* v. *Abilene & S. Ry. Co.*, 109 I. C. C. 114, 125 . . ."[66]

The next question was whether the rates in which the Eastern lines were willing to join from and to Territory A were reasonable, non-discriminatory, and non-prejudicial. In considering this question the Commission noted that:[67]

> "The rates in which the Eastern lines have expressed a willingness to join from and to points in territory

[66] Ibid at 551-2.
[67] Ibid at 554.

> A are, due to the greater distances to the Gulf and south Atlantic ports than to Baltimore and New York, relatively higher than the present rates to either of the latter ports. They are, however, all considerably lower than the corresponding domestic rates to and from the southern ports."

In fact, the Commission said, they are "generally over 30 percent lower than the corresponding domestic rates prescribed in the southern class-rate investigation." The rates proposed by the Southern carriers and approved by the Commission to and from Territory B were still lower, but the Commission found that the disparities which would result, particularly at points near the border of the two territories, were not shown to be unduly prejudicial to shippers or receivers.

The Commission concluded that:[68]

> "In view of the decision of the Supreme Court in *Texas & P. Ry. Co.* v. *United States*, supra, it is clear that we may not condemn either the rates advocated by the southern lines or those advocated by the eastern lines on the ground that the former would be unduly prejudicial to north Atlantic ports and port interests and preferential of southern ports and port interests, or that the latter would be unduly prejudicial to southern ports and port interests and unduly preferential of north Atlantic ports and port interests."

At the end of its opinion the Commission stated to the Eastern lines that they would "be expected to join with the southern lines in the establishment of import as well as export class and commodity rates on the bases herein found justified, insofar as there is a reasonable need therefor."[69]

D. *The Effects of the Commission's Decision*

(1) As previously noted, the Southern lines established, with the Commission's approval, export and import rates

[68] Ibid at 554.
[69] Ibid at 556.

between the southern ports and the territory *west* of the Monon line which were substantially lower, mile for mile, than those between the north Atlantic ports and the same points. The defendants introduced testimony and exhibits illustrating the differentials in favor of the Southern ports, including Georgia's ports, from and to various points in this territory.[70]

(2) Prior to the Commission's decision, the export and import rates between the Southern ports and the territory *east* of the Monon line, which the Southern lines could reach on joint through rates only with the concurrence of the Eastern lines, were generally the domestic class rates. These rates, in view of the relatively higher level of the Southern components, were substantially higher than the rates on like traffic to and from the north Atlantic ports.

As has been seen, the Eastern lines expressed their willingness to concur in rates which were substantially below the domestic rates, and the Commission found these proposals to be neither unreasonable nor discriminatory. While the Commission's opinion did not describe the effect of these proposals (other than to say that they were "generally 30 percent lower than the corresponding domestic rates prescribed in the Southern class rate investigation"), Kerr testified that the resulting rates secured by the Southern lines "were practically the same, mile for mile, as the rates between the same points and New York. It will thus be seen that the conditions with which we were faced in 1932, and the fears that were entertained, no longer existed."[71]

Georgia sought to show, on the basis of the defendants' own statistical evidence, that "to points east of the Monon line in territory controlled by Northern defendants the discrimination described by Mr. Kerr above" [referring to Kerr's testimony before the Commission in 1932] "is still

[70] ND-25, 26 and 27, Vol. J; Sheppard of the Illinois Central, VII, 2175-6; Oliver of the Southern Railway, IX, 2642-2653; Kerr of the Southern Freight Association, V, 1415.

[71] V, 1415.

rigorously maintained."[72] Georgia drew attention particularly to an exhibit,[73] the important parts of which were as follows (I have inserted the captions which indicate the points on or west of the Monon line, and those east of it):

(I) From Points On Or West of Monon Line (omitting for simplicity East Alton, Ill.)	To Savannah, Ga. Percentages of:			
	(a) Miles to New York, N. Y.	(b) Rate to New York, N. Y.	(a) Miles to Baltimore	(a) Rate to Baltimore
Alton, Ill.	86.1	77.3 (or 73.9)*	100.4	82.9 (or 79.3)*
Chicago, Ill.	111.2	91.9 (or 100.0)*	129.1	100.0 (or 108.8)*
Peoria, Ill.	97.0	82.9 (or 86.6)*	112.8	89.5 (or 93.4)*
Springfield, Ill.	91.1	81.0	107.4	87.2
Indianapolis, Ind.	101.3	97.1	124.5	106.3
Terre Haute, Ind.	94.0	91.9	113.4	100.0
Milwaukee, Wis.	122.0	91.9	129.4	100.0
Michigan City, Ind.	113.7	94.4	133.1	103.0
(*These starred rates are applicable only on export traffic via East-West lines)				
(II) From Points East of Monon Line				
Peru, Ind.	109.6	102.8	131.9	112.1
Detroit, Mich.	150.1	144.8	156.8	161.5
Cleveland, Ohio	161.0	161.5	203.8	182.6
Columbus, Ohio	123.5	137.9	160.1	153.8
Toledo, Ohio	134.4	141.4	163.9	157.7
Erie, Pa.	202.6	191.3	234.5	220.0
Pittsburgh, Pa.	199.1	187.0	277.3	215.0
Buffalo, N. Y.	258.5	214.3	255.9	214.3

Georgia emphasized the fact that, as shown by the above figures, the mileage-rate relationships from the points on or west of the Monon line to Savannah and New York respectively were generally more favorable than the relationships from points east of the line. For example, the distance from Chicago (west of the line) to New York was 111.2 per cent of the distance from Chicago to Savannah, yet the rate to New York was only 91.9 per cent of the rate to Savannah. By comparison, the distance from Columbus (east of the line) to New York was 123.5 per cent of the distance from

[72] Final Brief, p. 92.

[73] In the course of cross-examining Hodkinson (at XII, 3968-3974) who assembled the figures, ND-27, sheets 1 and 3; in Vol. J.

Columbus to Savannah, but the rate was a higher percentage —137.9 per cent. And it can be seen by inspection that, on the whole, the relationships west of the line were somewhat more favorable to the South than the relationships east of the line.

On the other hand, it also appears that east of the line, in the cases of Peru, Detroit, Erie, Pittsburgh and Buffalo, the mileage percentages were greater than the rate percentages, and were therefore more favorable to Savannah than to New York. In the case of Cleveland the relationship was almost equal (161.0 and 161.5), and only in the cases of Columbus and Toledo did the rate percentages exceed the mileage percentages.[74]

When *Baltimore*, rather than New York, is compared with Savannah, it will be seen from the above table that a relationship unfavorable to Savannah appears only in the case of Detroit (156.8 as against 161.5); with respect to the other points east of the line the relationships are all favorable to Savannah, by spreads which on the whole are not much exceeded by the favorable spreads in the case of the points west of the line.

As to the port of Brunswick, Georgia, the defendants' tables showed distance-rate relationships in comparison with New York and Baltimore which were even more favorable to the South than in the case of Savannah;[75] from all points but Columbus, for example, the relationships favored Brunswick over New York, and from all points without exception the relationships favored Brunswick over Baltimore; and the spreads in each case were larger than the corresponding spreads favoring Savannah.

Moreover, Hodkinson testified that it would be unlikely or uncommon for shippers to export or import from or to

[74] Hodkinson explained that the rates from the points east of the line to Savannah were equalized with the rates to New Orleans, and that this accounted for the unfavorable spreads at Columbus or Toledo (XII, 3969, 3970); but as counsel for Georgia pointed out, this did not alter the facts.

[75] ND-27, supra, note 73. The other tables, ND-25 and ND-26, need not be analyzed here; they reveal the same general picture.

the points east of the line listed in the tables, because these points were "more conveniently situated, geographically, to the ports of Baltimore, Maryland and New York, New York, and, naturally, both import and export traffic would find its outlet and inlet, whichever way it is, through these more conveniently located ports." [76] By contrast, he testified, the points west of the line were the significant ones; "those are the points where you would have the competition between the North Atlantic and the southern ports; where that competition comes more into play." [77]

E. *Georgia's Allegations Considered in the Light of the Foregoing Evidence*

1. *Discrimination*

On the principle of mile-for-mile rate equality for which Georgia is contending in this case, it is clear from the foregoing evidence that no complaint of discrimination could be made against the export and import rates between the South and the territory east of the Monon line. For the Commission itself found these rates to be non-discriminatory, and, in addition, Kerr testified that they were "practically the same," mile for mile, as the rates to and from the North Atlantic ports, while the statistical evidence showed that, if anything, they were predominantly *lower*, mile for mile, than the rates to and from the North Atlantic ports.

I find, therefore, that Georgia's charge of discrimination against the southern ports, east of the Monon line, is not substantiated. It is true, as Georgia has alleged, that the southern railroads were able to effectuate into the western territory, without the concurrence of the eastern railroads, rates somewhat more favorable to the southern ports than those which the eastern railroads were willing to join (and with Commission approval did join) in effectuating into the

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[76] XII, 3979; to same effect, 3985.
[77] XII, 3980.

eastern territory. But this in itself is not evidence of discrimination, and there is no reason for inquiry into the defendants' motives in this case since Georgia is in no position to claim that refusal to go *below* substantial mile-for-mile equality constitutes discrimination, whatever the motive.

2. Coercion

No evidence of coercion in any form appears in connection with the export-import rate controversy. There was simply a failure to agree in the negotiations between the Southern and Northern associations, following which the Southern lines protested the rates which the Northern lines set out to establish into the territory east of the Monon line, and the Northern lines protested the rates which the Southern lines set out to establish into the territory west of the Monon line, and the Commission settled the whole controversy.

PART THREE

The Nature of the Alleged Discriminatory Threat Against the South, Including Georgia, Inherent in the Power Acquired by the Defendants

(Second Installment, Consisting of the Alleged Discriminatory Rate Structure Resulting from Differences in the Southern and Northern Rate Levels)

In Part One of this Volume the first installment under this heading was considered, consisting of the alleged discriminatory voting arrangements and the alleged rate wall policy of the northern defendants. I there found that the discriminatory character of the voting arrangements had not been established, and that the "rate wall" in its historical sense had been dissolved by Commission action.

In Part Two I considered Georgia's case material involving North-South controversies over interterritorial rates, offered to illustrate the defendants' alleged "coercive and discriminatory price-fixing." I there found that neither discrimination nor coercion had been established in the particular case instances.

Now in Part Three I return to the second installment under the above heading. This installment covers the alleged discriminatory rate structure.

As has been noted in Volume One, Georgia's basic contention with regard to discrimination, the "guts of her case," as counsel for Georgia put it, rests upon the alleged disparity in rate levels between the North and the South, which is said to be maintained by the defendants' coercive mechanisms so that southern producers cannot reach northern markets on the same mile-for-mile rates as the northern producers.

In considering the alleged disparity it is necessary first of all to differentiate between *class rates* and *commodity rates*, since they constitute two different systems of rates and since the methods of making them and of measuring them are not the same.

I. *Class Rates*

A. *The Difference in Class Rate Levels, South and North (Prior to the 1945 Adjustments)*

In the *Southern Class Rate Investigation* the Commission provided that rates constructed on a new scale were to become effective in Southern Territory January 15, 1928.[1] In 1930, in the *Eastern Class Rate Investigation*, the Commission prescribed a class rate scale in Official territory.[2] In Section 14 of Georgia's amended complaint it was alleged that the defendants "fix rates and charges for transportation of some commodities . . . between points in the North and points in Georgia, which are approximately 39 percent higher than the rates and charges for transportation of like commodities for like distances between points in the North."

This 39 percent difference is the difference between the arithmetical average of the mileage scale of first class rates prescribed by the Commission in the above decisions for application *within Southern Territory* and the arithmetical average of the mileage scale of first class rates prescribed by the Commission for application *within Official Territory*.[3]

The defendants showed that the difference between the first class rates prescribed by the Commission for application *from the South to Official Territory* (which is what Georgia complains of) and those prescribed within Official Territory was, on an average, nearer 24 percent than 39 percent.[4]

The foregoing differences were substantially reduced by Commission orders in 1945, as described hereinafter at pp. 801, 802.

The defendants also showed that differences between the classifications prevailing in Southern and Official Territory

[1] 100 I.C.C. 513; 109 I.C.C. 303; 113 I.C.C. 200; 128 I.C.C. 567.
[2] 164 I.C.C. 314; 171 I.C.C. 481; 177 I.C.C. 156.
[3] Tilford, VI, 1752, 1753; and ND-24(a), Vol. J.
[4] Hodkinson, XII, 3824, 3825, 3915 to 3924; XVI, 5260 to 5264; ND-24(a), Vol. J.

respectively make it difficult to assess the exact relationships of the so-called rate levels, and that many articles carry a lower classification (and therefore a lower rate) in the South and from the South to the North than in the North.[5] The Commission itself has stated that:[6]

> "The class rate structures of the South and Official territory differ from each other in four major respects: (1) in the level of the scales, (2) in the progressions of the scales, (3) in the relations of the several component scales which make up the class-rate system, and (4) in the governing freight classifications. The difficulties involved in any attempt to compare the average level of these two rate structures, as well as the others, have been pointed out."

B. *The Small Use of Class Rates*

Whatever may be the exact differences between the respective class rate scales, Georgia has conceded[7] that these differences "contribute little to our knowledge of the substantial discrimination charged here, since the class rates move a relatively insignificant portion of the traffic from the South to the North. From the fragmentary data available the I.C.C. in Docket No. 28300 estimated that less than one percent of the carload interterritorial traffic from the South to the North moved on class rates.[8]

"In the same investigation the data gathered by the Commission discloses that approximately 95 percent of the total carload interterritorial traffic from the South to the North moved on commodity rates."

The Commission further stated, in the proceeding cited by Georgia and reported in 1945, that from the standpoint of volume of traffic, class rates were "the least important

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[5] Hodkinson, XVI, 5263, 5264.

[6] *Class Rate Investigation, 1939* (1945) 262 I.C.C. 447, 592.

[7] Final Brief, p. 86; citations omitted.

[8] *Class Rate Investigation, 1939* (1945) 262 I.C.C. 447. The data are shown at 564, 565.

of the different kinds of rates,"[9] and that for a long time their use had been "steadily diminishing."[10]

And, in the *Southern Governors'* Case, the Commission stated that, as it had pointed out a number of times, "no inference as to the degree of difference, if any, in the general rate levels and in transportation conditions in the two territories could properly be drawn from a comparison of the class-rate levels."[11]

C. *The Economic Importance of Class Rates*

In spite of the small volume of South-North traffic shipped on class rates, and the small effect which class rates have on the over-all average of rates, class rates play a significant part in the economics of rate relationships. This Court pointed out in *New York* v. *United States*, 331 U. S. 284, that class rates, being already in existence as prescribed by the Commission, have to be utilized where lower commodity rates cannot be negotiated and agreed upon; and consequently that manufacturers, when considering the possibility of locating in the South, have to reckon with the fact that unless they succeed in obtaining lower commodity rates they will be subject to the class rates, which will normally put them on a higher mile-for-mile basis than their northern competitors when they seek to ship into the northern markets.

This effect of the class rate structure will be further discussed in a moment.

D. *The Movement for Equalization of the Class Rate Levels, and for the Unification of Classifications as a Necessary Concomitant*

The Commission explained, in its opinion in the *Southern Governors' Case* in 1939, that the class rates which it had previously prescribed in the *Southern* and *Eastern Class Rate Investigations* in the '20s (and in its similar revisions

[9] Ibid at 564.
[10] Ibid at 548.
[11] *State of Alabama* v. *N. Y. Central R. Co.* (1939), 235 I.C.C. 255, 322.

of the Western and Southwestern class rates) had been fixed, not with a view to equalizing their respective levels, but with a view to removing internal inconsistencies and incongruities within the separate territorial class rate systems.[12]

Mindful of the need of moving toward equalization, the Commission on July 29, 1939 (while the *Southern Governors' Case* was before it) initiated on its own motion two investigations. These two investigations were interconnected, and were reported upon in 1945 under the title of *Class Rate Investigation, 1939*.[13] One investigation was designed to effectuate as much uniformity as possible in freight *classifications*, and the other to effectuate as much uniformity as possible in *interterritorial class rate levels*.

The second objective could not be accomplished without the first. For class rates, it will be recalled, consist of mileage scales of rates applicable to different classes of commodities, the commodities in each particular class paying the same rate per hundred pounds, so that the class to which a particular commodity is assigned (its "classification rating") determines the rate that is charged for hauling it a given distance.[14] The *classifications* consist, therefore, of lists containing descriptions of all the different commodities, and setting forth the class or "classification rating" assigned to each one. One class of commodities is designated as first class (or Class 100) and each other class is stated as a percentage or multiple of first class. The classification does not contain the class rates themselves; these are found in a published tariff which specifies, for each different class, rates in cents per hundred pounds between all possible points of origin and destination. Therefore, to determine the class rate applicable to the shipment of a

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[12] Ibid at 266, 321.

[13] 262 I.C.C. 447; the history of the investigations is set forth at 454-456.

[14] As the Commission has put it (Ibid at 473) "a rating must be complemented by a class rate, and vice versa, in order to give substance to either."

particular article from A to B, it is necessary first to find in the classification the class to which the article is assigned, and then to find in the tariff the class rate that applies to that particular class from A to B.

In each territory the railroads have established classification committees which assign commodities, as questions arise, to appropriate classes; in doing so the committees take into account such factors as the weight of the particular commodity, its liability to damage, its value, its possible movement in carloads, the danger of its damaging other goods, the trade and competitive conditions applying to it, and so forth.[15]

Obviously uniformity in class rates cannot be achieved without uniformity in classifications. As has been previously noted, many articles in the South have been classified in one way while the same articles have been classified in another way in the North, so that even if the freight rate mileage scales should be equalized between the two territories, these articles would nevertheless be carried at different rates depending upon the territory and its scheme of classification. And the same situation has prevailed as between the other territories.

Ever since 1887 the Interstate Commerce Commission has endeavored to promote the unification of freight classifications throughout the United States.[16] In its first annual report in that year the Commission "commended the work of the railroads in reducing the great number of classifications then in effect . . . but emphasized the necessity of a single classification for the entire country. The importance and practical necessity of uniformity were reiterated in succeeding annual reports." In 1912 the Commission "spoke of the multiplicity of varying classifications then prevailing, and condemned them as a public evil that caused confusion and constant embarrassment in the interchange of freight between railroads."

[15] Ibid at 481.

[16] Ibid at 459. The following citations in this and the next paragraph are from the same source.

Consistently, however, the Commission "adhered to the opinion that the actual work of unification could be undertaken best by the carriers themselves. We recognized fully the great difficulties to be overcome, but declared that they are not insurmountable to carriers' specialists of long experience in work of this sort, and that unification is practicable. Cognizance was taken of the obvious fact that the merging of ratings would necessitate mutual concessions from shippers and carriers, in that the effect must be to lower the ratings on some articles of commerce, and to increase them upon others."

Thus the work of unification came to consist of cooperative efforts by the railroads, urged on and aided by the Commission. Gradually the multitude of classifications promulgated by individual railroads gave way to classifications uniform within a given territory, in the South, the West and the North respectively.[17] In 1919 there came into being, upon the recommendation and with the approval of the Commission (in *Consolidated Classification Case*, 54 I.C.C. 1), a consolidation of these three territorial classifications into one volume containing one set of uniform commodity descriptions with three rating columns, one for each territory, and with one set of rules for their application.[18]

While this unification of the *rules* and *commodity descriptions* represented an important step forward, other differences in the classifications, which the Commission characterized in 1927 as "vital", persisted; and the Commission stated that so long as they did persist "it would be impossible to bring about uniform class percentages throughout the country." At the same time the Commission emphasized the dual nature of the task which confronted the industry by pointing out that "until the class

[17] Ibid at 459, 460.

[18] The Consolidated Freight Classification, a copy of which was given me at the hearings, is a book of 432 pages, exclusive of current supplements. IX, 2578.

percentages are made more nearly uniform, progress toward uniform classification is impeded." [19]

In the two investigations launched in 1939, which were destined to take six years to complete, the Commission tackled this dual task directly.

In 1940 Congress, in several amendments to the Interstate Commerce Act, emphasized the importance of the undertaking. One amendment (embodied in Section 5(b) of the Transportation Act of 1940) directed the Commission to make a general investigation of the rate structure both interterritorially and intraterritorially, covering both rail and water carriers, to determine whether the rates were unjust and unreasonable, or unlawful in any other respect. Commenting upon this enactment the Commission said in its annual report for 1940: [20]

> "The extensive class-rate and classification investigations above discussed may, we think, very properly be regarded as a highly important first step in this general investigation which Congress has directed us to institute."

Another 1940 amendment broadened the scope of the basic anti-discrimination section of the Act (Section 3(1)) by adding the words "region, district, territory" to the coverage of its protection.[21] At the same time Congress declared the purposes which it had in mind in providing for the regulation of all modes of transportation, and required that all provisions of the Act should be administered and enforced with a view to carrying out those purposes. One of the declared purposes was "to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue pref-

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[19] Ibid at 464, referring to and quoting from *Consolidated Southwestern Cases* (1927), 123 I.C.C. 203.

[20] Ibid at 513.

[21] Ibid at 688-692, tracing the legislative history of the several amendments.

erences or advantages, or unfair or destructive competitive practices."

After reviewing the history of these legislative enactments the Commission, in its report in *Class Rate Investigation, 1939*, issued in 1945, concluded that "the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country."[22]

And this Court observed, in *New York* v. *United States*, 331 U. S. 284, 309, that the Commission had further concluded in substance that interterritorial rate parity "could not be achieved unless traffic was, in the main, moved on class rates."[23] The importance of the Commission's undertaking in *Class Rate Investigation, 1939*, is therefore apparent.

E. *The Effect on the Class Rate Structure of the Commission's Orders in Class Rate Investigation, 1939*

The Commission's report, made public on May 15, 1945, after Georgia had brought this suit, was divided into three parts. A brief summary of each, necessary for an understanding of the relief sought by Georgia, here follows.[24]

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[22] Ibid at 692.

[23] The Commission said in its report that the relative disuse of class rates was "a rather surprising and significant fact in view of what we said relative to the proper functioning of class-rate structures in the prior decisions in which many of these rates were prescribed." *Class Rate Investigation, 1939*, 262 I.C.C. 447, 565. (To the same effect, 698, 699). And the Commission then quoted from two of these decisions; the following passage from *Southern Class Rate Investigation*, 100 I.C.C. 513, 603, being typical: "The new class rates should look also to the future. They should, for example, be so framed as to facilitate the elimination not only of special classification exceptions but also of many commodity rates which provoke complaints of discrimination and have no other excuse than an inadequate and imperfect class-rate structure."

[24] *Class Rate Investigation, 1939*, at 447-449 (the Commission's own summary, here greatly abridged).

(1) *Part I, Relating to Uniformity of Classification*

The Commission found that the substantial differences between the several territorial classifications were unduly prejudicial; that a basic unity was essential to the establishment of properly related class rates; and that the existing classifications were therefore unlawful.

In answer to objections that a uniform classification would not be practicable, the Commission observed that "members of the classification committees, who have expert knowledge of transportation, economic, production, commercial, and industrial conditions sufficient to determine ratings within these extensive classification territories and between them, *acting as one committee, if willing,* could initially decide upon uniform ratings for the entire country throughout which they now determine the ratings, with close approximation to the standards of justice and reasonableness laid down in the act. *They have done so, but only in part.*" [25]

The Commission then found that, in the main, and as a general pattern, the Official Territory classification would be just and reasonable for application uniformly throughout the country. The Commission then gave the carriers ninety days in which to state whether they would undertake to make and tender such a uniform classification.

Representatives of the railroads in Official, Western and Southern territory advised the Commission of their willingness to undertake this responsibility and to collaborate with other carriers to that end.[26]

Thus, on the Commission's initiative, the railroads have embarked upon a large cooperative undertaking to bring about a uniform freight classification as a necessary step toward a uniform system of class rates. The difficulties which the Commission would have faced if it had had to undertake the work itself are clear from the report; and the report also shows that the railroads, acting individually

[25] Ibid at 507; emphasis added.
[26] ND-5, Vol. F.

and not through their organizations, could not have attempted the task.

(2) *Part II—Prescription of New, Uniform Class Rates to be Made Effective Upon the Adoption of the New, Uniform Classification*

In this part of the report the Commission found that the relation between the interterritorial class rates applicable from the South (and from Southwestern and Western Trunk Line territories) to Official Territory, and the class rates within Official (and Illinois) Territory, gave undue and unreasonable preference and advantage to Official (and Illinois) Territory, and to shippers and receivers of freight located therein. The relation could not be justified by transportation conditions; in particular the Commission found that there were no significant differences between the territories in costs of transportation. The Commission therefore declared that the relation violated Section 3(1) of the Act.

In addition, the Commission found that the class rates within each of the foregoing territories, and between each of them, were unjust and unreasonable, in violation of Sections 1 (4) and 5a of the Act.

To cure these violations the Commission prescribed new uniform class rates, to become effective within and between the territories in question simultaneously with the adoption of the new uniform classification. The Commission recognized, however, that this classification could not be brought into being for some time, and that therefore some temporary stop-gap adjustments in the class rate structures, to alleviate their prejudicial and unreasonable characteristics, should be prescribed. With regard to the time element, and the nature of the task confronting the railroads in working out a uniform classification, the Commission said:[27]

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[27] 262 I.C.C. 447, 702.

"From our prior experience with extensive rate adjustments and classification proceedings, and from the record in this proceeding, we know that necessarily considerable time must elapse before the respondents can formulate and tender for our approval a classification which will conform to our finding with respect to justness, fairness, and reasonableness. *The many complexities inherent in a task of such character and magnitude are inevitable. The shipping public and rate-making authorities of the States should be afforded opportunity for participation in the undertaking as far as their interests are concerned.* And, as shown by the record, and as within our common knowledge, there is at the present time a shortage of men who may be devoted to such task by the respondent carriers, public authorities, including this Commission, and by shippers and their organizations . . ." (Emphasis added)

(3) *Part III—Temporary Class Rate Revision, Pending Completion of the New, Uniform Classification*

In spite of the time which would have to elapse before the adoption of the new, uniform classification and the simultaneous establishment of the new, uniform class rates, the Commission found that "in the circumstances it is possible and practicable to make certain readjustments in the existing basis of class rates, predicated upon the continued application of the existing classifications, which will be *just and reasonable*, which will have the effect of *bringing to the minimum the preferences and prejudices which we have found to be unlawful, as completely as it is practicable now to eliminate such violations.*" [28] (Emphasis added.)

Accordingly, the Commission ordered that, pending the establishment of the new, uniform rates and classification previously described:

(i) There should be a *reduction* of 10% in the existing class rates (interstate) within Southern, Southwestern, and Western territories, and between those territories, and between those territories and Official territory;

[28] Ibid at 702, 703.

(ii) There should be an *increase* of 10% in the class rates (interstate) within Official (including Illinois) territory.

The effect of this order was, of course, to narrow substantially the gap between the Southern and Northern class rate levels, by lowering the Southern and South-to-North rates and by increasing the Northern rates; but the complete closing of the gap was left for the future, pending the working out of a uniform classification.[29]

F. *Affirmance by this Court (in New York* v. *United States) of the Commission's Orders in Class Rate Investigation, 1939; and the Bearing of this Decision, and of the Commission's Action, on Georgia's Case*

Two suits, which were subsequently consolidated, were brought to set aside the orders of the Commission which have just been described.

In the first and principal suit, the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana, Michigan and Wisconsin (joined by the Governors of the six New England States as intervenors) attacked the Commission's action on the major grounds that it was "an attempt to regulate industrial conditions by means of rate making"; that it was "the result of political agitation"; and that the findings of undue prejudice and preference

[29] Subsequently, as noted by this Court in *New York* v. *United States*, 331 U.S. 284, at 349, the gap was somewhat further narrowed, percentagewise, by a nationwide increase in freight rates granted in *Ex Parte No. 162*, 264 I.C.C. 295, 266 I.C.C. 537. In this case rates on articles under the general commodity grouping of Manufactures and Miscellaneous, class rates and rates on less-than-carload and any-quantity traffic were increased 25 per cent in Official territory, 20 per cent within and between other territories, and 22.5 per cent between Official territory and points in other territories. Still later general freight rate increases may have still further narrowed the gap, percentagewise, but it cannot be eliminated except through the medium of a uniform classification and uniform class rates, as directed by the Commission.

were "arbitrary", and lacking in any proof of "substantial injury" to the shippers outside of Official territory.[30] Intervening as defendants in support of the Commission's orders were the Southern States, the Southern Governors' Conference, and various Southwestern and Western States, as well as various State regulatory bodies from the South and West.

In the second suit the Western Lines attacked the orders on the ground that the rate reductions would be confiscatory as to them.[31]

The District Court for the Northern District of New York upheld the orders, and on May 12, 1947 its decision was affirmed in *New York* v. *United States*, 331 U. S. 284. The opinion of this Court in the latter case established the following propositions which have a particular bearing on Georgia's suit, and which are therefore noted here without any attempt to summarize the opinion as a whole.

(a) *In spite of the small use of class rates, their relationships are discriminatory in favor of the North and are economically injurious to the South and the other affected regions; and this injury need not be established by showing actual discrimination against particular shippers in such regions*

The Court, after noting the "great differences between territorial class rate levels,"[32] as found by the Commission, and after holding that "discrimination in class rates in favor of Official territory and against the Southern, Southwestern and Western Trunk Line territories" had been "established",[33] considered the question whether this discrimination was unlawful as being unduly prejudicial

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[30] The quotations are from the opinion of the Court in *State of New York* v. *United States* (1946) 65 F. Supp. 856, 869, 870, affirming the orders. From this decision appeals were taken to this Court as indicated below.

[31] Ibid at 867, 870.

[32] *New York* v. *United States*, 331 U. S. 284, 301.

[33] Ibid at 305.

within the meaning of Section 3 of the Interstate Commerce Act.

In connection with this question the Court took up the appellants' objection that because of the disuse of class rates these rates could not be the "source of injury to shippers from the South and the West; that if the latter are prejudiced by the rate structure, the injury must flow from the exception rates and commodity rates not involved in this proceeding . . ." [34] The Court, however, rejected this argument as taking "too narrow a view of the problem confronting the Commission." Discriminatory rates are a form of "trade barrier" against a region, and "non-discriminatory class rates remove that barrier by offering that equality which the law was designed to afford. They insure prospective shippers not only that the rates are just and reasonable *per se* but that they are properly related to those of their competitors. *Shippers are then not dependent on their ability to get exception rates or commodity rates after their industries are established and their shipments are ready to move. They have a basis for planning ahead by relying on a coherent rate structure reflecting competitive factors.*" [35] (Emphasis added.)

The Court then went on to say that a showing of discrimination against a region is not "dependent on a showing of actual discrimination against shippers," because otherwise a case "could never be made out where discriminatory rates had proved to be such effective trade barriers as to prevent the establishment of industries in those outlying regions. If that were the test, then the 1940 amendment to § 3 (1) would not have achieved its purpose. We cannot attribute such futility to the effort made by Congress to make regions, districts and territories, as well as shippers, the beneficiaries of its anti-discrimination policy expressed in § 3 (1)." [36]

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[34] Ibid at 307.
[35] Ibid at 307, 308.
[36] Ibid at 308.

The Court then summarized the Commission's inquiry "into the effect of class rates on the economic development of Southern, Southwestern and Western territories . . .", and sustained its finding that "prejudice to the territories in question had been established." [37] The record, the Court said, "makes out a strong case for the inference that natural disadvantages alone are not responsible for the retarded development of the South and the West, that the discriminatory rate structure has also played a part. How much a part cannot be determined, for every effect is the result of many factors. But the inference of prejudice from the discriminatory rate structure is irresistible." [38]

(b) *The Commission's "10 per cent interim rate order did not attempt to bring about complete elimination of the discriminatory features of the class rate structure. It was only an approximation of that result, the complete step awaiting the new uniform classification."* [39]

I conclude from the foregoing propositions that in the present case Georgia need not prove by special evidence that the class rate structure as temporarily adjusted is injurious to her. This Court has sustained the Commission's finding that the class-rate relationships at the time of the Commission's decision were favorable to Official territory shippers and injurious to the economy of the South, necessarily including Georgia; and the Commission's orders, as the Court found, did not purport to eliminate the discrimination altogether but only to reduce it pending the adoption of the new uniform classification and the simultaneous taking effect of the new, uniform, non-discriminatory class rates which the Commission had prescribed for the future.

It is true that the interim rates resulting from the 10 per cent reductions in the South and from the South to the North, and the 10 per cent increases in the North, were de-

[37] Ibid at 310.
[38] Ibid at 315.
[39] Ibid at 343.

cleared by the Commission to be lawful for the time being. However, in the very order prescribing them the Commission, as noted at p. 801 above, affirmed their partial nature by stating that they would "have the effect of bringing to the minimum the preferences and prejudices which we have found to be unlawful, *as completely as it is practicable now to eliminate such violations.*" (Emphasis added.) In other words, the Commission was going as far as it then practically could to do away with the injurious discrimination, some portion of which, however, would still remain for future elimination.

I conclude, therefore, that Georgia would be entitled to relief, without a special showing of injury, if she could establish, first, that the railroads through road-by-road negotiation and agreement on rate changes could remove the remaining class-rate discrimination even before the taking effect of the new classification and the new class rates; and secondly, that the defendants' rate associations impede that process.

The evidence, however, shows that the remaining class-rate discrimination cannot practically be removed through such negotiation but can be removed only through the means directed by the Commission, namely, the completion of the uniform classification, now under way, and the consequent taking effect of the uniform class rates already prescribed by the Commission. The completion of the uniform classification, in turn, is a task which has necessarily been assigned to the classification committees representing the railroads in the several territories; it can be accomplished only by their collective negotiations and agreement —or by the Commission if they ultimately fail to reach an agreement.

Therefore, so far as class rates are concerned, we do not reach the question of the effect of the defendants' associations on the removal of discriminations through road-by-road rate negotiation, because such negotiation cannot be the means of bringing a uniform class rate system into existence.

The difference in this respect between class rates and commodity rates deserves to be emphasized. Commodity rates are the result of negotiation and agreement between particular railroads, and apply only to the shipment of a particular article from one specified point to another specified point; each such shipment is, in effect, lifted out of the class-rate system and given an individualized rate. It is true that each such rate may affect other rates and that therefore, as Georgia concedes, some forum is necessary at which the consequences of every proposed rate change may be discussed by all interested shippers and carriers before final action is taken. Nevertheless the fact remains that piecemeal adjustments of commodity rates are constantly made in this fashion through the initiative of some particular shipper or carrier, whereas the class rate structure has a unitary character[40] which for practical purposes enables it to be altered only by Commission action, with or without the implementing aid of collective action by the industry.

The contrast between commodity and class rates may be pointed up by noting that, if two or more railroads should attempt by agreement to change a particular class rate, the change would apply not merely to the particular commodity with which the railroads were then concerned, but to all of the commodities grouped in the particular class. The undertaking would normally have too many ramifications to be handled except through Commission hearings and Commission orders. Hence it is that when individual railroads wish to make some particular rate adjustment they almost always do it by way of a special bargain which establishes a rate outside of the class rate structure and without changing that structure.

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[40] In *Class Rate Investigation, 1939* (1945) 262 I.C.C. 447, 690, 691, the Commision said: "The description of the rates of which the Albany Port District complained—that is, that they are *not a loose aggregation of separately established rates but a single entity composed of interrelated rates*—is particularly apropos of the territorial and interterritorial rate structures with which we are concerned in this proceeding."

The unitary nature of the territorial class rates, as distinguished from the specially negotiated and heterogeneous body of commodity rates of all types, is further illustrated by the fact that the Commission has repeatedly referred to the class rate structures, and their relative levels, as having been "prescribed" by the Commission in the several class rate investigations previously described. For example, in the *Southern Governors' Case* (1939) the Commission said (speaking of its actions in the Southern and Eastern class rate investigations):[41]

> "In the southern case, broadly speaking, the existing level within the South was continued and the rates between the South and the North were reduced to a slightly lower level than that within the South. In the Eastern case the existing level was slightly increased. As a result, the class rates prescribed for application in the South and between the South and the North are on higher levels than the class rates prescribed for application within the North, the level of the first-class basic scale within the South prior to the recent general increases averaging about 139 percent of that in the North."

Similarly, in *Class Rate Investigation, 1939* (1945) the Commission said:[42]

> "The interstate class rates under investigation in this proceeding are, generally speaking, those prescribed by us in the general class rate revisions previously described."

And, speaking of what those revisions had accomplished, the Commission said in the same case:[43]

> "Removal of the unlawfulness found in these revisions resulted in the application of uniform percentage relations between the classes throughout official territory, southern territory, and the eastern half of western territory, respectively, and interterritorially

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[41] *State of Alabama* v. *New York Central R. Co., et al.* (1939) 235 I.C.C. 255, 267.
[42] 262 I.C.C. 447, 562.
[43] Ibid at 520.

when the rates are governed by the same classification. It also established harmony among rate levels, even though different levels were prescribed for defined parts of the same territory,[44] in place of the great variations that had existed."

As has been previously noted, the internal order which the Commission thus brought about in its prescriptions of the class rates within each of the territories was a forward step; but it left for completion the equalization of the class rate levels as between the territories. This equalization the Commission prescribed in *Class Rate Investigation, 1939*, as discussed above, to take effect upon the completion of the uniform classification, at which time the temporary adjustments ordered by the Commission would give way to full equalization.

I find for the reasons already stated that this equalization cannot practically be brought about except in the manner thus directed by the Commission, and that Georgia's allegations of a coercive freezing of rate discriminations can be made, if at all, only with respect to *commodity* rates.

II. *Commodity Rates*

A. *The Nature and Use of Commodity Rates*

As has been stated, commodity rates are specially bargained rates applying to the carriage of some particular commodity between specified points. They are not given a classification rating and have no fixed percentage relationships to first-class rates.[45]

[44] Thus within Official territory the Commission, in the eastern class rate investigation, "prescribed rates within zone A of New England 5 per cent higher than those prescribed for application within trunk-line and central territories. . . ." *State of Alabama v. New York Central R. Co., et al.* (1939) 235 I.C.C. 255, 325.

[45] A summary of the characteristics of the different sorts of rates is given in *New York* v. *United States*, 331 U. S. 284, 290. More extended definitions and descriptions appear in *Class Rate Investigation, 1939*, 262 I.C.C. 447, 476-479, 548-550, 562-565; and in the *Southern Governors' Case* (State of Alabama v. New York Central R. Co.) 235 I.C.C. 255, 265-267.

The establishment of commodity rates is the normal method of effectuating a desired adjustment, covering a particular type of shipment, without altering the class rate structure. The same function is performed by *exception* rates. These are rates resulting from the transfer of a commodity out of its regularly assigned class in the classification, into another (usually a lower) class. Another type of exceptions are the so-called "column" rates, which are fixed as definite percentages of first-class rates but, like commodity rates, are applied only to particular commodities and are assigned to no regular class.

Exception rates (including column rates) are not, strictly speaking, the same thing as commodity rates, but since they perform the same function of by-passing the class rate structure, they are here included with commodity rates, and whenever the latter term is used in this report it should be taken as including exception rates, unless the context indicates otherwise. In any event, exception rates carry only a very small portion of the traffic; for example, a study by the I.C.C. of the movement of all carload traffic transported on September 23, 1942, which Georgia cited in her Final Brief (p. 86) and which the Commission said "affords a rough approximation of the relative importance of traffic moving on class rates, exception rates, and commodity rates", revealed that:[46]

From Southern Territory to Official Territory:

.9 percent of the carloads moved on class rates;
4.9 percent of the carloads moved on exception rates;
94.2 percent of the carloads moved on commodity rates.

This Court observed, in *New York* v. *United States*, 331 U. S. 284, 331, that "the class rate traffic is largely that of small shippers, who do not have the ability to obtain the benefit of the lower exception or commodity rates." The Court was there speaking of Western territory, but it is evident from the very nature of these rates, as bargained

[46] *Class Rate Investigation, 1939*, 262 I.C.C. 447, 564.

departures from the class rates, that the statement would hold true more or less generally.

As to the way in which commodity rates are made, Georgia pointed to the testimony of Oliver of the Southern Railway, who said that "commodity rates comprehend competitive circumstances of transportation and marketing", and that in establishing rates there are "no standards in the sense of fixed rules. We try to put in a rate which yields fair revenue to the railroads and which is also fair to the shipper and will enable him to move his goods to the markets he is trying to reach." [47] He further testified that in rate-making the traffic men try to observe the requirements of Section 3 of the Interstate Commerce Act (that rates must be reasonable, non-discriminatory, and non-prejudicial) and of Section 4 (the long-and-short-haul provision), and that "we undertake to apply sound business judgment within that framework. One of the best tests by which reasonableness in freight rates may be properly determined is by comparison with the existing rates on the same commodity in the same general territory, and, if none are readily available for comparison, the comparison with rates on analogous commodities in the same or neighboring territories.

"In thus making commodity rates, the pattern works out into a fairly competitive relationship because, next to stability in rates, shippers are usually more concerned with the relationship of their rates than they are in the actual measure of them." [48]

Somewhat similarly, but with particular reference to a prospective new industry, Etheridge of the Seaboard testified that the first step was usually a conference between representatives of the interested railroad or railroads and the prospective industry, "on the premise that the new industry desires to or will require special commodity rates on which to market its products. There may be already available class rates, but the need of the business will be

[47] IX, 2579.
[48] IX, 2580.

such that the traffic would not move freely on such class rates and we therefore confer with the representatives of the industry with a view to establishing lower commodity rates that will cause the traffic to move freely.

"When the rates which are considered proper have been determined, the next step is to file a proposal in the appropriate rate association . . . and when such rates are interterritorial in character, the proposals are forwarded to other interested associations . . ." [49]

From the foregoing testimony of Oliver and Etheridge it is apparent that the establishment of particular commodity rates is on a case-by-case basis, in which the initiating carriers take into account, among other things, the rates on the same or analogous commodities in the same or neighboring territories, the shippers' need of rates that will enable the traffic to move freely, the requirements of the Act, and the carriers' revenue needs.

This process of establishing commodity rates as separately bargained rates below the applicable class rates emphasizes their heterogeneous and empiric character, in contrast to the unitary and tightly articulated character of the class rate structure.

B. *The "Levels" of Commodity Rates from the South to the North, As Compared With The "Levels" in Official Territory*

1. *Georgia's Contentions*

Georgia cited, in her Final Brief, a statement by Franklin of the Pennsylvania as indicating that in his view the general run of northbound interterritorial rates were higher than those within Official Territory on like commodities. The statement was made in the course of a discussion by Franklin of the divisions factors which the Commission had prescribed in its settlement of the basic North-South divisions controversy.[50] Franklin testified that the Southern

[49] X, 2919, 2920.

[50] *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, discussed supra, p. 633.

lines had been allowed a divisions factor of 125 on "the ordinary run of rates which are generally higher than the rates, the interterritorial rate, applying from the South to the North."

> "By the Special Master:
> "Q. Class rates?
> "A. Class or commodity rates.
> "Q. Either one?
> "A. Yes—are higher, then the Southern lines get the 125 and we get the 100."
> "Now, where the rates are set or put in on the basis that is substantially equal to the level of rates in our territory, then divisions are equal . . ."[51]

This passage from Franklin's testimony seems to imply that northbound rates, both class and commodity, are generally higher mile for mile than those within the North. The testimony, however, was not directed toward that point and the language was not wholly clear.

Georgia also cited in her Final Brief a statistical study made by Dr. Edwards of the I.C.C. staff which was one of the exhibits in the record of the proceedings of *Class Rate Investigation, 1939*. This study, according to Georgia, "demonstrated that for the group of commodities generally known as Group V, manufacture and miscellaneous, the gross freight carload revenues of Eastern carriers are 121 per cent of the distributed costs, whereas the similar figure for the Southern district is 130 per cent. Since the Commission found in Docket No. 28300 [Class Rate Investigation, 1939] that costs in the South were approximately the same as in the East, it is reasonable to conclude from Dr. Edwards' studies that the over-all level of all Southern rates on manufactured goods is approximately 9 per cent higher than the analogous level in the North."[52]

Dr. Edwards' studies were not referred to or discussed in the proceedings before me. Nor did the Commission in its report in *Class Rate Investigation, 1939*, refer to or

[51] XI, 3462.
[52] Final Brief, pp. 87, 88.

discuss this particular study of Dr. Edwards's, which Georgia obtained from the record before the Commission. For these reasons it is difficult to give weight to the citation.

The Commission's report in *Class Rate Investigation, 1939* made no statistical comparisons of northbound commodity rates with northern rates, but revealed a mosaic of northbound rates, some lower than, some equal to, and some above the northern level. Thus the Commission said:[53]

> "During recent years numerous reductions have been made in commodity rates from the South to official territory. A member of the auxiliary committee, central freight association, who testified for respondent carriers, named commodity rates on 97 commodities from specific points in southern territory to specific destinations in official territory that were reduced in 1940, 1941, and 1942, and compared these reduced rates with rates on like traffic within official territory. In many instances, the reduced interterritorial rates are lower than rates for the same distances on the basis that prevails generally in official territory. * * *
>
> "A parity is now maintained between the rates from southern territory to official territory and those within official territory on the following articles: Ferroalloys; unfinished aluminum, blanks, stampings, and shapes; asphalt petroleum, coke; leather; pig iron; aluminum pig or ingot; cast-iron pipe; iron or steel plumber's goods; cast-iron hollow ware; hydrants and fire plugs; upholstering fabric and trimming; cotton flannels or napped fabric; and automobile-body parts, wooden, painted. On automobile tires, there are some combination rates from the South to official territory that are lower than the rates on tires for the same distances within official territory.
>
> "In some instances, the rates on manufactured products from the South to official territory exceed the rates on like products within official territory to a greater extent than the corresponding interterritorial rates on raw materials, that compose the manufactured products, exceed the rates on like raw materials within official territory, but in other instances the reverse is

[53] 262 I.C.C. 447, 601-603.

true. * * * It will be noted that the rates from the South to official territory on boots and shoes, aluminum sheet or plate, and cigarettes and smoking and chewing tobacco are lower than the rates for equal distances on like traffic within official territory.

"In a number of proceedings we have prescribed or approved substantially the same mile-for-mile levels of rates on particular commodities from points in southern territory to points in official territory as were maintained thereon between points within the latter territory. * * *

"In some instances, we have prescribed commodity rates between southern and official territories that exceeded by 10 percent or less the rates found reasonable for application within official territory. . . ."

2. *The Defendants' Contentions.*

The defendants introduced an exhibit showing as to 61 different groups of manufactured commodities a comparison of (a) the northbound interterritorial rates, mile for mile, from particular southern origin points where the commodities were actually produced in quantity to various northern destinations, with (b) the Official territory rates mile for mile on like commodities.[54] The defendants pointed out that products of modern large-scale southern manufacturing industries—tobacco and cigarettes, textiles, cast iron pipe, pulpwood, chemicals, and aluminum—were included in the list. The defendants further stated that the exhibit did not include any of the commodities involved in the *Southern Governors' Case*, and that it did not purport to be complete.

On the other hand, it did not include northbound interterritorial rates which were higher than the Official territory rates on like commodities; and on this ground Georgia objected to the exhibit as irrelevant, contending that:[55]

[54] ND-28, Vol. K, with explanatory testimony by Butler in XII, 3857-3863, 4012-4019, and (on cross-examination) 3995-4010. Butler later supplied certain supplementary material, which it is not essential to discuss, in ND-28-A, Vol. K, and ND-56, Vol. M, explained at XVI, 5340-5347.

[55] Final Brief, p. 87 (citations omitted).

"Because of the myriad of published commodity rates, it is impractical to determine the average difference in commodity rate levels by reference to specific commodity rates. By selecting out of the trillions of rates available certain specific rates almost any thesis can be demonstrated."

The defendants' exhibit, like the Commission's recital above of southern commodities moving northbound on rate levels below those in Official territory, proves nothing as to the over-all average level of northbound rates compared with the level in Official territory. The exhibit and the recital both, however, are relevant as indicating the heterogeneous character of commodity rates, and the fact that in the case of a substantial and important portion of southern industry no complaint can be made of the level of northbound interterritorial rates, whatever may be the situation as to the remaining portion.

3. *Some Statistical Estimates.*

The defendants drew attention to the fact that in its report in *Class Rate Investigation, 1939* the Commission estimated, on the basis of comparisons of average freight revenues per ton-mile in the year 1939 in Official and Southern territories (with adjustments for differences in the average length of haul, the count of interterritorial traffic, the count of bridge traffic, and the ratios of gross revenues to net), that the difference between the freight revenue levels in the two territories was "somewhere between 3 and 5 per cent." [56]

Accepting these percentage figures as a measure of over-all average rate levels,[57] Tilford of the Louisville & Nashville Railroad testified that since the revenues included a division of the interterritorial rates, and since the southern

[56] 262 I.C.C. 447, 606, 607.

[57] The Board of Investigation and Research in its *Report on Interterritorial Freight Rates* (House Doc. No. 303, 78th Cong., 1st Sess., 1943, at p. 150) said: "The usual measure of average rate levels is the average revenue per ton-mile. . . ."

railroads received a larger percentage of the divisions, mile for mile, than their northern connections, it followed that "the southern rate level must be nearer to the northern rate level than is indicated by the figures in the Commission's decision." [58] The defendants next pointed out that the remaining difference, if any, between the over-all rate levels was still further reduced by the greater percentage of general increase within Official territory than within the South which the Commision authorized on December 5, 1946 on class rate traffic and on a large group of manufactured articles in *Ex Parte No. 162, Increased Railway Rates, Fares, and Charges, 1946*, 266 I. C. C. 537, 616.

Whatever the actual difference between the over-all southern rate level and the over-all level in Official territory may be, it is likely to lie, on account of the foregoing adjustments, in a range of probability lower than the 3 to 5 per cent range indicated by the Commission's 1939 calculations of comparative revenue levels.

This conclusion embodies a comparison of *all* the rates in southern territory on which traffic moves—a conglomerate of class and commodity, intraterritorial and the southern portion of the interterritorial rates—with a similar conglomerate of *all* the rates in Official territory on which traffic moves. It is not possible, from the data given in this record, to extract from the conglomerate of southern rates the portion represented by the northbound interterritorial

[58] VI, 1755. Since the Commission's figures of 1939 revenues included revenues from class rates as well as commodity rates, the difference between the two territorial revenue levels may have been further narrowed by this Court's affirmance on May 12, 1947, in *New York* v. *United States*, 331 U. S. 284, of the Commission's 1945 interim order increasing the Southern class rates by 10 per cent and decreasing the Northern class rates by 10 per cent. It is impossible to know, however, whether the effect of this order on the difference in the territorial rate levels by which freight actually moves was appreciable or not, because class rates move only a small proportion of freight; and moreover it is possible that lower commodity rates may have been negotiated in the South in particular instances after the class rates had been increased as a result of the Commission's order.

commodity rates, or to know with certainty whether these latter rates on a *through basis to northern points*, which is the basis that concerns us, are on a higher average mile for mile level than the Official territory rates on like commodities.

The record as a whole points to the probability that (a) the northbound interterritorial commodity rate level is slightly higher than the Official territory commodity rate level, but that (b) the difference between the two is less than the difference in levels between the conglomerate of all southern rates and the conglomerate of all Official territory rates. For, as the cases which have been analyzed in this Report have shown, northbound interterritorial commodity rates, even prior to the *Southern Governors' Case*, were commonly established on a level below that in southern territory, whether or not they were fixed at, below, or above the Official territory level on like commodities.

The defendants contended that the difference, if any, between the average level of the northbound interterritorial commodity rates and the northern level was too negligible to be significant. They cited in this connection the following passage from the Commission's decision in *Divisions of Rates, Official and Southern Territories*, in which the Commission, after making a finding as to the proper basis of divisions of the northbound rates before the Commission, said: [59]

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[59] Quoted by Commissioner Eastman in his dissenting opinion in *State of Alabama* v. *New York Central R. Co.*, 235 I.C.C. 255, 347. Note might also have been taken of certain language used by this Court in *New York* v. *United States*, 331 U. S. 284, in the course of upholding the Commission's finding that the class rate structures discriminated against the South. The Court there pointed to the "great differences between territorial class rate levels", referring to a table which showed an average difference of 37.7 per cent (p. 301). The Court then referred to other tables comparing the rates from various southern, western and northern localities and showing percentage differences in favor of northern shippers ranging from 20 to 50 per cent. The Court said (p. 303): "The disadvantage to the Southern or Western shipper who attempts to market his product in Official Territory is obvious." A little later the Court said that class

"The principle involved in this finding is, however, equally applicable to such interterritorial rates as may hereafter be reduced to or below the official-territory level, *or to substantially that level.* We shall expect the parties to apply this finding to interterritorial rates hereafter so reduced, as well as to those specifically named herein. By *'substantially that level' we mean to include rates which do not differ therefrom by more than 3 percent.*" (Emphasis added)

The defendants' contention was not sufficiently developed in the record before me to warrant a finding that there is some specific percentage point below which any difference in levels would cease to matter to shippers.

On the other hand, for the reasons explained below, if as is probable the northbound interterritorial commodity rates average mile for mile slightly more than the Official territory rates on like commodities, the excess cannot, I think, fairly be regarded as in and of itself an injury to the South.

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rates in the South and West, and from those territories to the North, were "generally much higher, article for article, than the rates within Official Territory. That was the basic finding of the Commission; and it is abundantly supported by the evidence." (p. 305.) Finally, at p. 313, the Court cited a statement by the Commission to the effect that southern manufacturers not only had the disadvantage of location in reaching northern markets, but were additionally burdened where they had to pay class rates "on a much higher level than their competitors in Official Territory."

PART FOUR

The Question of Injury to Georgia

I. *Summary of the Defendants' Uncontroverted Evidence*

The defendants introduced evidence to show that during the period of the alleged conspiracy there had been a more rapid development in Georgia and the South than in the North in manufacturing generally,[60] and in special industries of importance to the South, such as textiles, paper and allied products, iron and steel products, and chemicals and allied products,[61] that the Southern defendants had been active and successful in bringing industry to Georgia and the South;[62] that the Southern defendants knew of no

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[60] E.g.: the percentage increases for 1939 over 1931 in the number of wage earners engaged in manufacturing were: Georgia, 32.0, the North (Official Territory States) 18.7; in the amount of wages paid: Georgia, 44.3, the North, 25.4; in the value added by manufacture: Georgia, 54.8, the North, 22.2. (1939 figures were from Department of Commerce, Census of Manufactures 1939, Vol. III, Table 6. 1931 figures were from the Biennial Census of Manufactures 1931, Table 3.) The defendants also cited excerpts from the Interstate Commerce Commission's decision in the *Southern Governors' Case* (*State of Alabama* v. *N. Y. Central R.R. Co.*, 235 I.C.C. 255 (1939)) in which the Commission at p. 262 discussed the growth of Southern manufacturing. Oliver of the Southern Railway testified among other things to the "tremendous increase in tonnage of manufactured articles handled by the Southern Railway" between 1940 and 1944 (IX, 2514) and introduced supporting statistics in SD-38, Vol. O. He also introduced at IX, 2575 an excerpt from the Congressional Record of April 15, 1946, consisting of an address by Dr. B. R. Van Leer of the Georgia School of Technology, a State institution, to the general effect that an industrial evolution is taking place in Georgia and the South similar to that which occurred in Great Britain a century ago and in New England about the time of the war between the States.

[61] For this purpose the defendants cited Bureau of the Census figures; various reports of the Interstate Commerce Commission (211 I.C.C. 692; 258 I.C.C. 471; 234 I.C.C. 81; 148 I.C.C. 743; 190 I.C.C. 127), and testimony by Oliver of the Southern Railway at IX, 2525-2529, 2541-2560.

[62] According to the testimony of Tilford of the Louisville & Nashville at VI, 1780-1784; Sheppard of the Illinois Central at VII, 2114-2116; Oliver of the Southern at IX, 2549-2552; Etheridge

industry which had been kept from locating in Georgia or the South by freight rate differentials;[63] that the rates on many raw materials, being lower within the South than in the North, were an inducement to new industries to locate in the South;[64] and that a large number of new plants are presently being located, or are about to be located, in Georgia and the South.[65]

Georgia did not controvert any of this evidence.

II. *Georgia's Theory of Injury*

Georgia did undertake at the outset of the proceedings, in presenting the cases of alleged coercive and discriminatory price-fixing which have been analyzed in Part Two of this Volume, to show "the injury to the plaintiff in this case,"[66] "the injury and detriment suffered by the State of Georgia as a direct result of the conspiratorial action of these defendants."[67]

But Georgia's final position was that the cases were merely illustrative of the defendants' power, and were not an essential element of the proof; that the defendants' evidence of economic progress in the South was irrelevant because more progress might have been made had it not been for the defendants' conspiracy; and that *merely by acquiring coercive power to control freight rates, in the given setting of certain economic facts, the defendants injured the South, including Georgia* (pp. 18-20 above).

III. *The Extent to Which the Facts of Record Sustain Georgia's Theory*

In considering whether injury to Georgia has been estab-

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of the Seaboard at X, 2903-2906; Gottschaldt of the Gulf, Mobile & Ohio at X, 3114-3115; Doss of the Atlantic Coast Line at XV, 4858-4864.

[63] Sheppard, VII, 2112-2114; Oliver, IX, 2572-2574; Etheridge, X, 2906, 2907; Gottschaldt, X, 3116; Doss, XV, 4958.

[64] Etheridge, X, 2907-2913; Doss, XV, 4958.

[65] Oliver, IX, 2554-2556; Gottschaldt, X, 3108-3110; Doss, XV, 4867-4868.

[66] The Attorney General of Georgia, I, 43.

[67] Mr. Shaw, Assistant Attorney General, I, 308.

lished in accordance with the above theory, the first question is whether coercive power has been shown to exist. This question was examined in Volume Two, and the conclusion was there reached that coercion as such had not been shown, but that certain factors in the set-up and procedure of the defendants' territorial rate associations, in the North and the South alike, deterred to some extent the taking of independent action.

The second question is whether this deterrent, applied to the economic facts cited by Georgia, can be held to constitute injury to Georgia.

The economic facts cited by Georgia (see p. 18 above) may be grouped under two main headings: (1) the alleged inequality in rate levels; and (2) the practical marketing situation confronting the South. These will now be considered in relation to the deterrent referred to above.

A. *The Alleged Inequality in Rate Levels*

The question at issue here concerns only *commodity rate* relationships, because, as was found at pp. 806-809 above, the remaining *class-rate* inequality (which this Court held to be injurious to the South), can be removed only through the means directed by the Commission, namely, the completion of the uniform classification and the consequent taking effect of the uniform class rates already prescribed by the Commission; so that it cannot be charged, so far as class rates are concerned, that the defendants' rate associations by impeding individual road-by-road rate changes, are perpetuating an injurious rate relationship. That charge can be made, if at all, only with respect to commodity rate relationships.

Can it be said of the commodity rate relationships that they are injurious to the South? In considering this question it may be helpful to recapitulate, for comparative purposes, the nature of the injury inherent in the *class rate* relationships. At pp. 803-805 above it was pointed out that in *New York* v. *United States* this Court upheld the Commission's finding that the higher southern class rate

level constituted an injury to the South. This finding was based on a presumption that manufacturers interested in establishing industries in the South might be dissuaded from going there by the knowledge that, if they did not succeed in negotiating lower commodity rates, the higher class rates would apply to their shipments. By contrast, a uniform class rate structure, North and South, would give potential southern manufacturers advance assurance that their products would move at least on an equality mile for mile with competing northern products. For this reason, among other reasons, the Commission took action to bring about such uniformity. Meanwhile the great inequality in class rate structures (which the Commission partly reduced by its interim order) was found to be a hindrance to the growth of southern industry, even though the extent of the hindrance could not be demonstrated by proof.

No such hindrance could be presumed to flow from the probable small excess (see pp. 817, 818 above) of the average of northbound *commodity* rates mile for mile over the Official territory rates on like commodities. For the probability of the existence of such an excess, derived from a hypothetical lumping together of the jumble of all the separately bargained and variegated commodity rates, some above and some at or below the corresponding northern level, could not reasonably be taken by a potential southern manufacturer as a measure of the probable success or failure which he would experience in obtaining the particular commodity rates desired by him on his particular products from and to particular points. For all anyone knows the excess, if any, might have been produced by particular sets of northbound rates which were very materially higher than the northern level but which had been so fixed not because of northern competitive pressure but because of legitimate transportation conditions coupled with the absence of competition at the destination points. In any event there was no evidence in the record that, so far as commodity rates were concerned, there was any public or widely held belief that an excess prevailed or that

manufacturers, if they located in the South, would have difficulty because of it in negotiating northbound rates on a mileage parity with northern rates; or that in any other way the probable excess affected the choice of localities by producers. On the contrary, the defendants' evidence of rapid industrial growth in the South, including evidence of the location of many new plants in Georgia, while not conclusive, tended to negate the existence of any such psychological hindrances to the development of Southern industry.

For the reasons indicated, I find no basis for presuming that the probable excess in the average of northbound over northern commodity rates is injuring or threatening to injure the South by deterring producers from locating there. The only other injury which an excess, if it exists, might be said to be causing the southern economy would be a loss of the industrial profits that could be obtained if northbound rates above the northern levels were reduced to the northern level. But if one were to embark upon such a calculation it would be necessary to offset the profits that are now lost from this source by those gained from the rates which are mile for mile below the corresponding northern rates; and it would also be necessary to take account of the fact that profits which southern producers might gain from a reduction in rates might be profits lost to the southern railroads. In any event there is no evidence as to the volume or value of the shipments carried on the rates in either the higher, the lower, or any other category, so that the calculation becomes too speculative to be of any significance.

I therefore find that economic injury to the South has not been established by the attempted comparison of the conglomerate of northbound interterritorial commodity rates with the conglomerate of the Official territory rates mile for mile on like commodities. There being no demonstrable or fairly-to-be-presumed injury to the South, no basis remains for alleging that the difference in commodity rate levels, if any, constitutes discrimination against the southern region, or against Georgia as a part of it.

Therefore no basis remains for charging that the rate association deterrent to independent action in effectuating rate reductions, *applied to the existing north-south rate relationships*, injures the South in any manner peculiar to the South or to Georgia.

There remains for consideration the effect of this deterrent on:

B. *The Practical Marketing Situation Confronting the South*

This situation consists of the following elements (p. 18 above):

1. *The relatively backward industrial development of the South as compared to the North.*

This is not in dispute. Georgia cited, for example, the I.C.C.'s statement in the *Southern Governors' Case* in 1939 that "considering the vast and varied natural resources available and the favorable climatic conditions, and compared with that in the North and in other sections of the country, industrial development as a whole in the South is small. And the articles manufactured there are generally of lower grade or are less finished than those produced in the North." [68]

The defendants, however, denied Georgia's charge (of which there was no proof in the record) that the "role of the South as an undeveloped economic colony is artificially perpetuated by limiting its industries to the relatively unprofitable production of raw materials; the profitable role of fabricating finished articles is reserved for the North." [69] Oliver of the Southern Railway testified that during the year 1945 approximately half of all carload

[68] Georgia's Final Brief at p. 97, quoting from 235 I.C.C. 255, 259. Georgia also set forth at p. 98 two tables of statistics on relative income levels and value added by manufacture for the years 1939 and 1940, taken from *Class Rate Investigation, 1939.*

[69] Trial Brief, p. 77.

traffic originated by his road in Georgia consisted of manufactured or processed traffic.[70]

2. *The existence in the North of the largest consuming markets in the country.*

This also is not in dispute. Franklin of the Pennsylvania, for example, testified that "by common consent, Official Territory embraces the greatest single market in the country . . . for almost all commodities."[71] And in the *Southern Governors' Case* the Commission said that Official Territory constitutes "the most densely populated and highly industrialized, and consequently the greatest consuming, section of the United States."[72]

3. *The desire of Southern producers to sell in the Northern markets.*

Again, there is no controversy on this point. In *Class Rate Investigation, 1939* the Commission said that Official Territory was "the market nearly all manufacturers desire to reach, particularly where they have a surplus of their products to sell."[73] And in *New York* v. *United States*, 331 U. S. 284, 313, this Court, in upholding the Commission in the above case, said that the South and West are "dependent to a great extent on the markets for their products in Official" [Territory].

As previously noted, the northbound movement of freight is much larger than the southbound (p. 615 above), and the rate proposals submitted annually by the Southern roads for action in the North far exceed in number those submitted by the Northern roads for action in the South. Thus in 1939, as noted at p. 533 above, 1760 proposals went from Southern Freight Association to Official Territory, while 238 went from Official Territory to the South-

[70] IX, 2520.
[71] XI, 3502.
[72] 235 I.C.C. 255, 257 (1939).
[73] 262 I.C.C. 447, 696 (1945).

ern Freight Association. Most of these proposals, both ways, were for reductions.[74]

C. *Consideration of the Qualitative Significance of the Quantitative Differences Found under B. above*

It might be argued that because of the more backward condition of the South and its greater need of economic development, the effect on the southern economy of the denial of rate reductions desired by southern producers is qualitatively as well as quantitatively more serious than the effect on the northern economy of the denial of rate reductions desired by northern producers.

In the first place, however, the quotations under B. above, from the I.C.C. and the testimony, show that shippers from all over the country, and not merely from the South, have need of reaching the great consuming markets in Official Territory. Secondly, Official Territory itself is not uniform in its economy (there are well known backward areas in New England, for example); its rate structure is not uniform; and within its boundaries many northern shippers are constantly seeking rate reductions to particular consuming points in the territory.

Thus the defendants pointed out that in numerous instances in Official Territory different rates per mile were applicable on the same article and for the same approximate distance;[75] that the scale of class rates prescribed by the I.C.C. from New England origin points to other points in Official Territory were on a higher mileage basis than the class rates for corresponding distances within Central Freight Association Territory, or between that territory and Trunk Line Territory—the excess varying by percentages ranging up to as high as 44 per cent;[76] that there were numerous similar examples of differences in commodity rates for the same approximate haul in different

[74] P. 531 above.
[75] ND-39, Vol. M; Hodkinson, XVI, 5266-5277.
[76] XVI, 5273.

portions of Official territory, sometimes even within the same sub-territory;[77] and that in many instances the differences in rates per mile were greater between points within Official territory than the difference, mile for mile, between an interterritorial rate from the South, and a rate on the same article between points within Official territory.[78]

The statistical studies of rate association action in Official Territory, which have been previously referred to,[79] showed that within the Trunk Line Association, for example, the reductions proposed by Southern shippers and carriers were very much fewer than the reductions proposed by shippers and carriers in Trunk Line Territory itself, in addition to which a substantial number of proposals for reductions were filed by shippers and carriers in Central Freight Association territory and New England territory respectively.

In the light of these facts, there seems to me to be an insufficient basis for a finding that when shippers in Georgia seek and fail to obtain northbound rate reductions to consuming points in Official Territory they suffer more economic injury than shippers in other parts of the country, including shippers in Official Territory, who seek and fail to obtain reductions to consuming points in Official Territory. There is also an insufficient basis for finding that when shippers in Georgia seek and fail to obtain northbound rate reductions to consuming points in Official Territory they suffer more economic injury than shippers in Official Territory who seek and fail to obtain southbound rate reductions to consuming points in Southern Territory. There is clear evidence (for example, in the *Agricultural Implements* and *Paper* cases; see pp. 749 and 708) that with the recent rapid economic growth in the South many northern manufactured products compete, or seek to compete, with like southern products in southern markets, and

[77] E.g., XVI, 5290.
[78] XVI, 5311, 5312.
[79] See pp. 531, 532 above.

that in such competition the level of southbound rates is frequently of serious concern to northern manufacturers.

The only tangible difference that stands out is that there are many more southern producers who seek northbound rate reductions than there are northern producers who seek southbound reductions.

IV. *The Substance of the Case on Injury as it Emerges from the Evidence*

The record shows that while the Official Territory associations act on many more Southern proposals for northbound rate reductions than the Southern Freight Association acts on northern proposals for southbound rate reductions, there is no significant difference in the treatment of each other's proposals by the two groups of associations. Something in the neighborhood of three-fourths of the proposals are approved in both territories, and of those disapproved a very small fraction (say, five to ten per cent) are effectuated by independent action.[80]

Thus the only ground upon which Georgia can assert an injury, not equally suffered by the North, resulting from the deterrent effect of the defendants' rate associations upon the extent of independent action, becomes a quantitative one. That is to say, the deterrent effect applies to many more proposals for rate reductions addressed by the South to the North than to like proposals addressed by the North to the South.

Since Georgia is suing only on behalf of her own citizens, and not as an agent of other Southern States, it seems pertinent at this point to inquire into the probable general order of magnitude of the proposals for rate reductions from Georgia to the North which are disapproved each year.

For this purpose it is necessary to begin with data covering the South as a whole, and then to form a rough estimate of Georgia's share, there being no figures relating to

[80] Pp. 531-537 *supra*.

Georgia as such. The most representative data are those contained in the Northern defendants' exhibit ND-21, summarized at p. 535 above, containing an analysis of all Southern Freight Association rate proposals acted on in Official Territory from 1938 to 1942 inclusive.[81] This exhibit shows:

(a) That on an average the Official Territory associations approved about three-quarters of the proposals (most of which were for rate reductions) submitted through the Southern Freight Association.

(b) That the one-fourth which were disapproved averaged 141 per annum.

(c) That of these 141, on an average 14 a year were independently announced,[82] leaving a net average of 127 Southern proposals a year disapproved by the Official Territory associations and not effectuated. It may be assumed that almost all of these 127 proposals were for rate reductions, since the evidence has shown that the relatively few proposals for rate increases have nearly always been approved.[83]

To the extent that the Official Territory associations deterred northern railroads from joining in rate reductions

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[81] Shown as Table 8(b). As to the representative character of this exhibit, counsel for Georgia, in final argument, said that "the State is grateful to the Northern Defendants for having prepared this exhibit, and so much so that we might think they prepared it for our benefit but [sic] because of the fact that it contains a complete and exhaustive examination of each rate proposal between the South and the North for a five year period and, in a sense, forms a basic document to which we can all have reference in this lawsuit . . ." McGovern, XXII, 7868. Tannehill, who presented the exhibit, testified for the defendants that the particular five year period had been selected because the defendants believed that "this five year period was the most representative pre-war period during which the records would be readily available." XII, 3745.

[82] It has previously been shown that of the total independent announcements (namely 70) only about 6, or about one a year on an average, were of a character significant for this case (pp. 537, 538 *supra*). Nevertheless the full total of 70, or 14 a year, must be deducted to get the net total of Southern rate proposals disapproved by the Official Territory associations and not effectuated.

[83] Pp. 598, 599 *supra*.

proposed by southern roads, the deterrent effect would have operated within this average net group of around 127 proposals a year.

Another exhibit, summarized at p. 532 above, showed that during a representative three months period in 1945 the Trunk Line Association acted on 170 proposals for rate reductions by shippers and lines in Southern territory, of which all but 23, or about 87 per cent, were approved. Thus on a year's basis (assuming an even average distribution) we would have 92 disapprovals by the Trunk Line Association. To this should be added any disapprovals by the Central Freight and New England Freight Associations of Southern rate reduction proposals not acted on by the Trunk Line Association; but since all but a very small fraction of rate proposals acted on in Official Territory involve a "general basis" and are therefore processed in all three of the sub-territorial associations (p. 559 above), it is probable that the figure of 92 for the year 1945 would not need very much upward adjustment.

If we take the 1938-1942 average figure of 127 as the most representative, we have to estimate how many of these disapproved (and not independently effectuated) proposals for northbound rate reductions from Southern territory emanated from Georgia. Southern territory embraces eight states (Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi and Florida) and a portion of Virginia. If it were assumed that around one-eighth of the total Southern proposals would normally originate in Georgia, we would have a range of disapproved and not independently announced proposals from Georgia to the North (nearly all for rate reductions, as has been seen) of around 15 a year. These figures are, of course, very speculative, and Georgia's annual share might well be larger than one-eighth. It is also possible that a higher fraction of proposals from Georgia are disapproved in the North than from other Southern states. When all allowances are made, however, it seems reasonable to estimate that, based on the figures for 1938-1942 and for the three-months period of

1945 which have been discussed above, the average number of proposals for reductions in rates from Georgia to the North which are disapproved in the North (and not independently effectuated) probably do not exceed a couple of dozen a year.

Whatever the precise number may be, there is no way of telling whether these disapproved proposals in any year affect many of Georgia's producers or few; whether they affect large or small volumes of shipments; or to what extent they relate to manufacturing, with which Georgia is chiefly concerned, or to agricultural products or other raw materials.

Nor is there any way of telling how many of these proposals would be concurred in if there were no rate association machinery in the North. Georgia's basic grievance relates to a situation in which the Northern connections of the Southern proponent of a rate reduction are ready and willing to concur in the proposal but are outvoted by a majority of the other carriers in the rate association, and are then deterred by that fact, and by the rate association set-up, from joining independently with the Southern proponent in effectuating the reduction. A case in which the Northern connections of the Southern proponent in the first instance expressed their intention not to concur in the proposal, and the other roads thereafter voted adversely on the proposal as a matter of course, would not constitute action ascribable to improper features in the rate association set-up. There is no way of estimating the probable volume of cases of this sort, but it is scarcely to be supposed that they do not arise with some frequency. By the same token, granted the existence of a deterrent in the procedure, there is a fair chance, though not a certainty, that the effects of the deterrent will be brought to bear upon at least some of the nonconcurred in requests of Georgia shippers for northbound rate reductions.

Georgia's right to injunctive relief upon this showing is considered under Conclusions of Law in Volume One.

PART FIVE

APPENDICES

Appendix A

Order of Appointment of Special Master Dated December 17, 1945

It Is Ordered that Lloyd K. Garrison, Esquire, be and he is hereby appointed Special Master in this cause, with authority to summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to find the facts specially and state separately his conclusions of law thereon (cf. Rule 52 of the Rules of Civil Procedure for the District Courts of the United States, first sentence), and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him. The findings, conclusions, and recommended decree of the Master shall be subject to consideration, revision, or approval by the Court. The Master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowance to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct. If the appointment herein made of a Master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

Appendix B

The Misjoinder Issue

My findings and conclusions with regard to this issue are as follows:

1. *The Alleged Misjoinder of the Nashville, Chattanooga & St. Louis Railway Company.*

(a) I find as a fact, and conclude as a matter of law under the applicable Georgia decisions, that the Nashville, Chattanooga & St. Louis Railway Company is a citizen of Tennessee and is not a citizen of Georgia.[1]

(b) If it should be held nevertheless that the Nashville, Chattanooga & St. Louis Railway Company became a citizen of Georgia as well as of Tennessee, I conclude as a matter of law that:

(i) Its incorporation in Georgia was compulsory within the meaning of *B. & O. R. Co.* v. *Parkersburg*, 268 U. S. 35, 38; *Missouri Pacific Railway Company* v. *Castle*, 224 U. S.

[1] The evidence relating to the citizenship of the N. C. & St. L. is set forth in Vol. O, SD-55, SD-55A, SD-55B and SD-55C, consisting of Georgia Acts 1915 (Extra Session) p. 119, providing for the leasing of the Georgia-owned Western and Atlantic R. R.; the lease of the Western and Atlantic pursuant to the statute to the N. C. & St. L.; an excerpt from a decision of the Georgia Supreme Court in the case of *N. C. & St. L., et al.* v. *Edwards*, 91 Georgia 24, 16 S. E. 347, and an excerpt from a decision of the Georgia Court of Appeals in the case of *Bennett* v. *Western and Atlantic R. R.*, 42 Ga. App. 821, 157 S. E. 365. Sections 11 and 12 of the Georgia Act and the two decisions indicate that the N. C. & St. L., in order to lease the Western and Atlantic R. R., was required by Georgia law to create a new separate Georgia corporation with the name Western and Atlantic R. R. and with the principal office and railroad shops of the lessee railroad located within Georgia. The N. C. & St. L., however, continued as a Tennessee corporation, as held by the two Georgia cases referred to above, and even operated railroads in Georgia as a foreign corporation. This was conceded by the defendants (See Brief of Southern Defendants Before the Master On the Preliminary Questions of Jurisdiction, p. 17; XXII, p. 7788). No Georgia corporation having the name of the N. C. & St. L. was ever formed.

541; *Patch* v. *Wabash R. Co.*, 207 U. S. 277, 284; *Southern Railway* v. *Allison*, 190 U. S. 326; and *St. Louis & S. F. R. Co.* v. *James*, 161 U. S 545;[2]

(ii) That being so, the Company, under the rule applied in the cases just cited, retains, for purposes of jurisdiction in district courts based on diversity of citizenship, only its Tennessee citizenship;[3]

(iii) This same rule should be applied, with the same result, for purposes of original jurisdiction in the Supreme Court. On this last proposition no authority has been found, but no reason appears for suggesting that the rule ought not to be applied.[4]

(c) If it should be held that the Nashville, Chattanooga & St. Louis Railway Company became a citizen of Georgia as well as of Tennessee and that, in addition, the rule of com-

[2] The theory of these cases is that when a corporation is rechartered in a state other than its original state of incorporation pursuant to a state statute compelling reincorporation as a condition of doing business in the state, the corporation for purposes of diversity of citizenship jurisdiction remains a citizen solely of its original state of incorporation.

[3] In *Carolina & N. W. Ry. Co.* v. *Town of Clover*, 34 F. (2d) 480 (W.D.S.C. 1929), app. dis. 42 F. (2d) 1021 (C.C.A. 4th, 1929), rev. on other grounds 46 F. (2d) 395 (C.C.A. 4th, 1931), the Court discussed numerous cases, including the *James* and *Allison* cases cited above in the text, and adopted the somewhat different view that a corporation never acquires additional citizenship when rechartered as a corporation, but that additional citizenship only occurs when natural persons obtain the subsequent incorporation. The conclusive presumption that the corporate stockholders are citizens of the state of incorporation underlies this theory. The N. C. & St. L. is only a citizen of Tennessee under the rule of the *Town of Clover* case as well as under the doctrine of compulsory incorporation.

[4] The applicable constitutional and statutory language is very similar. Section 2, Article III of the Constitution provides, "The judicial power shall extend. . . .to controversies. . . .between a State and citizens of another State;—between citizens of different States. . ." Section 24 of the Judicial Code dealing with jurisdiction of District Courts says "between citizens of different States" (28 U.S.C. § 41) while Section 233 of the Judicial Code provides that the Supreme Court shall have original jurisdiction in controversies "between a State and citizens of other States." (28 U.S.C. § 341.)

pulsory incorporation referred to in paragraph (b) above is not applicable to this case, I conclude as a matter of law that the fact of the Company's Georgia citizenship should not bar the original jurisdiction of this Court over the controversy between the Company and Georgia, for the following reasons:

(i) Georgia could have sued the Company in the U. S. district court in Tennessee under the applicable diversity of citizenship cases;[5]

(ii) There is therefore no constitutional objection to jurisdiction in a lower Federal court as such, the only objection being to jurisdiction in a lower Federal court *within Georgia's borders;*

(iii) In suing in the Supreme Court of the United States Georgia is not suing in a court within Georgia's borders, but in a court having national jurisdiction, and therefore by analogy there should be no bar to the jurisdiction (provided, as is the case here, that the defendant is not a citizen *only* of Georgia, but is a citizen also of another state, and is sued in the latter capacity);

(iv) If Georgia had sued in the U. S. district court in Tennessee, the Supreme Court of the United States would

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[5] See *Town of Bethel* v. *Atlantic Coast Line R. Co.*, 81 F. (2d) 60, 67 (C.C.A. 4th, 1936), *cert. den.* 298 U. S. 682, and cases cited. The Court in the *Bethel* case, referring to cases brought against corporations organized under the laws of two or more states, said: "For our present purposes these cases may be divided into two classes comprehending (1) suits brought by a citizen of one of the states of incorporation in (a) the federal courts or (b) the state court of another of the states of incorporation; and (2) suits brought by a citizen of one of these states in (a) the federal courts or (b) the state court of his own state. In suits of the first class it is uniformly held that the federal courts have original jurisdiction, or that the right of removal of the state to the federal court exists; and in suits of the second class opposite conclusions are reached." *Muller* v. *B. & M. Railroad*, 9 F. Supp. 802 (D.C.N.H., 1935) is an example of the first class mentioned above, while *Murphy* v. *Hudson and Manhattan Ry. Co.*, 45 F. Supp. 720 (E.D.N.Y., 1942) is an example of the second class.

have had appellate jurisdiction. There would seem to be no reasonable ground for holding that the definition of judicial power in Article III, Section 2 of the Constitution means one thing when applied to appellate jurisdiction and another when applied to original jurisdiction;

(v) The basic purpose of the establishment of the original jurisdiction of this Court was to provide a supreme tribunal to decide questions which in the absence of a federal system could only be decided by diplomacy or war.[6] The questions involved in the controversy between Georgia and the Nashville, Chattanooga & St. Louis Railway Company appear to be of this character. Georgia claims to be injured by a conspiracy in which that Railway participates, and the center of which lies outside of Georgia.

2. *The Alleged Misjoinder of The Seaboard Air Line Railway Company.*

(a) I find as a fact and conclude as a matter of law that the Seaboard Air Line Railway Company is a citizen of Georgia, as well as of Virginia and certain other States,[7] and that its acquisition of Georgia's citizenship was not

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[6] As the Court said in the present case (324 U. S. 439, 450): "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. See *Missouri* v. *Illinois*, *supra*, pp. 219-224; *Virginia* v. *West Virginia*, 246 U. S. 565, 599. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. *Missouri* v. *Illinois*, *supra*, p. 241; *Georgia* v. *Tennessee Copper Co.*, *supra*, p. 237."

[7] I am, of course, referring to citizenship only as it is used in the cases involving diversity of citizenship jurisdiction. Seaboard thus is a Georgia citizen for purposes of determining the jurisdiction of a Federal court sitting in Georgia.

compulsory within the meaning of the cases cited in paragraph 1(b) above.[8]

(b) I conclude as a matter of law that the fact of the Seaboard's Georgia citizenship should not bar the original jurisdiction of this Court over the controversy between Georgia and the Seaboard, upon the same grounds as those set forth in paragraph 1(c) and its sub-paragraphs above, relating to the Nashville, Chattanooga & St. Louis Railway Company.

3. *The Consequences if Either Company Has Been Misjoined.*

If this Court, having found that a particular defendant is a citizen of Georgia, should differ with the reasoning set forth in paragraph 1(c) and its sub-paragraphs above, and should rule that Georgia cannot maintain this action against such a defendant in its capacity as a citizen of some other State, several questions would arise.

First. The defendants contend that as a result of the proceedings before me and the facts developed therein, each of the two defendants in question has *become* a necessary party, and cannot *now* be properly dismissed, so that the whole suit must fall. The defendants base this contention upon the following grounds:

(a) Instead of moving to strike the two defendants promptly following the decision of this Court, Georgia introduced its case against all the defendants, forced the two in

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[8] The Seaboard grew out of a series of consolidations and mergers, traced in a special Note at the end of this Appendix. The multiple incorporations of the Seaboard were voluntary and without compulsion, so that under the decisions of *Patch* v. *Wabash R. Co.*, 207 U. S. 277 and *Town of Bethel* v. *Atlantic Coast Line R. Co.*, 81 F. (2d) 60 (C.C.A. 4th, 1936), *cert. den.* 298 U. S. 682, it would be held to have Georgia citizenship for purposes of diversity of citizenship jurisdiction in any suit in a Georgia court, whether state or federal.

question to participate in the proceedings, and thereby treated them as necessary parties.[9]

It seems clear, however, that Georgia could not have been expected to move to strike at the outset because, as this Court said in its opinion, the citizenship issue was "an involved one," which necessarily had to be tried before the Special Master and finally decided by the Court before it could be known whether any motion would be in order.

(b) It is well settled that an application by a plaintiff for leave to dismiss a defendant will be denied where it would be manifestly prejudicial to the defendant. In this case the facts as they have been developed demonstrate, according to both defendants, that any decree in favor of Georgia would "vitally and irrevocably affect the interests of Seaboard and N. C. & St. L. if meanwhile they should have been dismissed from the case." [10]

As to this ground of objection, it is true that any decree in favor of Georgia would affect each of the two defendants, but the question is whether, if they were now dismissed from the case, they could claim prejudice in any substantial sense. The Southern defendants have taken identical positions throughout the proceedings; the interest of no one of them, in relation to the basic charges made by Georgia, is any different from that of any other; there has been no lack of thoroughness or diligence in the presentation of the Southern defendants' position; and the Northern defendants have throughout supported, and aided by evidence, the position of the Southern defendants. Under these circumstances, I conclude as a matter of law that neither of the two defendants in question, if now dismissed from the case, could claim to be substantially prejudiced.

Secondly. If it be concluded, as I believe to be proper, that the two defendants in question have not become necessary parties, there is a controversy as to whether the motion

[9] Brief of Southern Defendants Before The Master On The Preliminary Questions of Jurisdiction, pp. 8-11.
[10] Ibid, p. 13.

to strike from the case a defendant found by this Court to be a citizen of Georgia should be made by the defendant in question or by Georgia. The defendants contend that the motion should be made by Georgia, and Georgia contends the opposite.

As has been indicated, the Court in its opinion in this case did not decide that question but merely said (324 U. S. 439, 464) that "the citizenship of the two defendants in question may be challenged by a motion to strike. *Louisiana* v. *Cummins*, 314 U. S. 580." The quoted sentence implies that the motion to strike would be made not by the plaintiff but by the defendant challenging the citizenship. The defendants, however, state that an examination of the record in *Louisiana* v. *Cummins* discloses that in that case it was the plaintiff who made the motion.[11]

The desire of each party in this case to thrust upon the other the onus of moving to strike (if a motion to strike be in order) apparently arises from considerations of tactical advantage. The defendants assert that if the Seaboard and the N. C. & St. L. were dismissed from the case, there would be untouched by the final decree six railroads (the two in question and four small railroads not named as defendants) having a total mileage in Georgia of 2,897, while defendants with a total mileage in Georgia of only 2,385 would remain in the case.[12] The defendants contend that this Court cannot equitably determine the far-reaching issues presented by Georgia in a case in which the Court would have jurisdiction of only a minority of the railroad mileage in Georgia.[13] The defendants apparently believe that they could assert this argument with more effect if Georgia should have to make the motion to strike; they may also wish in any case to shift to Georgia the burden of proof on the jurisdictional issue.

I conclude that the proportion of the total mileage in Georgia possessed by the railroads which are in the case as

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[11] Ibid, p. 7.
[12] Ibid, p. 22.
[13] Ibid, pp. 22-23.

compared with those which are not is immaterial, for the reasons discussed above in connection with the question of prejudice; and that since the jurisdictional facts have been presented and are not in dispute, only questions of law remain, and there is no longer any question of burden of proof; therefore no prejudice would result to any of the parties if the motion to strike were made by one party rather than another.

In the light of these conclusions it seems to me that the procedural question becomes a practical one. The parties do not know what this Court will decide upon the misjoinder issue. I have concluded that the N. C. & St. L. is not a citizen of Georgia for purposes of jurisdiction and that the Seaboard, though a citizen of Georgia, may properly be sued in this Court as a citizen of Virginia—an admittedly novel point. If the Court should sustain these two conclusions, there would be no occasion for a motion to strike.

If, on the other hand, the Court should disagree with either or both of these conclusions, and should also decide that Georgia is entitled to injunctive relief, either or both of the defendants would have to be dismissed from the case. Presumably the Court's conclusions upon the misjoinder issue will be set forth in the Court's opinion, as a part of the final disposition of the whole case. If so, no end would be served, and the issuance of the decree (if the decree were in favor of Georgia) would only be delayed, by calling for a motion to strike after the handing down of the opinion. I respectfully submit that the practical course would be for the Court itself, as a part of its decree, to dismiss from the case any defendant found not to be a necessary party and found to be a citizen of Georgia, treating the jurisdictional objection heretofore advanced by the defendants as the equivalent of a motion to strike (or holding in the alternative that the jurisdictional issue, having been raised by the pleadings, and having been duly tried, should be finally disposed of by the Court's decision like the other issues in the case).

Of course, if the Court should conclude that Georgia is not entitled to relief against any of the defendants, the misjoinder question would not need to be passed upon at all.

Special Note on the Consolidation and Merger History of the Seaboard Air Line Railway Company

Paragraph 7 of Georgia's amended complaint alleged that the Seaboard was a resident of the State of Virginia.

Paragraph 16(2) of the Southern defendants' answer alleged that the Seaboard was a corporation of the State of Georgia as well as of the State of Virginia, "as appears from its separate Return to the Rule to Show Cause issued by this Court."

The Return referred to consisted of a brief argument on the part of the Seaboard's attorney, claiming Georgia citizenship for the Seaboard [14] and of an affidavit of L. B. Plummer, Seaboard's assistant general counsel, to which was attached several exhibits. Plummer's affidavit together with the exhibits set forth the facts on which the citizenship argument was based.

The Plummer affidavit with exhibits was offered as evidence on behalf of the Seaboard,[15] and although the exhibits were not objected to by counsel for Georgia, the affidavit was introduced subject to Georgia's objection to its competency on the ground of hearsay,[16] with counsel for the

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[14] The Return also claimed that the suit should have been brought against the Receivers of the Seaboard, who were appointed and took over the properties in 1930. This same point was argued in the Seaboard's Brief "upon its Return to Rule to Show Cause." The complaint, however, was served on the Seaboard and the Return was by the Seaboard, so the Seaboard was properly before the Court and was the only party before the Court.

[15] XVII, 6024. The affidavit and exhibits were assigned Exhibit Number SD-54. See XVII, 6029.

[16] XVII, 6030. While Mr. McGovern's agreement to the introduction of the exhibits was not altogether explicit, all later objections to SD-54 were directed solely to the affidavit, and therefore I have concluded that no question now exists as to the propriety of the introduction of the exhibits.

Seaboard reserving the right to place Plummer on the stand if it should be deemed "proper and necessary to do so."[17] Subsequently, on final argument, counsel for the Seaboard announced that an agreement had been reached between himself and counsel for Georgia to the effect that the affidavit could be introduced as stating what Plummer would testify to if personally present, subject to the qualification that any conclusions or opinions of Plummer to the effect that the Seaboard was a Georgia corporation should either be stricken from the affidavit or disregarded as proof.[18] At the time that counsel for the Seaboard announced this agreement, counsel for Georgia stated that a right to further objection was still retained.[19] No further objection, however, was in fact made. Moreover, counsel for Georgia, without specifically referring to the affidavit, generally withdrew all the State's objections to evidence with the exception of a few based on the authenticity of certain documents, none of which were included in the evidence in question.[20] Finally, Georgia has introduced no evidence which in any way questions the facts included in the Plummer affidavit and exhibits. I find, therefore, the following to be the relevant facts.

1. The Seaboard Air Line Railway Company as it existed at the time of this suit was the product of the following consolidations:

(a) A consolidation effected on November 7, 1901 between the Seaboard Air Line Railway and eight other railroads.[21] Although the agreement between these railroads is entitled "Articles of Agreement of Merger and Consolidation" and

[17] XVII, 6032.
[18] XX, 6868-6869.
[19] XX, 6869.
[20] XX, 7119, 7120. With regard to the objections addressed to authenticity see XX, 7121.
[21] The Articles of Agreement of Merger and Consolidation are set forth as Exhibit A to the Plummer affidavit. *Return of Seaboard Air Line Railway Company to Rule to Show Cause* (hereafter cited as "Seaboard's Return") p. 17.

the word "merger" is included in the Articles several times,[22] I conclude that the transaction was a consolidation and not a merger. The word "merger" is always used in conjunction with the word "consolidation"[23] and consequently does not appear to be a term of art but rather a synonym for consolidation. One of the "Whereas" clauses speaks of the merger and consolidation of "said hereinbefore mentioned several companies into one new consolidated company."[24] The Articles consistently refer to the new corporation as the "consolidated company."[25] Article VIII states that the "stockholders of each such constituent company shall be stockholders of the consolidated company."[26] Article X provides that "the rights, privileges and franchises of each of said constituent companies, and all the property . . . and other things . . . belonging to each of said companies, shall be transferred to and vested in such consolidated company."[27]

The Articles stated that the Seaboard (i. e., one of the constituent companies) was a corporation organized under the laws of Virginia and North Carolina; that two of the remaining eight constituent railroads were organized under the laws of South Carolina and Georgia; and that one of the other constituent railroads was organized under the laws of Georgia. The Articles provided that the principal office of the consolidated corporation should be in Petersburg, Virginia, but included an authorization for general offices in other cities, specifically naming Atlanta and Savannah, Georgia. The Articles were filed in the office of the Secretary of State of Georgia[28] as well as in those of the other States involved.

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[22] See, e.g., Seaboard's Return, pp. 24, 25, 32.
[23] Ibid.
[24] Seaboard's Return, p. 24.
[25] See, e.g., Seaboard's Return, pp. 25, 27, 29, 30, 31, 35.
[26] Seaboard's Return, p. 30.
[27] Seaboard's Return, p. 35.
[28] Seaboard's Return, p. 59.

(b) A consolidation effected on June 27, 1903 between Seaboard Air Line Railway and the Florida Central and Peninsular Railroad Company.[29] The Articles in this case follow almost precisely the 1901 Articles discussed in paragraph (a) above. For the reasons there given I conclude that a consolidation and not a merger took place. This disagrees with the decision in *Royal Palm Soap Co.* v. *Seaboard Air Line Ry. Co.*, 296 Fed. 448 (C. C. A. 5th, 1924) in which the Court held that the Seaboard merged the other corporation into itself and did not change its own identity nor become a Florida corporation. The *Royal Palm* case, however, was decided solely on pleadings in which the Seaboard stated, "the said Florida Central and Peninsular Railroad Company, by virtue of said agreement, then and there becoming a part of the Seaboard Air Line Railway." In view of this agreement, which was emphasized by the Court, the decision does not conflict with my conclusion based on a full review of the Articles.

The Articles described the Seaboard as a corporation organized and existing under the laws of the States of "Virginia, North Carolina, South Carolina, Georgia and Alabama", and the Florida Central and Peninsular as a corporation organized and existing under the laws of the States of Florida and Georgia. These Articles contained a provision regarding offices of the consolidated corporation similar to the provision mentioned in the 1901 Articles in Paragraph (a) above. Again the Articles were filed in the office of the Secretary of State of Georgia as well as in those of the other States involved. The certificate signed by the Georgia Secretary of State in connection with the filing refers to the Articles as "forming the 'Seaboard Air Line Railway', a corporation created by and existing under the laws of the States of Virginia, North Carolina and other States as therein mentioned."[30]

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[29] The Articles of Agreement of Merger and Consolidation are set forth as Exhibit B to the Plummer affidavit. Seaboard's Return, p. 56.

[30] Seaboard's Return, p. 76.

(c) A final consolidation on October 11, 1915 between Seaboard Air Line Railway and Carolina, Atlantic & Western Railway.[31] For the reasons already given in paragraphs (a) and (b) above, I have concluded again that a consolidation and not a merger occurred. The name of the consolidated corporation was Seaboard Air Line Railway Company. The Articles referred to the constituent Seaboard as a corporation organized and existing under the laws of the State of Virginia "and other States," and referred to the Carolina, Atlantic & Western as a corporation organized and existing under the laws of North Carolina and South Carolina. With respect to corporate offices the Articles provided that the principal office of the consolidated corporation should be in Petersburg, Virginia but the corporation was granted the authority to have general offices and principal offices "at such other places in the United States as the Board of Directors shall from time to time determine or as may be required by the laws of any State in which said company may own or operate a railroad." These Articles, like the previous ones, were filed in the office of the Secretary of State of Georgia[32] as well as in those of other States.

2. On December 2, 1929 the Secretary of State of Georgia issued a certificate amending the charter of the Seaboard Air Line Railway Company in accordance with a petition for such amendment.[33] The provisions of the amendment are irrelevant but the preamble to the Secretary of State's certificate refers to the Seaboard as a corporation organized and existing under the laws of "Virginia, Georgia and other States."

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[31] The Articles and Agreement of Merger and Consolidation are set forth as Exhibit C to the Plummer affidavit. Seaboard's Return, p. 77.

[32] Seaboard's Return, pp. 108-109.

[33] This Certificate is set forth as Exhibit D to Plummer's affidavit. Seaboard's Return, p. 125.

3. The Seaboard Air Line Railway Company filed returns to certain Georgia taxes as a foreign corporation,[34] but the ex parte filing of these routine documents can scarcely be regarded as evidentiary on the issue of corporate citizenship here before the Court.

4. No Georgia statute was presented which required a railroad, such as the Seaboard, to incorporate in Georgia in order to be able to operate within the borders of the State.[35] The Seaboard consolidations described above were based on permissive Georgia statutes and were, therefore, the result of voluntary action on the part of the constituent corporations.

5. On or about August 1, 1946, over two years after the suit in this case was commenced, the Seaboard completed a reorganization,[36] following upon a receivership instituted in 1930. A new Virginia corporation took possession of the properties at that time "under decrees of the receivership court" and under a certificate of the I. C. C. issued in the reorganization proceedings. The new Virginia corporation has continued operation since that date, although the old corporation had not been dissolved at the time of hearing.[37]

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[34] S-511, XVII, 6165-6172. These consisted of Georgia foreign corporation reports from 1938 through 1944 inclusive, filed with the Office of the Comptroller-General in 1938, and with the Department of Revenue, Property and License Tax Unit in each of the other years. In every case the Seaboard reported that it was organized under the laws of Virginia, North Carolina and South Carolina. Counsel for the Seaboard stated at XX, 6886 that the Chief Public Relations Officer filed the returns with "no legal advice from the Law Department that I have any knowledge of. . . ."

[35] The statutes involved were Sections 2591, 2596 and 2597 of Park's Annotated Code of Georgia, 1914, which are set forth in the Appendix at pages 22-25 of the "Brief on behalf of Seaboard Air Line Railway Company upon its Return to Rule to Show Cause."

[36] XX, 6887.

[37] XXII, 7786.

Appendix C

Certificate No. 44

In footnote 7 to its opinion in this case [1] the Court stated that consideration had been given to the defendants' argument "that Certificate No. 44, issued March 20, 1943 under § 12 of the Act of June 11, 1942 (56 Stat. 357) by the Chairman of the War Production Board (8 Fed. Reg. 3804) protects this alleged combination from the charges contained in the bill. That certificate approves joint action by common carriers through rate bureaus and the like in the initiation and establishment of rates. We do not stop to analyze it beyond observing that in no respect would it be a bar to the present action. It does not purport to be retroactive. It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. Moreover, legal means may be employed for an illegal end."

The defendants now contend that the above disposition of their arguments about Certificate No. 44 had been made in the light of the allegations in the amended complaint, and that the case as it was actually developed before me sustains the defendants' claim that the suit is barred by Certificate No. 44.[2] Their basic argument is that Georgia in her final position relies on what she asserts to be proof of the defendants' power to coerce and to discriminate rather than upon proof of actual coercion and discrimination. I assume, however, that if this Court should agree with the defendants that Georgia has established no more than the defendants' power to coerce and discriminate and should then hold that the acquisition of this power was illegal, the Court would continue to hold that the issuance of Certificate No. 44 would not bar the suit.

With regard to the statement by the Court that Certificate No. 44 "does not purport to be retroactive," the defendants

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[1] 324 U. S. 439, 459.

[2] Brief of Southern Defendants Before The Master On The Preliminary Questions of Jurisdiction, pp. 28 to 39.

now contend that the conspiracy is alleged to be a continuing one and that Georgia is seeking relief *in futuro* and not damages for any past action, so that no retroactivity is called for. However, the Court had these facts before it when it made the statement just quoted; the amended complaint clearly alleged a continuing conspiracy and, as limited by the Court, sought relief only *in futuro*.

In *United States* v. *Association of American Railroads*, 4 F.R.D. 510 (1945), which is now pending in the District Court of Nebraska, the Attorney General brought suit for an injunction under Section 4 of the Sherman Act against the Association of American Railroads, the Western Association of Railway Executives, and a group of railroads, banking houses and individuals, to restrain alleged violations of the anti-trust laws. The defendants moved to dismiss the suit on the ground, among others, that the suit was barred by Certificate No. 44. In overruling this motion Judge Delehant, speaking of *Georgia* v. *Pennsylvania R. R. Co., et al.*, said at pp. 525-526 that:

> "While that case was not instituted by the United States, its object and the basic averments on which it is grounded are so strikingly comparable to those of the complaint before this court that the action in it of the Supreme Court is compellingly persuasive, if not controlling in the present instance."

Thereafter, quoting this Court's foot-note 7, referred to above, which he interpreted as holding and not mere dictum, Judge Delehant continued:

> "This language is positive and unequivocal, and, unless some deterring reason to the contrary exists, directs the action of this court upon the question under immediate consideration.
>
> "It was said in argument that in the Georgia case, the pertinence of Certificate 44 and Section 12 was not adequately presented to the Supreme Court, in fact, was only casually drawn to its attention. But from the context of the footnote it appears affirmatively that there was argument upon the point and that the court

considered that argument and announced its conclusion respecting it."

I conclude that no adequate ground has been shown to warrant recommending to the Court a reconsideration of its ruling that Certificate No. 44 does not bar the suit.

Appendix D

Summary of Certain Evidence Introduced by Georgia but Treated by the Special Master as Irrelevant and Not Analyzed in the Body of the Report

I. *"Elimination of the Coordinator and Frustration of his Efforts to Achieve an Efficient and Integrated Transportation System."* [1]

A. *Letter from Mr. Wood to Mr. Milbank, Dated February 7, 1934*

On February 7, 1934 Mr. Willis Wood, identified by Georgia as a railroad director and a member of a New York City bond house, wrote to Mr. Jeremiah Milbank (a member of the Directors' Committee appointed to carry out the purposes of the Metropolitan Club meeting which preceded the formation of the Association of American Railroads),[2] criticizing an unidentified report by Commissioner Eastman, mentioning "Dupont's fear of Eastman", Arthur James' violent opposition to the report, and James' suggestion "that you ought to talk the matter over with a group composed of Williamson, Holden, Budd and Gray."[3]

B. *Lobbying Activities in April, 1935*

On April 19, 1935, at a meeting of the Board of Directors of the A.A.R., Judge Fletcher submitted a report of lobby-

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[1] Georgia's Final Brief, p. 115.
[2] Supra, pp. 298, 299.
[3] S-13, I, 94; Vol. A, p. 73 (full text).

ing activities of the A.A.R.'s Law Department. The report included a statement that:[4]

> "As to the question of the continuance of the office of Coordinator, many members of both House and Senate were found to be uninformed or not interested. The general sentiment, however, is that a majority of the members will follow the lead of the administration, although here and there were individual members who were outspoken in their opposition to continuing the Coordinator's office."

The contacts with the members of Congress were made through representatives of State railroad associations and State legislative committees from forty different States who were called together in Washington by Judge Fletcher on April 10, 1935 to report on their lobbying work and to make a canvass of Congress to determine the status of legislation in which the railroads were interested. The bulk of Judge Fletcher's report dealt with legislative objectives other than the discontinuance of the office of Coordinator, namely, the enactment of laws to regulate motor vehicles and water carriers, and the repeal of the Fourth Section of the Interstate Commerce Act (long and short haul provisions); specific canvasses were made with regard to these projected measures, with the results strongly favoring the railroads' desires. No canvass was made with regard to the continuance of the office of Coordinator. At the conclusion of the report brief mention was made of pending labor legislation.

C. *Opposition to Extension of the Emergency Railroad Transportation Act of 1933*

On May 17, 1935 the Board of Directors of the A.A.R. approved the sending of a letter from the president of the A.A.R. to Senator Wheeler, opposing the extension of the

[4] S-47, I, 138, at 140.

Emergency Railroad Transportation Act of 1935.[5] The substance of the letter was as follows.

The Emergency Railroad Transportation Act of 1933 became law on June 16, 1933. Title I, which created the Federal Coordinator of Transportation and with which alone Mr. Pelley's letter to Senator Wheeler was concerned, was limited to one year, with power in the President to extend it for an additional year. This the President did.

On May 1, 1935 Senator Wheeler introduced a bill to extend the Act again. The Committee's report accompanying the bill pointed out that the financial condition of the railroads had not improved in the two years during which the Act had been in force and that the railroads had been heavy borrowers from the R.F.C.

On May 3, 1935 President Pelley, on behalf of the A.A.R., asked Senator Wheeler for a hearing at which the railroads might present their views with regard to the bill. Senator Wheeler declined to grant a hearing but stated that consideration would be given to a letter from the A.A.R. outlining the views of the railroads.

The purposes of the Act, as summarized in Mr. Pelley's letter, were "to encourage and permit or require action on the part of the carriers which will avoid unnecessary duplication of services and facilities and permit joint use of terminals and trackage incident thereto, to control allowances, accessorial services and the charges therefor and other practices affecting services or operation to the end that undue impairment of net earnings may be prevented, wastes and preventable expense avoided, and in order that there may be an adequate immediate study of means of improving conditions surrounding transportation in all its forms."[6]

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[5] S-48, I, 140-142; Vol. A, 173-177 (full text). The full text of the letter needs to be read, and the summary made below is from the full text.

[6] Vol. A, 173, 174.

Two important considerations led to the creation of the office of Federal Coordinator. "In the first place, it was thought that certain joint actions which might be taken by the railroads looking toward economies might be in violation of the antitrust statues. In the second place, it was feared that certain coordinating projects thought to be desirable in the public interest might be prevented by the action of one or two railroads who would not be willing to go along with the views of the railroads involved."[7] Suitable powers were given the Coordinator to deal with such situations.

During the consideration of the bill by Congress, over the protest of the railroads and of Mr. Eastman, there was inserted a section which became part of the law providing, with certain limited exceptions, that no actions taken under Title I should operate to reduce the number of employees below the number in service in May, 1933 or to deprive workers of jobs held by them in that month. "It was understood at the time these amendments were offered and adopted, first by the Senate and afterwards by the House of Representatives, that the effect of these labor clauses would be to render futile any effort of the railroads or of the Coordinator to accomplish substantial economies. . . . The result has been precisely as was predicted. The Federal Coordinator has stated many times in public addresses that the effect of including the labor clauses was to prevent in very large degree the economies and waste prevention measures which it was the primary purpose of the Act to accomplish."[8]

Prior to the passage of the Act the railroads had been studying ways and means of accomplishing economies by the coordination of facilities. After the passage of the Act, with its objectionable labor clauses, the railroads considered the possibility of effecting economies by coordination through their own agreements outside of the Act and without any order by the Coordinator. The Coordina-

[7] Vol. A, 174.
[8] Vol. A, 174, 175.

tor, however, took the position that the Act covered all such undertakings, whether directed by the Coordinator or not, and that the labor provisions of the Act would apply to them in every instance. Hence the Act "was positively harmful in preventing economies which the railroads had hoped to bring about. Joint use of facilities has been a progressive activity and has been increasing continuously for many years until it was arrested by the provisions of the Act."[9] * * *

"The Federal Coordinator, prohibited by the labor clauses from cooperating in measures of economy, has devoted himself most assiduously to the study of problems in the field of transportation, in which studies he has been aided by the railroads and by those who operate other forms of transportation, as well as by the general public. He has incorporated these studies in numerous reports and recommendations, many of which have been valuable. He has made recommendations to Congress with respect to legislation, and the railroads are heartily in accord with the Coordinator's suggestions dealing with the regulation of all forms of competitive transport. It is submitted, however, that these studies, if not now complete, can and will be carried on by the Association of American Railroads in cooperation with the Interstate Commerce Commission. * * * He has been able to accomplish nothing in the way of improving the financial condition of the railroads, and for this result he is in no way censurable." * * *

"Upon principle we submit that no officer of the Government should be given the power now vested in the Coordinator unless at the same time he is clothed with responsibility for results. * * * It is true that the present Coordinator has used his power very sparingly, indeed, and has in fact made but a single order, and that one which affected but a limited number of railroads. But the grant of arbitrary and unlimited power is not rendered less objection-

[9] Vol. A, 176.

able because it is lodged in the hands of a man who uses it sparingly." [10] * * *

"In closing, your attention is directed to the fact that since the enactment of this legislation the railroads formed the Association of American Railroads, with authority vested in its Board of Directors to effect all the economies contemplated in the Emergency Transportation Act." [11]

Georgia, commenting upon the last paragraph just quoted, stated that Mr. Pelley's letter contained at once "an admission that the Emergency Transportation Act was required by the antitrust laws and a bald assertion that the legislative immunity was no longer necessary" because the railroads had formed the A.A.R. with authority to effect all the economies contemplated in the Act.[12]

D. *Criticisms by the A.A.R. of a Report by the Coordinator on Freight Traffic.*

On May 6, 1935 the Coordinator, Mr. Eastman, submitted to the carriers' regional coordinating committees which had been set up by the Act a report on freight traffic prepared by his Section of Transportation Service, covering all freight traffic handled by railroads, water carriers, highway carriers and pipe lines.[13] In his letter of transmittal Mr. Eastman said that the report was the result of a study "which undertook to get the basic, fundamental facts in regard to this traffic, including the unit costs of every phase of operations, the character of service furnished and equipment used, the rates charged, and the extent to which present methods and practices are or are not well suited to modern commercial needs and competitive transportation conditions. These facts have been obtained, not only for the rail-

[10] Vol. A, 176, 177.
[11] Vol. A, 177.
[12] Final Brief, p. 116.
[13] SD-16, Vol. N (no page number). The quotations which follow are from this exhibit, consisting of Mr. Eastman's letter of transmittal.

road, but for the other forms of transportation, so that comparisons can be made."

Mr. Eastman recognized that some of the "conclusions and suggestions will be regarded as radical or revolutionary, and I anticipate that they will be received with skepticism. That is a normal attitude, and an entirely appropriate one, so long as the skepticism is open-minded. The matters dealt with in the report are of such vast scope and importance that definite recommendations with respect to changes in present methods and practices, from me or from my Section of Transportation Service, would not be justified at this stage nor until the data have been reviewed by others. We offer, therefore, not recommendations but suggestions."

He closed by expressing his conviction that "modern commercial needs and competitive transportation conditions imperatively demand a thorough reexamination of the operating methods of the railroads, of their service and equipment, and of their rate structure. If the report herewith submitted demonstrates nothing else, it demonstrates this. I believe that the need for many comprehensive changes will be found. The report and the data which accompany it will, I am confident, be of great value in such a reexamination."

The record does not contain the text of the report.

On November 1, 1935 Mr. Cleveland, head of the Traffic Department of the A.A.R., forwarded to members of the Traffic Advisory Committee an analysis and discussion of the Coordinator's report prepared by his assistant, Mr. J. G. Kerr (who subsequently became the Chairman of the Southern Freight Association).[14] Mr. Cleveland stated that Mr. Kerr's analysis was too voluminous for presentation to the Board of the A.A.R. and that it would be desirable to make a shorter report summing up the views of the Traffic Advisory Committee, with the analysis attached. He accordingly asked the members of the Committee to examine

[14] S-49, I, 142-144; full text in Vol. A, 178-181.

the analysis and "give me the benefit of such suggestions or advice as you may think would be helpful. . . . For your information, I would say that my conclusion is that there is absolutely nothing of practical value in the carload report and that our final treatment will contemplate as forcefully as possible presenting such conclusions." [15]

Mr. Cleveland pointed out that the analysis was not complete "in that the question of 'Coordination', which in this report practically means treating all railroads as a single company, is not handled at all and nothing is contained therein except in a very general way in regard to operating matters, which of course will be handled by Mr. Symes, or accounting matters which will be handled by Mr. Bunnell" [16] (Georgia then submitted as S-50, Vol. A, 182, 183, with an extract in I, 144, an analysis by Mr. Bunnell which stated that from an accounting and statistical viewpoint no recommendations were contained in the report that could to advantage be passed on to the carriers for adoption. The record contains no analysis by Mr. Symes).

Georgia next submitted an extract from proceedings of the Traffic Advisory Committee held on July 21 and 22, 1936.[17] The extract was headed "Coordinator's Report—Cost Finding for Regulatory Purposes", and consisted of a resolution, "that the Traffic Advisory Committee is fundamentally opposed to the use of cost formulae in the fixation of rates either by the railroads or for regulatory purposes, in view of the fact that any basis of rates so predicated will not meet commercial requirements." It will be noted that this resolution was adopted after the Emergency Railroad Transportation Act of 1933 had expired and the Coordinator had gone out of existence (June, 1936)[18] so that it can-

[15] Vol. A, 178.

[16] Ibid.

[17] S-52, I, 145; Vol. A, 187.

[18] Final Brief, p. 118. In connection with this resolution of the Traffic Advisory Committee Georgia also cited an extract from a letter from Mr. Cleveland to one Gormley, written on September 11, 1935, stating that he was not impressed as to the practicability of

not be regarded as a part of any action to eliminate the Coordinator.

II. "*Evasion of the Regulatory Scheme Enacted by Congress*" [19]

The larger part of the evidence under this heading of Georgia's brief dealt with the resolution of the Board of Directors of the A.A.R. of September 20, 1935, in substance prohibiting joint rates between railroads and truck companies where such rates would constitute an invasion by one railroad of the territory of another. Since Georgia sought to show that the resolution was designed to be and was in practice coercive, and since Georgia cited the resolution in an earlier portion of the Final Brief at p. 58, headed "Absolute Power of A.A.R. to Dictate Rates", I have analyzed this portion of the evidence under the heading of "The Alleged Binding Authority of the A.A.R. in Rate Matters" at pp. 423-447 above, noting at the same time that Georgia was treating it in the additional aspect of an invasion of Congressional policy.

After presenting the evidence relating to the September 20, 1935 resolution under the heading of "Evasion of the Regulatory Scheme Enacted by Congress", Georgia went on to say:

> "At the same time that they undertook to prevent truck-rail arrangements, the defendants launched two other attacks designed to exclude the trucks from participation in traffic normally the monopoly of the rails." [20]

One of these "attacks" consisted of certain negotiations in the fall of 1934 and early in 1935, between Mr. Pelley, Mr. Cleveland and major oil companies, looking toward the

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research work in the field of rates and saying, among other things, that "a proper rate was determined by knowledge of what the traffic will reasonably bear, as a result of which there can be no uniform formula for general application." S-68, I, 190.

[19] Final Brief, p. 118.

[20] Final Brief, p. 125.

recovery for the railroads of certain petroleum traffic then being carried by trucks from ports in the Southeast to the interior.[21] The negotiations came to nothing.[22]

The other "attack" consisted of the railroads' "voluntarily lowering rail rates on routes where truck competition existed, while maintaining rates at the higher levels on routes where truck competition did not exist", thus "compelling shippers on routes without truck competition to subsidize the rate war on routes where such competition existed."[23] As has previously been noted, in the '30s competition between railroads and trucks was severe and railroad rates were frequently lowered to meet that competition.[24] This phenomenon antedated the A.A.R. and was one of the causes which brought about the acute financial distress of the railroads in the '30s.[25] The establishment of the A.A.R. did not, so far as the record shows, aggravate this situation; indeed, as has previously been noted, the A.A.R., upon the urging of the Interstate Commerce Commission, brought about the appointment in 1935 of "low spot" committees designed to raise those rail rates which had been artificially depressed to meet truck competition.[26]

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[21] The evidence relating to this matter is to be found in S-508, XVII, 5989-5999, and in Mr. Pelley's testimony in XVII, 5983-5988. Georgia suggested that a proposal of Mr. Pelley's to the oil companies for certain rate reductions would have violated the antitrust laws (Final Brief, p. 126); but here, as elsewhere, we are not concerned with collateral questions of illegality but only with the question of the nature of the A.A.R.'s power to coerce the fixing of railroad rates.

[22] Pelley, XVII, 5988.

[23] Final Brief, p. 127. The only authority cited in support of this statement was an instance in which certain rates in Eastern territory on wine were reduced to meet truck competition, as to which Mr. Franklin of the Pennsylvania testified that "that means that they" (the reduced rates) "are on a low basis; that does not necessarily mean that those rates should be established interterritorially where there may be no truck competition as from Atlanta, Georgia, to the North on wine." (XI, 3487.)

[24] Pp. 283-291, 303.

[25] Ibid.

[26] P. 396.

Georgia next stated that:

> "While seeking to exclude trucks from rail traffic, the record reflects that the railroads were also conferring with truckers to induce them to raise their rates to the rail level." [27]

In support of this statement Georgia cited the following evidence:

(a) Certain conferences between representatives of trucking companies and railroads were held in 1939 at the request of the Public Utility Commission of Pennsylvania "to discuss the possibility of harmonizing the rate structure" within Pennsylvania—conferences which came to nothing, according to Mr. Franklin of the Pennsylvania Railroad.[28]

(b) A projected and undescribed conference in 1939 between Trunk Line carriers, Southern Freight Association carriers and trucking company representatives, apparently for the purpose of discussing uniform rate adjustments.[29]

(c) A conference in 1937 in which representatives of the Southern railroads asked representatives of the Southern truckers to use all-rail rates instead of the lower water-and-rail rates.[30]

(d) The fact that in 1942 certain motor carriers did raise their rates in such a manner.[31]

Finally, Georgia cited a statement by Mr. Franklin that "as you realize, now, the truck level is above the rail level".[32] Georgia charged that this development was "the

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[27] Final Brief, p. 128.

[28] XI, 3584.

[29] Franklin, XI, 3588.

[30] S-534, XV, 5085; Doss of the Atlantic Coast Line, XV, 5088, 5089.

[31] S-535, XV, 5091; Mr. Doss testifying, however: "I do not know that it was the result of any efforts on the part of the railroads. I think the sheriff was about to get the most of them and they had to raise the rates to keep from becoming bankrupt." XV, 5092.

[32] XI, 3588.

ultimate result of railroad interference with the normal development of the potentialities inherent in low cost truck transportation".[33] There is no evidence in support of this charge.

Georgia claimed that the result of the alleged interference was contrary to the policy of the Transportation Act of 1940 "to provide for fair and impartial regulation for all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each . . ." (49 U. S. C. § 1, 54 Stat. 899).

III. "*Insulation of Price-Fixing Machinery from Interference by the Interstate Commerce Commission*"[34]

Georgia charged that:

> "While frustrating the Congressional scheme for an integrated transportation service through joint truck-rail arrangements, defendants simultaneously moved to immunize their private price-fixing structure from interference by the public regulatory authority, the Interstate Commerce Commission."[35]

Georgia then cited the A.A.R. resolution of May 17, 1935, the substance of which was that where territorial groups of railroads disagreed as to proposed rates, they would first confer with Mr. Cleveland of the A.A.R. before either filing the rates with the I. C. C. or moving to suspend them if they were already filed.[36]

Georgia then charged that if in spite of this resolution a rate question should reach the Commission, "experience

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[33] Final Brief, p. 128.

[34] Final Brief, p. 129.

[35] Ibid.

[36] I have discussed this resolution and the evidence relating to it at pp. 447-460 above, under the heading of "The Alleged Binding Authority of the A.A.R. in Rate Matters" inasmuch as Georgia earlier in her Final Brief, at p. 59, treated this resolution under the heading of the "A.A.R. Ultimate Appellate Authority in Rate Matters", and there sought to show the compulsive nature of the resolution.

had fortified the defendants with the knowledge that they possessed the power to circumvent the Commission's order by evading the impact of it on their rate structure. This power was exhibited in the arbitrary fashion the defendants manipulated the classification exception ratings so as to deprive Georgia and the South of the benefits of the Commission's orders in 28,300, requiring a reduction in Southern class rates." [37]

The remainder of Georgia's evidence under this heading relates to the alleged manipulation referred to in the sentence last quoted above. The basic facts were as follows.

On July 29, 1939 the Interstate Commerce Commission on its own motion initiated two investigations. One, known as Docket No. 28,300, *Class Rate Investigation, 1939* (discussed supra, pp. 798-809), was the one Georgia referred to. It was an investigation into the lawfulness of interstate class rates, all-rail, all-water, and rail-and-water, applicable in the United States generally (Mountain-Pacific territory excepted). The other (known as Docket No. 28,310, Consolidated Freight Classification) was a nation-wide investigation of rail and water freight classifications. Both investigations were conducted together and were completed and reported upon on May 15, 1945 (262 I. C. C. 447).

Referring to No. 28,300 Georgia went on to say: [38]

> "Georgia and the South had been aware that any decision the I. C. C. might make . . . would necessarily confer but meager benefits since the scope of the investigation was limited to class rates, and class rates were less than one per cent of the interritorial carload traffic from the South to the North."

(The great bulk of the interterritorial movement is on *commodity rates*, which apply to a specific article or groups of articles between specific points. They have no percentage relationship to class rates and are always lower than the

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[37] Final Brief, pp. 129, 130.

[38] Final Brief, p. 130 (citations omitted and emphasis added).

class rates which otherwise would be applicable to the particular commodity.) [39]

> "However, it was contemplated that any reduction order in the class rates" (which the South desired) "would ultimately cause a substantially similar reduction in commodities moving on *exceptions to the classification*, which move approximately five per cent of the interterritorial carload traffic from the South to the North."

(*Exceptions to the classification*, or exception rates as they are customarily called, are rates which are determined by the transfer of an article out of its regularly assigned class in the classification into another class, usually lower.)[40]

> "Exceptions to the classification effect the movement of a substantial amount of traffic, not only quantitatively but also qualitatively. For example, nearly all canned foods within the South move on exceptions to the classification. . . .
>
> "Whether exceptions to the classification would automatically be affected by a decision of the Commission reducing the class rates, defendants, having a flexible mechanism at hand for immunizing the effect of any class rate order upon exceptions to the classification, decided it would be unwise to run any risk."

Georgia then introduced some rather complex evidence designed to show that Mr. Kerr of the Southern Freight Association evolved a plan to transfer "exceptions to the classification" to "commodity columns" where they would presumably be immune from attack on the ground that they were not embraced in the coverage of the I. C. C.'s order in Docket No. 28,300. Georgia stated that "the Northern lines indicated some hesitancy in supporting Mr. Kerr's scheme" [41] and that finally Mr. Kerr "decided that the

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[39] *Class Rate Investigation, 1939*, 262 I.C.C. 447, 562.

[40] Ibid. Exceptions may also occasionally utilize intermediate columns in the system of class rates not assigned to any standard class.

[41] Final Brief, p. 134.

time for action had come. On March 20, 1940, the Southern carriers transferred all exceptions ratings applying between Eastern port cities and interior Southern points, including points in the State of Georgia, to commodity columns."[42]

It was by this transfer of certain exceptions rates to commodity rates, according to Georgia, that "the defendants manipulated the classification ratings so as to deprive Georgia and the South of the benefits of the Commission's orders in 28,300, requiring a reduction in Southern class rates."[43]

The transfer in question obviously has nothing to do with coercion since it consisted of voluntary action taken by the Southern roads, not under Northern promptings, but, if anything, in opposition to Northern views as to what was appropriate. Nor has the incident anything to do with discrimination since, if the effect of the action was to support the level of certain Southern commodity rates, it was the Southern roads themselves which took the action.

It seems to me unnecessary to review the details relating to the alleged impropriety of the transfer (if such impropriety were held to be relevant) because, as the defendants' evidence showed, exception rates were not within the scope of Dockets 28,300 and 28,310, and therefore the transfer of some of them to commodity rates could not have constituted a "circumvention" of the Commission's order as Georgia charged. The substance of the defendants' evidence on this point consisted of the following.

In December, 1939, Western States sought to have the Commission's investigation broadened so as to include exception rates; and Southern States, including Georgia, joined in that application in January, 1940.[44] This was several months before the transfer described above took

[42] "Mr. Kerr," said Georgia in a foot-note (p. 134) "was able to effectuate this segment of the general scheme by virtue of the fact that these rates were rail-water rates under the exclusive jurisdiction of Southern Freight Association."

[43] Supra, note 37.

[44] Kerr, XVII, 6085, 6086.

place, and the application expressed the understanding of the parties at that time that the investigation would not include exception rates.[45] After the application had been filed, but exactly when does not appear, the Southern States changed their minds about the desirability of including exception rates, and were described by the Commission in its report as insisting that exception and commodity rates "are not in issue and should not be disturbed in this proceeding."[46] The application just referred to was denied on August 1, 1940.[47] Thereafter the Commission in its report stated that Docket 28,300 "does not embrace exceptions to the classifications";[48] that "exceptions to classifications are not in issue in this proceeding";[49] and that "no changes in existing exception rates . . . are contemplated" by the Commission's orders reducing Southern class rates and increasing Northern class rates.

Tabulated below are the portions of the evidence on both sides relating to the alleged manipulation, which I have not thought it would serve any purpose to summarize for the Court.

(1) The defendants referred to:

(a) The "Border Rate Cases", *Commonwealth of Kentucky* v. *A. & W. Ry.* (and related cases), 229 I. C. C. 20, decided July 12, 1938, and to a series of reports therein, excerpts from which are set forth in Part VI of SD-13, Vol. N and commented upon by Mr. Kerr in XVII, 6102-6108. The point of this evidence was to show that the orders in

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[45] So Kerr, XVII, 6093.

[46] 262 I.C.C. 447, 664. The full sentence reads: "Southwestern interests, unlike those in the South, interpose no objection to revision of exception and commodity rates within, to, and from the Southwest on a uniform basis with that in the East, whereas the Southern Governors' Conference insists most emphatically that such rates are not in issue and should not be disturbed in this proceeding."

[47] The text of the order appears in Vol. O, SD-57B, and was explained by Mr. Kerr in XVII, 6089, 6090.

[48] 262 I.C.C. 447, 454.

[49] Ibid at 505.

these cases, intended to apply to class rates, were literally applicable to exception rates, contrary to everyone's intention, and that the I. C. C. accordingly entered corrective orders to exclude exception rates from the coverage.

(b) Conferences between Southern railroad representatives and members of the Commission's staff held in 1932 and in 1937 regarding the confusion created by the practice of publishing commodity rates in the form of exceptions to the classification. SD-58 and SD-59 in Vol. O; Kerr, XVII, 6109-6110.

(c) Application by Southern carriers to the I. C. C. on February 6, 1942 to permit tariff classifications necessary to the publication of exceptions ratings in such form as to characterize the rates applicable thereto as commodity rates. SD-60, Vol. O, and Kerr, XVII, 6112-6114.

(2) Georgia referred to:

(a) A letter from Mr. Kerr to Mr. Lawrence of the Traffic Executive Association—Eastern Territory dated December 23, 1938, expressing fear because a "good many parties" believed that if they could break down the first class rates they could drive down exception rates at the same time. S-509, XVII, 6059; and Kerr, XVII, 6133.

(b) Letter from Mr. Lawrence to Mr. Kerr dated January 24, 1939 stating his understanding of Mr. Kerr's intention to publish exception rates in the form of commodity rates. S-509B, XVII, 6062.

(c) Letter from Mr. Kerr to Mr. Lawrence dated February 17, 1939, urging Mr. Lawrence's support of the plan. S-509C, XVII, 6064.

(d) Letter from Commissioner Aitchison to Mr. Cleveland of the A.A.R., dated December 7, 1938, suggesting that the railroads differentiate clearly in their tariffs between the regular designated classes and the column rates (which are not the same as exception rates; they are a species of

commodity rates expressed in terms of a percentage of first class—262 I. C. C. 447, 562). SD-61, Vol. O, and Kerr, XVII, 6121-6129.

(c) Letter from Tariff Agent Miller to Vice-President Kelly of the A.A.R., dated February 27, 1939, stressing the need of handling the proposal to "transmute classification exception ratings to commodity columns" as a "simplification matter," in the light of Commissioner Aitchison's letter supra, and because of the "importance of keeping this matter out of the hands of the shippers . . ." S-509E, XVII, 6066; and Kerr's concurrence "in a general sort of way" in the view that it was important to keep the nature of the proposal from the shippers, XVII, 6145.

IV. *Rates on War Traffic*

A. *Rates on Sulphur*

On April 7, 1942, Cleveland of the A.A.R. forwarded to the Chairmen of the respective territorial associations a request from O. P. A. for a reduction in the rates on sulphur from Texas to North Atlantic coast points.[50] The request from O. P. A., evidenced by two letters dated April 4, 1942 and May 8, 1942,[51] pointed out that the sulphur movement from Texas to the North Atlantic coast points had previously been almost exclusively by water. Due to the war conditions sulphur would have to be shipped by rail. The manufacturers of sulphuric acid, which enters into the manufacturing processes of almost every commodity in some way, could not continue to withhold price advances if forced to pay the freight from Texas at the existing level of rail rates, which were three or four times those previously charged by the water carriers.

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[50] S-127, I, 245. Exhibits S-124 to S-126 inclusive, I, 242 to 245, have to do with certain rate reductions on sulphur shipments from points in the Southwest to points in Official territory, not related to the wartime incident for which the case is cited.

[51] S-128 and S-129, I, 245 to 248; and S-131, I, 248.

The O. P. A. proposal was considered by the Traffic Executive Association—Eastern Territory on May 14, 1942 and "it was the consensus of Eastern roads that the proposed reduction could not be recommended."[52] On May 22 and 23, 1942, a joint meeting of the Chief Traffic Officers in Western, Southern and Eastern territories was held, following which Cleveland informed the O. P. A. that "the situation was carefully reviewed after which the Chief Traffic Officers concluded that no further reduction in these rates is warranted under present conditions."[53]

The foregoing completes Georgia's evidence.

For the defendants, McGohan, the Freight Traffic Manager of the B. & O., explained the unwillingness of the carriers to go along with the O. P. A.'s request, as follows. In the first place, he said, the O. P. A. had not requested any rate reductions to intermediate points. Unless the rates were reduced to these points at the same time that reductions were made to the Atlantic seaboard ports, there would be a violation of the long-haul, short-haul provisions of Section Fourth of the Interstate Commerce Act. Since water competition could not be cited to justify a departure from the Fourth Section, the railroads believed that the I. C. C. would not grant an exception and that, therefore, if they agreed to the reduction requested by the O. P. A., corresponding reductions would have to be granted to apply all over Official territory.[54] In the second place, the carriers believed that the rates requested would be so low as not to be compensatory.[55] The record stops at that point.

There is no evidence to indicate that the rate associations did anything more than to act as a medium for the expression of the views of the carriers whose revenues would have been affected by the O. P. A. proposal.

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[52] S-132 and S-133, I, 249.

[53] S-134, I, 249.

[54] XIV, 4618, 4619, 4621, 4622.

[55] XIV, 4634, 4635.

B. *Rates on Gypsum Rock*

On May 28, 1941 Cleveland of the A.A.R. was asked by a representative of O.P.A. "to ascertain what rates the railroads would be willing to make" on shipments of gypsum rock from inland producing points in Michigan and New York State to gypsum-board mills located at several points on the Atlantic seaboard. These seaboard mills had previously obtained their gypsum rock from Nova Scotia by water, and the O.P.A. representative informed Cleveland "that there is a strong probability that vessels will not be in a position to handle this tonnage much longer." [56]

The next day, the O.P.A. asked Cleveland "what rates the rail lines would be willing to make" for all rail movements of gypsum rock from Nova Scotia to the seaboard mills. Cleveland informed the territorial association chairmen concerned that the O.P.A. "desires the information so that it may conclude whether it will be advisable to furnish this rock to these mills or to enlarge the capacity of existing interior mills." [57] These inland mills were running at capacity. The O.P.A. representative "expressed the hope that the railroads will advise them [O.P.A.] whether they would prefer from their standpoint to have the production of existing gypsum-board mills in the interior increased or that these raw materials shall be supplied to the mills covering the movements that have been enumerated above [the Eastern seaboard mills]. In this connection my attention was called to the fact that the principal distribution from the eastern seaboard has been by truck." [58]

The O.P.A., so far as the record discloses, did not request any specific rate. According to Cleveland's report to the association chairmen, the O.P.A. representative thought

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[56] S-136, I, 250.

[57] Ibid.

[58] S-137, I, 250, 251.

that the rate from a producing point in Texas to Savannah and Jacksonville "should be somewhere between $6.00 and $6.25." Cleveland further reported that "they [the O.P.A.] gave me no suggested rate from Michigan producing points but desire the lowest possible rate the railroads think they could consistently provide." From four producing centers in New York State "the opinion is expressed that the rate to New York City should be $2.53," the same rate which prevailed from one of the New York State producing points to two points in New Jersey. Summing up the situation Cleveland concluded: "I am not asking for the publication of any rates but I do think it is incumbent upon those here addressed to advise as quickly as possible what bases you would be willing to establish covering the movement referred to herein." [59]

On June 26, 1941, a meeting of the Traffic Executive Association-Eastern Territory was held at which there was discussion of a rate of $2.75 from inland New York points to New York City and to New Brighton, New York.[60] This figure originated in certain calculations by Chairman Lawrence of the Association, which he had sent to the members for their views together with the reports from Cleveland referred to above on June 3, 1941.[61] The minutes of the Association meeting contained only the following entry with regard to discussion of the $2.75 rate:

> "By reason of the diversity of responses, the question had been docketed for consideration at this meeting.
>
> "Following discussion the subject was struck from the docket."

The foregoing completes Georgia's evidence.

I find in this evidence no showing whatever of any coercive activity by the rate associations and, therefore, I con-

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[59] The foregoing, which does not appear in the extracts cited by Georgia in S-137, I, 250, 251, is from the full text of S-137 in Vol. B, pages 408, 409.

[60] S-138, I, 251.

[61] S-135, I, 249, 250 and Vol. B, p. 406.

sider it unnecessary to summarize the supplementary evidence of the defendants, which was introduced through McGohan of the B. & O. at XIV, 4639 to 4642,[62] and by Kerr, Chairman of the Southern Freight Association, at V, 1396 to 1400.

C. *Rates on Scrap Iron*

In the spring of 1941 the Office of Production Management forwarded to the Association of American Railroads a request for the establishment of reduced rates and reduced minimum carload weights on light scrap iron (old automobile bodies, etc.). The reductions were to apply to short hauls from country origin points to compression points in the several territories.[63] At a subsequent meeting of the Traffic Executive Association-Eastern Territory it was reported that the Joint Conference of Official Territory Lines had considered the request and concluded "that revision of the present rates on basis of minimum weight of 30,000 pounds will not attract additional traffic to rail lines, which view had been confirmed by dealers in this commodity." After discussion, the nature of which was not revealed, the Association decided "not to recommend establishment of the proposed reduced rate on this traffic."[64]

Subsequently the New Hampshire State Council of Defense undertook a campaign to compress old automobile bodies partially by means of a portable device which could be moved around to various points. In order to ship these partially compressed bodies to the steel mills, the Defense Council requested a reduced minimum weight requirement, on the ground that it had been found impossible to load the cars up to the minimum generally required for scrap iron shipments throughout the East. The War Production Board urged the Eastern carriers to work out

[62] McGohan's cross-examination at 4713, 4714 did not serve to alter his testimony.
[63] S-142, I, 252.
[64] Ibid at 253.

this reduced minimum and indicated that it was a matter of importance all over the country. The Chairman of the Traffic Executive Association-Eastern Territory reported these facts to the membership and asked that the subject be considered by the Association.[65] Accordingly the Association met and "after again reviewing the whole situation with respect to the movement of this traffic between points in Official Territory, it was recommended that eastern lines do not concur in the proposed reduction in carload minimum weight."[66]

The foregoing completes Georgia's evidence.

For the defendants Kerr, Chairman of the Southern Freight Association, testified that the Southern lines had already established rates of the kind requested wherever there was any need for them and were prepared to establish rates on the same basis to other points wherever they might be needed.[67]

McGohan of the B. & O. testified that the reduced rate involved was only that which would have resulted from the reduced minimum weight[68] and that the real question was the minimum weight. He said that in Official territory the railroads, after investigating the whole question, had declined to concur in the proposed reduced weights for two main reasons: first, because it was very difficult to provide a description which would differentiate between the light and bulky scrap on the one hand and the traditionally heavy scrap on the other; and secondly, the scrap iron dealers advised the carriers that shipment by freight would not be feasible for the short hauls in question from country origin points, even with the requested weight reductions, and that the movements would continue to be by truck.[69] The Western lines disapproved of the proposal, and so did the Southwestern and Pacific lines,[70] but the Eastern car-

[65] S-143, I, 253.
[66] S-144, I, 253, 254.
[67] V, 1402.
[68] XIV, 4651.
[69] XIV, 4644 to 4647.
[70] XIV, 4648.

riers did nothing to influence the views or judgment of these lines in the other territories.[71]

Whatever may have been the true merits of the case, and even though the railroads might have been subject to some criticism for lack of cooperation in particular territories with the government's requests, the proof falls short of establishing any coercion by the associations in the different territories.

D. *Blackstrap Molasses*

On April 20, 1942 Joseph B. Eastman, for the Office of Defense Transportation, wrote to Cleveland, stating that on April 23 representatives of his Division of Rates would present to the Traffic Executives Committee at Chicago proposals with respect to rates on sulphur and also on "blackstrap molasses, invert molasses commingled." He asked Cleveland to read his letter to the Committee if Cleveland attended the meeting. He stated that the molasses was owned by the Defense Supplies Corporation and was rationed to alcohol manufacturers for use in producing smokeless powder. The traffic had been diverted to the railroads from water routes which the war had rendered unavailable. "The traffic moves or is to move in great volume. There was no comparable traffic by rail between the points in question prior to the war.

"Plainly the existing rates were not established in the light of the traffic conditions which now prevail, and should be readjusted. The problem before the railroads with respect to the readjustment can be approached from various differing points of view. I very much hope that it will not be approached from what might be called the ante-war or normal viewpoint." [72]

Mr. Eastman then urged the railroads to establish rates which were not below a minimum reasonable level but at

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[71] XIV. 4649.

[72] S-146. I. 255. 256. The word "ante-war" appears in this portion of the record submitted by Georgia as "anti-war" but the correct spelling, as appears from the reproduction of the document in Vol. B at 427, was "ante-war".

the same time were consistent with the duty of the railroads to assist in the prosecution of the war, and to resolve doubts in favor of the war effort. "I realize," he said, "that the approach which public officials have made to the railroads in regard to rate matters, since the emergency began, has not always been tactful and on occasion has given cause for resentment. But the principle of *noblesse oblige* may be applicable.

"I have considered the rates which the Division of Rates is to propose to the Committee. It seems to me that under all the circumstances and conditions they may well be accepted. Here we have new movements in much volume of low-grade, heavily-loading traffic. No doubt the equivalent of train-load movements will be practicable to a considerable extent. The hauls are for long distances, the car-mile and ton-mile earnings seem to me to be excellent. Certainly they are such that if the railroads had established these rates voluntarily and they were being attacked before the Interstate Commerce Commission on the ground that they were below minimum reasonable level, the railroads would vigorously deny the charge and support their denial by the convincing evidence of the earnings. From past experience I am sure that this would be so.

"Most earnestly, therefore, I ask the Committee to give these proposals their most careful consideration, uninfluenced by any preconceived ideas or adverse emotional reactions."

On May 14, 1942, at a meeting of the Traffic Executive Association-Eastern Territory, the minutes showed that "Section 22 quotation" (a reduced rate, which under Section 22 of the Interstate Commerce Act need not be published, for carrying government property) had been made to the Office of Defense Transportation covering rates on import Black-strap Molasses or Invert Molasses from Gulf and South Atlantic ports to Eastern destinations and had been accepted by that organization.

"Request, however, had been received for further consideration of the subject with a view to quotation of the

lower rates originally sought by the Office of Defense Transportation.

"The statement submitted in support of this request was carefully considered but it was concluded by the several Eastern lines that no further reductions should be recommended for their account in the rates covered by the Section 22 quotation on this traffic."

The foregoing completes Georgia's evidence. The evidence shows only that the O.D.T. requested a particular low rate on the molasses in question; that Mr. Eastman thought that "under all the circumstances and conditions" this rate proposal "may well be accepted"; that he urged upon the railroads a liberal approach, and resolution of doubts in favor of the war effort; that the Eastern lines quoted to the O.D.T. a reduced rate, but not as low as the O.D.T. had asked; that the O.D.T. accepted this reduction, while asking the Eastern lines to consider further the O.D.T.'s original request; that this consideration was given at a meeting of the Traffic Executive Association-Eastern Territory; and that the Eastern lines concluded at that meeting, for reasons not stated in the minutes, that no further reductions should be recommended.

There is no showing of coercion or of anything more than a difference of opinion as to the extent of the reduction. For the defendants McGohan of the Baltimore & Ohio gave reasons why, in the railroads' judgment, the full reduction requested "could not be considered remunerative under any circumstances";[73] but it seems to me unnecessary to review his testimony in view of the above finding.

[73] XIV, 4658.

Appendix E

Detailed Analysis of Case Material Cited to Show Cleveland's Authority

I. *Section 22 Quotations*

Under Section 22 of the Interstate Commerce Act,[1] railroads may charge reduced rates for carrying property for the United States, State or Municipal Governments. Rates quoted under Section 22 need not be published, and may be changed without regard to Section 6 of the Act, which requires thirty days' notice before any change in a published tariff can be effective. Section 22 rates may be unlawful under Section 3(1) of the Act if found by the Interstate Commerce Commission to be unduly prejudicial or preferential. *Nashville, C. & St. L. Ry.* v. *State of Tennessee*, 262 U. S. 318.

In 1939 the practice of making Section 22 quotations in secret or without notice to other railroads or to bidders on government contracts who might be affected thereby, gave rise to a particular complaint of discrimination which reached Cleveland.[2] He wrote about it to the Chairmen in the Eastern, Southern and Western territories, on August 8, 1939, as follows:[3]

> "Complaint has reached me that the railroads serving Birmingham, Alabama, in connection with the Atchison, Topeka & Santa Fe Railroad, have quoted less than commercial rates covering movement of Pipe for the use of the Wichita, Kansas Water Works, and that a substantial reduction in tariff charges is involved; that this reduction was made pursuant to the authority contained in section 22 of the Interstate Commerce Act.
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> "Pipe, of course, originates in several territories. The commercial relationship of rates is well known

[1] 58 Stat. 751, 49 U.S.C. Sec. 22.

[2] Sheppard of the Illinois Central, VIII, 2272-2275.

[3] S-102, I, 221.

to pipe manufacturers and where a section 22 rate is made from one district without conference with the other districts it naturally creates, as has been shown in the instant case, not only resentment and ill-will as between the railroads but in addition thereto severe complaint on the part of competing manufacturers who find that they have been underbid through preferential arrangements in rates obtained by a competitor.

"I am requested to list this subject for discussion at the next meeting of the Traffic Advisory Committee in order to obtain if possible an understanding with reference to the use of section 22 rates in the future so that difficulties of this nature may not again arise. I have also been requested to obtain and furnish to the complaining lines a statement showing the present current rate on pipe from Birmingham to Wichita together with the basis that has been authorized under section 22.

"I would appreciate it greatly if you would furnish me with the data requested and would ask further that your lines make no further quotations under section 22 that would involve other lines and other territories without proper conference with such lines or territorial groups, and I hope this will be the policy generally until such time as it can be determined whether or not it would be well to ask the Board to pass a resolution of policy that section 22 rates should not be made on competitive traffic without proper conference with those directly concerned."

The next thing that happened, so far as the record discloses, is that on September 28, 1939, a Joint Meeting of Traffic Executive Committees and of Operating, Accounting and Law Officers from Eastern, Southern and Western Territories was held in Washington and took the following action:[4]

"Attention was called to certain situations which had recently arisen wherein quotations were made to municipalities under section 22 without notification to other lines in the same territory and lines in other territories

[4] S-103, I, 221, 222.

producing the same commodities. After discussion, the following motion unanimously carried:

> 'RESOLVED, that on interterritorial traffic (with the exception of trans-continental traffic) and on territorial traffic to border points no special rates will be quoted under Section 22 of the Interstate Commerce Act for the account of United States, State, County or Municipal governments without first following the regular rules of procedure and, further that no final action will be taken without first exchanging information with the other interested territories.'
>
> "The purpose of this resolution is to avoid action by one railroad or one territory that may be disadvantageous to other railroads in the same or other territories as well as to competing manufacturers or shippers of similar commodities located at other points."

The foregoing completes Georgia's evidence on this branch of the case. In view of the decision in *Nashville, C. & St. L. Ry.* v. *State of Tennessee*, supra, that Section 22 rates may be unduly prejudicial or preferential and therefore unlawful under Section 3(1) of the Interstate Commerce Act, I conclude that it was both proper and appropriate for the railroads to confer together about the proposed Section 22 rates before putting them into effect in order to make sure that there would be no violations of Section 3(1). I find that Cleveland, in requesting that no such rates be made without prior conference, did not undertake to coerce or threaten the railroads. There is no showing that the railroads themselves complied with the resolution which was adopted at the Joint Meeting of September 28, 1939, described above.

This resolution, in its reference to "the regular rules of procedure", evidently meant that Section 22 proposals should be discussed in the appropriate rate association committees just like any other proposals. Whether or not the rate association procedures were coercive or discriminatory is of course a basic issue, but the mere fact that the

Joint Meeting resolved to handle Section 22 quotations in accordance with those procedures throws no light one way or the other on the question of coercion and discrimination.

In the course of cross-examination of Sheppard of the Illinois Central, Georgia introduced another charge in connection with Section 22 quotations. This concerned the quoting of Section 22 rates for the purpose of *equalizing non-land-grant rates with land-grant rates.*

"Land-grant" rates are based on federal statutes, which provided, as explained by Judge Fletcher,[5] "that whenever Government freight moved over the railroads constructed with the aid of the land furnished by the Government, they should be fifty per cent of the standard rate. In course of time a great many railroads developed and other questions arose.

"For example, the shipment of Government freight from Chicago to the Pacific Coast can be made almost all the way over land grant mileage; that is true because the Northern Pacific was land-grant all the way from the Twin Cities to the Pacific Coast.

"Other railroads operating between Chicago and the Pacific Coast entered into agreements whereby they would apply on Government freight the same rates that the land grant roads applied. * * * Those rates are found all over the West. They are found in a considerable part of the South.

"It is a very peculiar thing: A certain piece of traffic can start at one point in non-land grant area and then go part way land grant, and then non-land grant and then land grant, and, the Government, acting under the proper conception of their duty, will figure out as between one point and another every possible route they can make which will give them the least possible rate. * * *

"The Congress repealed all the land grant Acts effective October 1, 1946."

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[5] VIII, 2406, 2407.

Georgia charged that a resolution of the Traffic Executive Association-Southern Territory adopted in March, 1939, "*further restricted the right of railroads* to grant Section 22 quotations by providing that such quotations should not be used to equalize land grant deductions from other points of origin."[6] (Emphasis added.) The resolution read as follows:[7]

> "*Recommended*, That on any traffic transported for account of the U. S. Government, the land-grant rates applicable from or to competitive points should not be equalized from or to points where land-grant rates are in effect.
>
> "Approved unanimously."

Georgia then quoted Sheppard as saying on cross-examination that it was possible, by a Section 22 quotation, "to equalize from non-land-grant points the rates applicable between two land-grant points," and that in an instance which he was then being asked about, the Rock Island and his railroad had issued such a quotation for such a purpose.[8]

Thus Georgia charged in substance that this possibility of equalization was restrained by the resolution of the Traffic Executive Association-Southern Territory, which was adopted several months after the Rock Island and the Illinois Central had issued a Section 22 quotation in the instance just referred to.

Sheppard, however, testified that in that instance he had been forced to issue the quotation in question, much against the Illinois Central's will, as the result of certain actions by a number of other lines which would have resulted in a

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[6] Final Brief, p. 150.

[7] S-477, IX, 2836.

[8] VIII, 2413.

[9] VIII, 2404, 2409-2413. Other evidence relating to this instance consisted of Sheppard, XVI, 5433-5455; S-471-476, IX, 2829-2835; and S-472, XVI, 5444. On Sept. 21, 1938 Cleveland's Traffic Advisory Committee recommended, in connection with certain rates on cement, that "rates on government freight be not quoted for the purpose of meeting land grant deductions from other sources of origin." S-497, XVI, 5447. Related evidence, including an

loss of revenue to the Illinois Central if it had not granted the equalization.[9] He further testified that:[10]

> "From time immemorial, Mr. McGovern, it has not been the practice to equalize rates from non land-grant points with the rates between two land grant points.
> "In other words, we have not done that."

If the practice had been otherwise, he did not think that "the Congress would ever have granted the land grant arrangement. In other words, everything would have been land grant then, and this resolution merely carries out what the practice of the railroads had been prior to that time, and we subscribed to it as well as anyone else; it said 'unanimously' . . ."

No evidence was introduced to show the effects, if any, of the resolution.

II. *Soda Products Agreement*

This case was presented by Georgia as an illustration national in scope of a restraint upon the independence of action of the carriers as a result of agreement among themselves. No direct contention of pressure by the A.A.R. or Cleveland was made but Georgia's Final Brief pointed out that the most important conference was "convoked by Vice-President Cleveland" and that Cleveland and the Traffic Advisory Committee took cognizance of the matter on other occasions.

The agreement complained of was reached on April 17, 1936 at a meeting in Chicago "convoked" by Cleveland and attended by representatives of Southern, Southwestern, Western Trunk Line, Transcontinental and Central Freight

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example of independent action in connection with rates on pipe to Wichita, Kansas, consisted of S-498, 499, at XVI, 5448-9; and Sheppard, XVI, 5447-8; AD-14, Vol. D, 215; S-519, XIV, 4443; Burgess, XIV, 4442-4531. Since none of the foregoing evidence was cited or relied upon by Georgia in her Final Brief at pp. 149-151, or in her proposed Findings of Fact at 251-253, and since it would not affect my own findings, I have not attempted to summarize it.

[10] VIII, 2420.

Association lines. The relevant provisions were that any proposal, whether intraterritorial or interterritorial, contemplating a change in rates applicable to soda products, should be sent by the association receiving the proposal to the chairmen of all other freight associations, and that in the event of objection by any group of carriers "action on said proposal will be automatically abeyanced pending conference between the representatives of the respective involved groups of carriers." [11]

The evidence is clear that soda rates were sensitive to any adjustment due to competition between various producing areas in the North, South, Southwest, and Pacific Coast. No soda products are produced in Georgia.[12]

A complicated history of controversies between the various territories regarding soda rates preceded the April 17, 1936 agreement described above. A brief account of these is important as background to that agreement. Four instances were involved, all starting in the year 1935.

(1) The Southwestern carriers proposed to reduce rates from certain producing points in the Southwest to St. Louis and Kansas City. The reduction was to be to a level substantially lower than that in effect to those cities from Detroit and other producing points in Central Freight Association territory. After complaint by Central territory producers the Central Freight Association held a hearing in March, 1935. Two weeks later a conference requested by Official territory lines was held in Cleveland's office in Washington between those lines and the Southwestern lines. No account of the proceedings of either meeting appears in the evidence but the result was a modification of the Southwestern rate reduction to Kansas City and a partial reduction by Official lines to the same point. The Southwestern carriers, however, stood firm on

[11] S-386, II, 537; Georgia Final Brief, p. 151.
[12] Dervin of the New York Central, XV, 5210.

their proposed reduction to St. Louis. All the new rates were then published and became effective in April, 1935.[13]

(2) The St. Louis reduction led to a second controversy. Crystal City, Missouri, located in Southwestern territory, was an intermediate point which benefited from the St. Louis reduction. Official territory shippers sought comparable reductions in joint rates to Crystal City. The Southwestern lines, however, refused to agree to the reductions requested by the Official lines. The Official lines then proposed to establish rates to the borders of Official territory which would produce a combination rate to Crystal City equal to the refused joint rate. The Southwestern lines then asked Cleveland to hold a conference. He agreed to do so, and persuaded the Official lines to postpone the effective date of their proposal for about three months, until October 1, 1935. The conference, however, was never held since the Southwestern lines withdrew their objections and the new rates became effective.[14]

(3) A third controversy arose over the desire of Official territory producers to obtain a reduced joint rate with Southern lines to Memphis, Tennessee, which would equal the level in effect from Baton Rouge to Memphis. The Southern lines having refused to concur, a hearing requested by Official lines was held in May, 1935 before the Joint Conference of Contact Committees and the proposal was *disapproved*. Two subsequent meetings were held on the same proposal by this Committee, one in May, 1936, at which the Committee *approved* the proposal, and the other in August, 1936, at which the Southern lines concurred in the proposal, thereby ending the matter. These proceedings are not described so that the basis for the ultimate concurrence of the Southern lines is unknown. There is no

[13] The foregoing paragraph is summarized from the testimony of Dervin, XV, 5174-5182.

[14] The foregoing paragraph is summarized from the testimony of Dervin, XV, 5182-5186.

ground, however, for assuming that the withdrawal of their disapproval was the result of coercion.[15]

(4) The final controversy resulted from a proposal of the Southwestern lines in the fall of 1935 (a) to broaden the description of commodities covered by the rate reduction made earlier in the year and discussed above, from Lake Charles to Kansas City, thereby including additional soda products, and (b) to broaden the territory so as to include additional destinations in Kansas. Official territory lines objected. In January, 1936 the Joint Conference of Contact Committees disapproved the proposal. Certain of the Official territory shippers then advised their carriers that they no longer opposed the reduction, as it would afford them a basis for requesting a reduction for themselves. The matter was apparently dropped at this point.[16]

Such were the interterritorial controversies which preceded Cleveland's efforts, described below, to straighten matters out.

A general discussion of the entire soda rate question took place at a meeting of Cleveland's Traffic Advisory Committee in March, 1936.[17] At this meeting it was suggested that Cleveland call a meeting of special committees from each territory to consider all proposals in connection with soda products.[18] Such a meeting was held on April 17, 1936, and at it the soda products agreement complained of by Georgia was reached. Cleveland took no control of the arrangements, asking that each territory name its committee[19] and that, if attendance of shippers was wanted, the committee should arrange for such representatives "as they deem desirable".[20] He wrote the Chairman of the

[15] Dervin, XV, 5186-5189.

[16] Dervin, XV, 5189-5195.

[17] Dervin, XV, 5195, 5196; S-381, Vol. C, p. 997.

[18] S-383, 384, 385, Vol. C, pp. 999-1003, consist of letters preparatory to this meeting; S-386, Vol. C, p. 1004 contains the minutes of the meeting.

[19] S-382, Vol. C, p. 998.

[20] S-383, Vol. C, p. 999.

Southern Freight Association that Southern representation was up to the South, but "if it is true your lines are only remotely involved, I see no object in their attending the meeting."[21]

As stated above, Georgia's complaint against the April 17, 1936 agreement was that it produced a restraint on independent action, particularly since any objection would be "automatically abeyanced pending conference between the representatives of the respective involved groups of carriers." Dervin of the New York Central testified that the agreement "was generally complied with to the extent of notifying each association of new proposals from then on. But it was not uniformly complied with so far as it contemplated that all action proposals would be held in abeyance pending a conference."[22] He then gave the following two specific instances of independent action.

In June, 1936, the Southern Freight Association, at the request of the Illinois Central, issued a proposal to reduce the caustic soda rate from Baton Rouge to Old Hickory, Tennessee, near Nashville, from 35 cents to 23½ cents. The General Committee of the Southern Freight Association disapproved the proposed rate and recommended a slightly higher one, i.e., 26 cents. The Southwestern lines also wanted a rate no less than 26 cents. This change was unacceptable to the shipper, for whom the proposal was being urged. Accordingly the Illinois Central directed the Southern Freight Association on June 29, 1936 to proceed with the rate originally proposed. Cleveland on July 8th telegraphed the Illinois Central requesting a postponement until a conference of interested origin group carriers could be held. The Illinois Central agreed, and conferences were held accordingly on July 14 and 22. Thereafter the Illinois Central wrote the Southern Freight Association to proceed promptly with independent publication of the originally proposed rate of 23½ cents. In its letter the Illinois

[21] S-384, Vol. C, p. 1000.
[22] XV, 5198, 5199.

Central stated that "the objections from the other territories have been noted," but since the Illinois Central was convinced of the need to meet water competition it had "decided to establish the rate." The Southern lines then published the rate, to become effective September 15, 1936. The Chairman of the Traffic Executive Association-Eastern Territory, according to Dervin, had "besought Mr. Cleveland to ask the Southern lines to defer publication" pending another conference, but Cleveland declined to do so.[23]

The other instance of independent action occurred late in 1936 when the Southwestern lines reduced rates on soda products from Corpus Christi to Kansas City, despite the protest of Central Freight Association, the non-concurrence of Western Trunk lines, and a request by Cleveland that the proponents not proceed with the proposal.[24]

On December 22, 1936, shortly after this independent action by the Southwestern lines, Cleveland wrote to the Chairmen of the Traffic Executive Association-Eastern Territory, the Southern Freight Association, the Western Traffic Executive Committee, the Central Freight Association, and the Southwestern Freight Bureau, stating that the April 17, 1936 agreement had failed to establish harmony. Georgia quoted a portion of this letter as a summary of the complaints of the carriers:[25]

> "* * * It seems that regardless of what change is suggested, objections thereto are filed and some of the Chief Traffic Executives are resenting having their conclusions questioned by other lines where that which is involved is an origin grouping within their own territory and where such grouping is entirely satisfactory to the producing point with the shorter mileage. Other lines resent exceptions being taken to local adjustments within their own territory and they further resent the implication that those far removed from their producing points assume to be better posted with

[23] XV, 5204. The foregoing paragraph is summarized from XV, 5199-5204.

[24] Dervin, XV, 5206, 5207.

[25] S-388, II, 544-546.

regard to conditions within foreign territory than the lines that are serving such territory * * *"

Cleveland offered nevertheless "to participate in a further conference in a hope that better results will be accomplished than apparently now obtain."

On January 11, 1937, Morris, Chairman of the Central Freight Association, replied to Cleveland that the "conference of April 17, 1936, has not resulted in rate stabilization as anticipated, and it has not prevented the dissipation of carriers' revenues." The agreement, he said, had been "of value to the extent of informing all interested carriers, but unfortunately it has not resulted in revenue conservation. It is not believed that an improvement in the unfortunate conditions that have been and are existing with respect to revenue changes in soda products will result from another conference." [26]

Dervin testified that he could find no further reference to the April 17, 1936 agreement in the New York Central files, and that soda product rate proposals made in 1942 did not follow the procedure of the agreement.[27]

No coercion is shown by this evidence. Independent action was shown to have been taken freely, while no instance of restraint appears. The failure of the plan in less than ten months after its adoption is good evidence of lack of over-all control.

Appendix F

Case Material of Georgia's Not Analyzed in Detail in the Text

I. *Gums and Resins*

In March, 1940 the St. Louis-San Francisco Railway Company requested the Southern Freight Association for a rate of 27½ percent of first class on synthetic gums and

[26] Dervin, XV, 5208.
[27] XV, 5209, 5210.

resins for application between points in Southern territory as well as from points in Southern territory to points in Official territory, including Illinois Freight Association territory.[1] The proposal arose from the fact that U. S. Industrial Chemicals, Inc. was building a new plant at Pensacola, Florida, which was located on a switch track belonging to the Frisco.[2] Georgia alleged that there were plants producing similar products at Columbus, Georgia and at Brunswick, Georgia.[3] The record, however, indicates that the only plant in Southern territory producing *synthetic resins* was the one at Pensacola.[4]

The proposal for a 27½ percent rate was a substantial reduction in the existing rate, which was 55 percent of first class. The reasons given for requesting 27½ percent were that a special 22 percent rate had been previously set for the carriage of *ester gum* (a combination of resin and glycerin), and a close relationship was claimed to exist between ester gum and the products here in question due to the high resin content of both.[5] Also, the 27½ percent rate was asserted to result in rates substantially equal to those in effect in Official territory.[6] It appears, however, in the documents submitted by Georgia that the proposed rate produced rates in many instances lower than the Official territory level,[7] and Dervin of the New York Central testified to the same effect, with supporting documents.[8]

[1] S-170, I, 321.
[2] Tilford of the Louisville and Nashville, VI, 1813.
[3] Final Brief, p. 155.
[4] S-184A, I, 326, at 328; S-186, I, 332. Tilford of the Louisville & Nashville testified that the plant at Columbus, Georgia did not produce synthetic resins (VI, 1815), and Dervin of the N. Y. Central testified that the products involved in this case were produced solely at Pensacola (XV, 5140). Georgia argued that in any event traffic from Pensacola would necessarily affect overhead traffic in Georgia (I, 339; Final Brief, p. 156). No evidence was submitted on this point. Concededly the only shipper involved in this case was U. S. Industrial Chemicals, Inc.
[5] S-170, I, 321.
[6] S-179, I, 324; Dervin, XV, 5116.
[7] S-175, I, 323.
[8] XV, 5119.

Dervin gave five reasons why the Northern railroads were opposed to the proposed rate:[9]

1. As indicated above, the proposed rate had been chosen primarily because of its relationship to the 22 percent rate effective on *ester gum*. The Northern roads felt that the 22 percent rate was an exceptionally low one, having been agreed to on the grounds that ester gum was a low grade product. They concluded, therefore, that it was a mistake to employ a depressed rate as a precedent for another rate.

2. The proposed description for synthetic gums and resins was so broad that it would include a more valuable group of products than those which the Pensacola manufacturer proposed to produce and which consequently were not entitled to such a low rate.

3. In many instances the proposed rate would have been lower mile for mile than the rates in existence in Official territory.

4. The proposal was only to apply northbound, whereas there were producers in Official territory who wished a similar rate southbound in order to compete in Southern markets.

5. The proposed divisions did not correspond to those prescribed by the I.C.C. in the *Southern Divisions* Case.

Expanding the above reasons, Dervin testified that the 22 percent rate on ester gum was substantially lower than the Official territory rate, which was 35 percent of first class. On behalf of Northern shippers, Official territory carriers had sought at about the time of the present proposal to remove the ester gum differential by obtaining the approval of Southern carriers to an increase in the interterritorial rate. The Southern carriers, however, refused to concur in any increase. Consequently, the Northern roads were anxious not to permit the prevailing low ester gum rate to influence other rates.[10] It should be noted in this con-

[9] XV, 5118, 5119.
[10] XV, 5119, 5120.

nection that when the proposed reduction was considered, as will be shown later, at a meeting of the Joint Conference of Contact Committees on July 26, 1940, the Committee decided to postpone the matter due to the fact that rates on ester gum were still in the process of negotiation.[11]

Dervin testified that the product description contained in the proposal was one of the main problems involved. The I.C.C. had held that a general description carrying a lower rate will supersede a previously established higher rate even though the description attached to the higher rate more specifically described the commodity involved.[12] This being true, the Northern roads feared that the rate proposed might be held to apply to products of considerable value, such as synthetic rubber gums. Georgia's evidence confirms the existence of this difficulty. At a conference of the Southern and Southwestern Freight Committee, Trunk Line Association, held on May 14, 1941,[13] MacArthur, the general traffic manager of the Pensacola manufacturer, made the following statement:

> "Ester Gum is used in cheap grades of varnishes. In the higher grade of varnishes, prices are $4., $5., even $8. a pound. For the higher grades, they use natural gums that are imported from the Congo and the Dutch East Indies. Those are expensive gums."

The chairman then asked MacArthur whether in his opinion there was any way of separating these different grades, to which MacArthur replied:

> "I don't know. We had the same discussion with the inter-coastal conferences from the east coast and the west coast, and they wanted to see if we could reach a breakdown. I brought our President down and we talked with them and tried to reach an agreement. It was almost impossible to do it. I don't know where you would draw the line."

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[11] S-178, I, 323, 324.

[12] XV, 5121.

[13] S-184A, I, 326, 327-328.

At another point in the same conference MacArthur admitted that synthetic rubber was, for purposes of freight rate description, a synthetic resin.[14]

At a meeting of the Joint Conference of Contact Committees, held on May 30, 1941, a Committee member, discussing the description here involved, stated:[15]

> "We will have to change the description because you will involve synthetic rubber sure as you are born."

Finally MacArthur, writing the Frisco on July 2, 1941, said:[16]

> "I am going to start back at the beginning and consult with the Classification Committee for a description to cover our materials with a lower Classification rating. Our materials are nothing more than raw materials for the manufacture of Paint, Lacquer and Varnishes, and I am convinced we are being penalized by reason of the all-inconclusive description under which we are shipping at the present time."

The defendants introduced two exhibits as further confirmation of the difficulties of description.[17] These consisted of an exchange of letters, both in May, 1941, between Garte, the chairman of the Southern and Southwestern Freight Committee, Trunk Line Association, and Flint, a member of the Auxiliary Committee of the Official Classification Committee. Garte's letter requested information regarding the possibility of some description which would apply to the lower priced gums but which would not include the higher priced gums. Flint in his reply stated:

> "This Committee knows of no manner in which the Classification description of Synthetic Gums or Resins, Noibn [not otherwise indicated by name], might

[14] Ibid, at 327.
[15] S-185A, I, 332.
[16] S-187, I, 333, 334.
[17] ND-40, 41, Vol. M.

be modified to exclude the Synthetic Gums or Resins having a wide use in the development of plastics."

Dervin, in connection with Georgia's theory that the 27½ percent rate would substantially equal the Official territory rate, stated that Georgia had failed properly to take into account the interterritorial rates prescribed by the I.C.C. in the *Southern Class Rate Case*. He then introduced two exhibits [18] showing that in numerous instances the proposed rate would, mile for mile, achieve a lower result than the existing Official territory rate.

Regarding the fact that the initial proposal was limited to a northbound rate and thus failed to include a similar southbound rate, Dervin testified that Northern producers had indicated in 1940 their desire for a southbound rate which would permit them to bring their products into the Southern markets. In this connection he introduced two letters, one from the Barrett Company and the other from the assistant general freight agent of the Pittsburgh & West Virginia Railway Co.[19] The Barrett Company said that the failure of the proposal to include a southbound rate was "decidedly objectionable". The second letter stated that both the American Cyanamid & Chemical Corp. and the Glidden Co., Northern shippers, were anxious for a southbound rate similar to the northbound rate.

As to divisions, Dervin testified that a serious difference of opinion was involved.[20] He pointed out that the divisions included in the proposal were not those prescribed by the Commission in the *Southern Divisions* Case, 234 I.C.C. 175. The divisions suggested were predicated on a temporary basis which had been in effect prior to the Commission's decision.[21] The decision was handed down on July 25, 1939 and the order became effective on May 31, 1941. During the period of negotiations between the Southern and North-

[18] ND-42, 43, Vol. M.
[19] ND-44, 45, Vol. M.
[20] That divisions were in issue appears also in Georgia's document S-175, I, 323.
[21] XV, 5136-5137.

ern railroads on the proposal here in question, neither side was certain as to the precise meaning and application of the I.C.C. order. Dervin testified that consequently the Northern railroads were anxious to obtain a clarification of the meaning of the I.C.C. order as applied to gums and resins before committing themselves to some possibly inconsistent result.

After approximately fifteen months of negotiations, and consideration by several of the rate committees, the Northern and Southern railroads agreed to a 37½ percent rate instead of the 27½ percent originally proposed; and they agreed to have this rate apply to southbound shipments as well as to northbound shipments.[22]

Georgia criticized the delay involved in the determination of this proposal by the various rate bureaus. Although the proposal was considered by numerous committees, none of which approved the 27½ percent proposal, the only committee which could be held responsible for delay was the Joint Conference of Contact Committees. Georgia's evidence showed that the proposal was considered by this Conference eight different times. The first four times and the sixth time that the Conference considered the proposal it was "postponed at the request of official lines". The action taken at the fifth consideration does not appear from the evidence, through postponement may be inferred. The seventh consideration resulted in the amendment of the proposal from 27½ percent to 37½ percent, while the eighth consideration merely approved the inclusion of tank car shipments in the amended proposal. The first six meetings on this matter, therefore, are the significant ones in connection with the criticism of delay.

The first postponement appears to have been based on the fact that the rates on synethetic gums or resins were, as already stated, related to the rates on ester gum and were therefore held up to await the conclusion of negotiations then in process on ester gum.[23] The evidence supplies

[22] XV, 5139.
[23] S-178, I, 323-324.

no reason for the second postponement, and the document included in the record is so brief that any inference is impossible.[24] The third, fourth and fifth postponements were all based on a failure to reach an agreement on divisions.[25]

The sixth postponement was the result of the inability, already discussed, to reach an agreement on a proper description.[26]

Georgia argued finally that the Northern associations' actions in this case illustrated "the flexible yardstick their arbitrary power permits them to apply as the occasion demands."[27] Thus, Georgia argued, the proposal was rejected in the *Trunk Line Association* as injurious to Northern industry, and in the *Central Freight Association* on the ground that competition did not require it.

With regard to the action in the *Trunk Line Association*, Georgia relied exclusively on an extract from a lengthy memorandum of a conference held on May 14, 1941 by the Southern and Southwestern Freight Committee, Trunk Line Association. The language emphasized by Georgia was:[28]

> "Chairman: There must be competition with your products and others in Official territory.
> "Mr. MacArthur: Perhaps we might take some business away from some people, yes.
> "Chairman: To that extent, you would hurt Official territory manufacturers."

There is no evidence in the record to show either what action the Southern and Southwestern Freight Committee took or, if non-concurrence is assumed, that the quoted statement by the chairman was in fact the basis for such non-concurence.

With regard to the action in the *Central Freight Association*, Georgia relied exclusively on two extracts from a de-

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[24] S-180, I, 324.
[25] S-181, 182 and 183, I, 324-325.
[26] S-185A, I, 332.
[27] Final Brief, p. 154.
[28] S-184A, I, 326, 329.

tailed letter, some 4700 words in length, from the Chairman of the Central Freight Association to the General Committee of the Association, reviewing the whole proposal and at the end recommending non-concurrence in it.[29] Georgia's Final Brief stated:[30]

> "However, when the shipper's proposal was before Illinois Freight Association, that Association was *impressed with MacArthur's testimony* that (State 186):
>
> " 'Our plants in the North are taxed far beyond capacity. We cannot produce sufficient quantities in our Northern plants. That is the reason for the plant at Pensacola.'
>
> "Accordingly, Illinois Freight rejected the proposal *on the ground that competition did not require it* (State 186):
>
> " 'In fact the proponent shipper's statements clearly indicate that a movement from the South under present conditions could be brought about even under the existing basis of class 55, because the demand at present appears to be greater than the production.' "

Again, the record does not contain evidence showing either what action the General Committee of the Illinois Freight Association took on the basis of the Chairman's letter, quoted from by Georgia above, or, if non-concurrence is assumed, that the action was in fact based on the shipper's lack of competitive need for the reduction. The Chairman's letter stressed among other things the fact that, according to his analysis, submitted with the letter, the proposed 27½ percent rate would result "in materially lower rates mile for mile" than the Official territory 37½ percent scale "for the same distances to many points within Official

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[29] S-186, I, 332, 333; but the full text needs to be consulted, Vol. B, 530-538.

[30] At 155; emphasis added.

territory."[31] He also stated that if the reduction were approved, "Northern carriers can expect a demand for a reduction within Official territory"; he pointed out the need of establishing the same rate southbound as northbound, "because statements from CFA lines clearly demonstrate there is a movement southbound and that there is no possible justification for a different basis northbound than southbound"; he urged that a commodity description be adopted "at no time broader than applicable within Official territory"; and finally he recommended that, subject to the foregoing conditions, including "an understanding that the percentage relationship to first class will not be lower at any time than applicable within Official territory," a rating of 37½ percent be established, southbound as well as northbound.[32] Finally, he recommended a particular basis of divisions.[33]

The record, as I have indicated, does not disclose upon which of the different grounds of objections the several Northern associations acted. I therefore accept the uncontradicted testimony of the defendants' witnesses that each of these grounds was taken into consideration. That being so, the evidence does not warrant a finding that the rejection of the proposal was based either on a desire to prevent or hinder competition with Northern producers, or on a Northern judgment that competition did not require the reduction.

Georgia introduced no evidence to show what effect any of the rates here involved had upon Southern industry. Tilford, however, testified that since the rate reduction from 55 percent to 37½ percent, which was finally effected, the Pensacola plant in question had expanded, including an increase in 1945 of approximately 1,000 feet in its private track facilities and the installation of additional

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[31] S-186, Vol. B, at 536.
[32] Ibid at 537.
[33] Ibid at 538.

manufacturing facilities.[34] He also testified that the case was so contrary to his previous information that he made a further inquiry into the matter. This inquiry developed that one of the serious drawbacks to a further increase in the production of the products in question at Pensacola had been "the difficulty of obtaining a sufficient supply of raw materials. It is hoped that this situation will improve shortly, which will permit further expansion of the industry."

II. *Logs—Alabama to Alta Vista, Virginia*

According to Georgia this case "demonstrates that the power of defendants to coerce, prevent, hinder and delay the filing of rate proposals is not limited to situations where the railroads confer upon the formation of joint rates. Here the entire movement was over the lines of the proponent railroad; even so its managerial judgment was subjected to the concerted judgment of the defendants, none of whom were parties to the rate proposed."[35]

On October 11, 1941 the Southern Railway proposed to the Southern Freight Association a reduction in the rate on logs from points in Alabama on the Southern Railway's Memphis division, west of Decatur, Alabama to Alta Vista, Virginia.[36] The reason for the proposal was that a manufacturer of articles made from cedar was having a difficult time obtaining an adequate supply of cedar and had located an additional supply in the area covered by the rate proposal, but claimed that the existing rates were too high to permit movement to his plant at Alta Vista. As soon as the proposal was submitted to the Southern Freight Association membership, an objection was filed by the Nashville, Chattanooga & St. Louis Railway. The grounds of the objection were that the proposed rates were lower than those prescribed in 1931 by the I.C.C. in *Farris Hardwood Lumber Co.* v. *Louisville & N. R. Co.*, 178 I.C.C. 671, and

[34] VI, 1814.
[35] Final Brief, p. 156.
[36] S-194, I, 341.

also that the proposed rates were "lower relatively than the rates from origins on other lines in the same general territory."[37] The N. C. & St. L. concluded that the *Farris* scale of rates was sufficiently low except in instances where truck competition existed. No truck competition was here claimed. Finally, the N. C. & St. L. felt that approval of the proposal would result in increased demand for a revision in the rates from points on other lines.

On October 25, 1941 the Southern Hardwood Traffic Association wrote the Southern Freight Association urging that the proposal be amended to include a further reduction in aid of Greensboro manufacturers.[38] The amendment was based on the ground that the proposal, if approved, would result in an unfairly favorable rate for Alta Vista in comparison with that from similar points of origin to Greensboro.

The proposal was disapproved by the Standing Rate Committee of the Southern Freight Association on October 29, 1941;[39] disapproved by the General Freight Committee of the Southern Freight Association on November 11, 1941;[40] disapproved by the Executive Committee of the Southern Freight Association on February 10, 1942;[41] listed for consideration at the request of the Southern Railway by the Traffic Executive Association-Southern Territory, on June 27, 1942;[42] postponed by the Traffic Executive Association on July 16, 1942;[43] and finally struck from the docket by the Traffic Executive Association on July 20, 1943.[44] Georgia offered no evidence to show the reasons underlying the actions of any of the committees mentioned.

Oliver of the Southern Railway, the only witness testifying on this case, supplemented the story given by Georgia's

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[37] S-196, I, 342.
[38] S-198, I, 342-343.
[39] S-199, I, 343.
[40] S-202, I, 343.
[41] S-205, I, 344.
[42] S-207, I, 344.
[43] S-208, I, 344.
[44] S-209, I, 344.

documents.[45] He stated that the proposal described by Georgia was the second one submitted by the Southern Railway. An earlier reduction had been independently published by the Southern Railway in 1937 in order to aid the same manufacturer. This earlier proposal also included points in the Memphis division of the Southern Railway as well as Decatur, but did not include points west of Decatur. According to Oliver, the independent announcement of this reduction was made despite "numerous objections" and the fact that the rate proposed by even this first reduction "was lower than rates on cedar logs theretofore established by the Interstate Commerce Commission."[46] Thereafter the Southern Railway was persuaded by the Alta Vista manufacturer mentioned above to file the second proposed reduction described by Georgia's evidence. Oliver testified that this brought forth protests from other Southern lines, and a demand from a Greensboro consumer for "a relative reduction in his rates."[47] This demand appears to correspond to the evidence in connection with Greensboro mentioned above.

With regard to the alleged delays in consideration of this second proposal, Oliver testified that the first delay occurred after consideration by the Executive Committee of the Southern Freight Association in February, 1942. This delay, however, was occasioned by the failure of the Southern railroad to take any steps to obtain consideration by the Traffic Executive Association until June, 1942. Thereafter postponement by the Traffic Executive Association was at the request of the Southern Railway, and the proposal was struck by the Traffic Executive Association, also at the request of the Southern Railway. Oliver stated that he withdrew the proposal from further consideration because he had concluded "from my own investigation and from the arguments and views presented, that we should

[45] His testimony, summarized below, is from IX, 2596-2603.
[46] IX, 2597.
[47] IX, 2598.

not go forward and reduce these rates through independent announcement." [48]

Oliver pointed out that the initial reduction which had been independently announced had originally been published on a temporary basis, namely, from April 25, 1939 until December 31, 1939. "However," Oliver said, "before that expiration date arrived or before that time elapsed, the industry urged that they [the rates] be continued in effect, and they have been continued in effect to this date, but when it was proposed to extend them relatively for greater distances" (i. e., the proposal described by Georgia) "I didn't feel that we were justified in doing so by independent notice and, accordingly, I instructed that the proposals be withdrawn." [49]

There is nothing in the record to indicate that Oliver's judgment was not a free and bona fide one.

III. *Tin Plate—Decoration-in-Transit—At Savannah, Ga.*

Georgia described this case as follows: [50]

> "This case demonstrates the insidious fashion in which Northern industrial influences insinuate themselves into rate discussions in an effort to perpetuate the historical economic tribute of the South to the North. As a result, rail management, itself a captive of non-rail influences, undertakes to dictate to industrial managers where products should be fabricated, to the end that the industrial status quo shall not be disturbed."

Counsel for Georgia in argument said: [51]

> "Two large manufacturers in the North, steel manufacturers, informed Mr. J. G. Kerr, chairman of the Southern Freight Association, that these privileges or this privilege should not be accorded to those railroads and, as a result of these Northern shippers intervening, these particular roads were not permitted to adopt this

[48] IX, 2603.
[49] IX, 2601-2.
[50] Final Brief, p. 159.
[51] Assistant Attorney General Shaw, I, 357, 358.

practice and business which was headed for Savannah, Ga. was headed off."

* * * * * * *

"Here is an important thing about the Tin Plate case:

"The rate proposed in this case was altogether in Southern Freight Association territory but, in spite of that fact, the Northern shippers intervened and that rate was not permitted to be put in, even though the Southern carriers vigorously tried to have that rate inaugurated."

The proposal was a joint one, made on October 16, 1941 by the Atlantic Coast Line, the Central of Georgia, and the Seaboard Air Line to establish a transit arrangement at Savannah, Ga. whereby tin plate originating at Birmingham, Ala. and destined to Tampa, Fla. could be decorated in transit at Savannah, Ga. The real proponent of the proposal was the American Can Company, which had a Tampa plant requiring about 2,000 tons a year of decorated or labelled tin plate for its operations. The American Can Company had decorating or labelling machines at Baltimore and at Savannah, but none at Tampa. At the time of the proposal all the Tampa requirements were being shipped by boat from Baltimore. The proposal was to enable the company to obtain its undecorated tin plate from Birmingham, ship it by rail to Savannah, decorate it at the Savannah plant, and deliver it to Tampa on the established through rate from Birmingham to Tampa, plus a transit privilege charge of 2½ cents per hundred pounds.[52]

The carriers proposing the privilege felt that if published it would permit them to participate in transportation which, as stated, had previously been moving by water from Baltimore to Tampa. A number of Southern railroads, however, protested the proposal in late October and early November, 1941. The dates of their protests are important to note, because they *preceded* the objections from the two Northern steel companies, which, as will be seen later, were

[52] S-210, I, 346, 347.

evidenced in letters dated November 7 and 11, 1941 respectively.

On October 25, 1941 the Atlanta, Birmingham and Coast Railroad Company objected on the ground that no similar arrangement was in effect in either Southern or Official territory, and that under the proposal routing would be through Savannah, thus precluding other routes.[53]

On October 30, 1941 the Nashville, Chattanooga & St. Louis Railway pointed out that the fabrication-in-transit privilege on iron and steel articles cost 3¼ cents per hundred pounds, and that the decoration-in-transit privilege should not be any cheaper. Moreover, the N. C. & St. L. pointed out that a galvanizing-in-transit privilege had been unsuccessfully sought for iron and steel in a number of points in Southern territory. Should the present proposal be approved, the N. C. & St. L. stated, "we do not see how the Southern carriers may justifiably continue to decline to establish a galvanizing-in-transit privilege."[54]

On October 30, 1941 the Louisville & Nashville claimed that no commercial necessity existed to justify the privilege, since "this is a process which should be taken care of at point of origin or at point of destination."[55] The Southern Railway joined in one of the objections made by the N. C. & St. L., stating that the decoration-in-transit privilege "would be as objectionable as galvanizing-in-transit on iron and steel articles."[56]

Etheridge of the Seaboard mentioned another ground on which his railroad and several others had objected to the proposal. He pointed out that the through rate from Birmingham to Tampa on tin plate had been intended from the start to apply only to undecorated tin plate. Due to an oversight, however, the through rate had not been sufficiently restricted in its definition, so that it applied to decorated as well as to undecorated tin plate. The objection

[53] S-211, I. 347.
[54] S-212, I. 347.
[55] S-213, I, 348.
[56] S-214, I, 348.

was that decorated tin plate should not be entitled to be shipped on the established through rate.[57]

The evidence relating to the objections from the two Northern steel companies may be summarized as follows.

On November 7, 1941 the general traffic manager of the Acme Steel Company of Chicago wrote the general freight agent of the Illinois Central, making the following comments about the proposal here in question:[58]

> "While we are not interested in the manufacture of tin plate, we are concerned about various fabrication-in-transit privileges put into effect by the carriers. * * *
>
> "It seems to us the rail lines are departing in a large measure from the original purpose of fabrication-in-transit when a proposal is made to include decoration of the tin plate. We are wondering if the time is not here when the carriers might well curtail such privileges as suggested in this proposal and thus conserve revenue. *Now that mills are generally completely integrated in practically all sections of the country, there seems small necessity for spreading the privileges of fabrication-in-transit.*" (Emphasis added.)

On November 11, 1941 the vice-president of Weirton Steel Company of Pittsburgh wrote the general freight agent of the Illinois Central:[59]

> "We consider this a highly objectionable proposal. By establishing a precedent for this service to be performed at Savannah, there are numerous other places in the southeastern territory, as well as in Trunk Line and Central Freight Association territory, that can be expected to request a similar arrangement.
>
> "Decorating tin plate is a highly diversified art carried on at many points all over the country, interested concerns ranging from those who handle small, less than carload shipments, up to the largest who handle numerous carloads per week. *All of this business in the past has been handled on the combination of local rates to and from the decorators' plants. In our opinion, this*

[57] X, 2975-2977.
[58] S-218, I, 349.
[59] S-221, I, 350.

is only a short step from decorating tin plate in transit to the coating of black plate with secondary metals, such as tin, zinc, lead, etc., under the same rate. . . .

"Under the circumstances, and considering the facts as decided above, we trust that this proposition will not have your support." (Emphasis added)

Etheridge testified that Acme and Weirton were notified of the proposal as a result of an arrangement made by the Illinois Central, pursuant to which it notified all shipper patrons of proposed rate changes in which they might be interested. Moreover, Acme and Weirton could have learned of the proposal from the announcement carried in the Traffic Bulletin.[60] The Illinois Central sent the two letters mentioned above to the Southern Freight Association with a request that they be distributed to interested roads for their consideration.[61] The Illinois Central, however, did not itself file any objection to the proposal, nor did any Northern carriers object.[62]

The proposal was considered only by the Southern rate committees and received approval from none of them.[63] The last of these bodies, to which the Seaboard had appealed the matter from the prior disapprovals, was the Traffic Executive Association—Southern Territory. Before the appeal had reached that Association America had entered the war, and steamship service from Baltimore to Tampa had been discontinued. Etheridge testified that the Traffic Executive Association considered the appeal at both its April and June, 1942 meetings. Each time, however, "it

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[60] X, 2976, 2979.

[61] S-219 and 222, I, 349 and 350.

[62] X, 2979.

[63] The Standing Rate Committee recommended disapproval on November 10, 1941 (S-216, I, 348). The General Freight Committee disapproved the proposal about the middle of November, 1941 (S-223, I, 350). The Seaboard then appealed to the Executive Committee (S-223, I, 350), which disapproved on February 10, 1942 (S-229, I, 354). The Seaboard again appealed, this time to the Traffic Executive Association (S-230, I, 354). After postponement the Traffic Executive Association struck the matter from its docket on July 20, 1943 (S-235, I, 355).

was postponed awaiting further developments that would afford an opportunity to weigh the apparent advantages of the adjustment upon the resumption of steamship service, against the possibility of greater losses on other adjustments that might be effected thereby, bearing in mind the obligation of the carriers under Section 3 of the Interstate Commerce Act." [64]

The Traffic Executive Association held no meeting from June, 1942 until July, 1943. The proposal was struck from the docket at the latter meeting in view of a statement by the chief traffic officer of the Seaboard that "it would be relisted whenever conditions might dictate the wisdom of such action. . . . The water competition having disappeared, there was no justification to pursue the matter further at that time." [65]

Etheridge pointed out that, in addition to the disappearance of the water competition, the Federal government had prohibited the use of decorated cans during the war. Consequently, the shipper involved in this case moved his tin plate from Birmingham to Tampa, undecorated, on the basis of the established through rate.[66] Etheridge indicated that he had been advised that decorated tin plate would soon be used again and "that plans are under way to establish facilities at Tampa, Florida for repairing tin plate in this manner." [67]

With regard to the letters written by the Acme and Weirton companies, Etheridge testified that these were the only objections from Northern interests of which he knew.[68] Doss of the Atlantic Coast Line testified that the letters had been brought to his attention but that they did not have "the slightest influence" upon his decision to defer action on the proposal. He added: "I can positively say that had

[64] X, 2978.
[65] X, 2978.
[66] X, 2978-2979.
[67] X, 2979.
[68] X, 2979.

the water movement from Baltimore, Maryland been resumed, we would have proceeded with the establishment of the proposed transit arrangement without regard to those letters or adverse action of the Southern Freight Association." [69]

Georgia argued in its Final Brief that the Southern Freight Association, in addition to the action already described disapproving the decoration-in-transit privilege, "had another trick up its sleeve." [70] This statement was based on a Southern Freight Association proposal, introduced by Chairman Kerr, which was designed to remove decorated tin plate from use of the through rate from Birmingham to Tampa via Savannah. If this proposal had gone through it would have made any transit privilege useless. Etheridge testified that the proposal was promulgated at the direction of two member lines on the ground, already mentioned, that the through rate had from the start been intended only to apply to undecorated tin plate. The chief traffic officer of the Seaboard filed a vigorous objection to the proposal, and it was never progressed.[71]

There is nothing in the record to show that the letters from the two steel companies to the Illinois Central, which were written after four Southern railroads had filed their own objections to the transit privilege, and which did not even induce the Illinois Central to support the steel companies' position, had anything to do with the outcome in this case.

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[69] XV, 4911-4912.
[70] Final Brief, p. 159.
[71] X, 2977.

Appendix G

Comparison of the Old and New Agreements of the Association of American Railroads

The plan of organization of the Association of American Railroads, adopted on November 21, 1947, is the same as that in effect on February 14, 1946 (see p. 408 above) except for the following minor differences.

In the new agreement a Department of Public Relations has been added. This department "shall have charge of the Association's advertising and its other activities looking to public understanding of matters relating to the railroad industry." This department is to be under the head of a Vice-President and, therefore, an additional Vice-President is called for in the new agreement. Also, in the new agreement the head of the Bureau of Railroad Economics is to be a Vice-President where in the old he was a Director.

The only other change in the agreement is a matter of language. In Article IX(b) of the old it was provided that "no bill should be incurred without the approval of the President, a Vice-President, or the Director, Bureau of Railroad Economics." In the new the reference to the Director of the Bureau of Railroad Economics has been deleted since he is covered by the term "Vice-President", and the phrase "or other officer in charge of a Department" has been added.

APPENDIX H

ANALYSIS OF GEORGIA'S PROPOSED FINDINGS 152 TO 155 INCLUSIVE, ON WHICH GEORGIA'S CHARGES REGARDING DISCRIMINATORY ROUTING ARE BASED.

I. *Frisco-Southern Railway Dispute.*

Proposed Finding 152 first cites a statement by Prince of the Southern Railway, in IX,2625, that "the Frisco undertook to restrict some routing against the Southern Railway system from its stations in Alabama to points in Central Freight Association territory and the East. We protested those restrictions and the Commission suspended the tariff in I. & S. proceedings No. 4391. The tariff was later withdrawn."

This is all that there is in the record regarding this particular incident. There is no indication of the nature of the proposed routing, or the limitations to be placed upon it, or the reasonableness of those limitations, or what the views of the Interstate Commerce Commission may have been, or why the tariff was withdrawn after the Commission had suspended it. The incident was cited by Prince not by way of complaint about the routing but as an illustration of the value of distributing rate proposals through the rate associations. Prince simply observed that the Southern Railway would not have known of the proposed restriction unless it had been distributed in advance.

While the incident is inconclusive on the routing point, it does at least show that the powers of the Interstate Commerce Commission were invoked by the Southern Railway to correct what was believed to be an alleged injustice in routing.

II. *The Clewiston Case.*

Except where otherwise indicated, the following facts (cited in Proposed Finding 152) are summarized from the testimony of Etheridge (Seaboard Air Line) in X, 3059

to 3063, and of Doss (Atlantic Coast Line) in XV, 4976 to 4978.

Clewiston is a small point on the western side of Lake Okeechobee in Florida. There is located there a large sugar refinery of the United States Sugar Corporation.

The raw sugar cane comes into Clewiston from the vicinity to the southeast, over the line of the *Florida East Coast Railroad*. The *Atlantic Coast Line* runs westerly from Clewiston a little way, and thence north to Jacksonville and beyond. Consequently, the refined sugar could be shipped from Clewiston by the Atlantic Coast Line to Jacksonville and points north.

Instead of this, the refined sugar goes back over the Florida East Coast Railroad in a southeasterly direction, curving around the bottom part of Lake Okeechobee to its eastern side and thence north to Jacksonville. At Jacksonville the Atlantic Coast Line picks up the refined sugar and takes it north, ultimately delivering it to northern carriers whose lines form part of the joint through route to northern destinations.

This route from Clewiston via the two railroads and their northern connections to northern destinations, is the only route available to the United States Sugar Corporation on a *joint through rate basis*. The Corporation, if it chose to do so, could ship its cane out of Clewiston by the Atlantic Coast Line and after that by any combination of routes that it desired. However, it would then have to pay the higher charges resulting from the combination of local rates, because the Atlantic Coast Line has not given the Corporation the benefit of a joint through rate to northern destinations via the Atlantic Coast Line as the initial carrier. It has made a joint through rate available only via the Florida East Coast as the initial carrier, the Atlantic Coast Line picking up the shipments at Jacksonville, as previously described.

In other words, the Atlantic Coast Line deliberately "short hauls" itself in favor of the Florida East Coast

Railroad by letting the Florida East Coast Railroad in on the haul as far as Jacksonville, and applying the joint through rate only via this route. According to Doss, this sacrifice on the part of the Atlantic Coast Line "is in consideration of other important matters. The Florida East Coast Railroad participates in our rates from Clewiston only in the product of sugar cane and potatoes drawn from the local stations on the Florida East Coast Railroad around Lake Okeechobee to Clewiston for manufacture. It is kind of a transit arrangement."[1]

He then proceeded to outline what he regarded as a mutually beneficial arrangement between the Florida East Coast Railroad and the Atlantic Coast Line, the details of which are of no particular concern. The arrangement, he said, "is like hundreds and hundreds of other transit arrangements that contemplate the inbound movement of raw materials and the later and subsequent movement out over the line that brought in the raw materials."[2]

So much for the relations between the Atlantic Coast Line and the Florida East Coast Railroad. Georgia made a point of the fact that the Atlantic Coast Line, in its journey north from Lake Okeechobee, very soon intersects the line of the Seaboard at a junction called Sebring. Georgia then argued that it would be feasible for the Atlantic Coast Line, if it took the refined sugar itself from Clewiston, to let the Seaboard in on the northern haul at Sebring. In other words, there was possible here a perfectly feasible through route to the North, consisting of the Atlantic Coast Line from Clewiston to Sebring, and the Seaboard from Sebring to the North, which would have given the United States Sugar Corporation a choice of two through routes and would have permitted the Seaboard to participate along with the Florida East Coast Railroad in the northward movement. A third alternative route, of course, would

[1] XV, 4977.
[2] XV, 4978.

have been by the Atlantic Coast Line from Clewiston all the way north on its own line through Jacksonville to ultimate junctions with northern carriers.

As already indicated, the Atlantic Coast Line's explanation for the limitation of the United States Sugar Corporation to the one through route was that there were mutual benefits to be had in the arrangement with the Florida East Coast Railroad which made it worthwhile for the Atlantic Coast Line to sacrifice its own direct haul to the North. And, since the Atlantic Coast Line was willing to sacrifice its own direct haul to the North, there was no reason why it should haul north a part of the way for the purpose of letting the Seaboard Air Line in at Sebring.

Etheridge of the Seaboard was asked on cross-examination whether he regarded the arrangement "as being discriminatory to the Seaboard Air Line Railway?"[3] He replied:

> "A. No, I don't, and if we were able to locate a sugar mill, say at Labelle, Florida, which is just due west of West Palm Beach, Florida, I would say we would restrict the rates so as to get our own long haul to destination.
>
> "Q. The question of the long haul, I think, does not enter into the matter I am discussing.
>
> The Atlantic Coast Line Railroad Company sacrificed its own long haul to give the Florida East Coast Railroad this part of the traffic.
>
> The question I am posing for you is whether or not they did not discriminate against the Seaboard Air Line Railway in not giving you a similar part of that route?
>
> "A. No, they get no raw sugar cane from points on our line, and, if I am not mistaken, it is the finished or processed material only from the sugar cane that comes off the Florida East Coast Railroad that goes back on that line."

[3] X, 3062.

In other words, Etheridge regarded the routing arrangement between the Atlantic Coast Line and the Florida East Coast Railroad as warranting the beneficial considerations described by Doss and as not a matter for complaint by the Seaboard.

Georgia, in the Final Brief at p. 103, emphasized Doss's statement in Vol. XV, 4976 that the rates from Clewiston do not apply jointly in connection with the Seaboard Air Line "because we do not work together".

What Doss meant by this generalization was apparent from the next two sentences of his statement, as follows:

> "The Seaboard Air Line does not permit us to haul the traffic it originates in Florida and we do not permit the Seaboard Air Line to haul the traffic we originate in Florida. It is just a question of protecting our long hauls."

The record contains no examples of any competitive situations comparable, in routing consequences, to that which exists between the Atlantic Coast Line and the Seaboard. Indeed, it appears from the map[4] that throughout most of the long peninsula which constitutes Florida, the Seaboard and the Atlantic Coast Line (and the Florida East Coast Line) parallel each other in a north-south direction. This geographical configuration of the lines, coupled with the absence in Florida of industrial centers and important junction points, may perhaps explain why there is not the same criss-crossing and interlacing of routes in countless different combinations between competing carriers in Florida as there is when one moves further north (the routes between Atlanta and Buffalo, described at pp. 218-221 above, being an example).

III. *Crossings East of Cairo.*

The next citation in proposed Finding 152 is to a case of non-concurrence by the Northern lines in routing traffic

[4] See SD-44, Vol. O.

between Official and Southwestern territories via Mississippi River crossings east of Cairo, Illinois, referred to in XI, 3452-3456. It is clear that the basic controversy involved in this case concerned the divisions—the share of the revenue that would be received by the Northern lines—which would be applicable through Cairo.[5]

The Official territory carriers, according to Franklin's testimony on cross-examination, were dissatisfied with the share of earnings per mile which they would receive on traffic handled through crossings east of Cairo. In the case of traffic handled in that way Southern carriers would pick up the traffic east of Cairo from the Southwestern carriers for a portion of the haul before delivering it to the Official territory carriers who would complete the haul, and the divisions between the Official and Southern territory carriers on overhead traffic of that sort were regarded by the Official territory carriers as unfair to them.

Therefore, the Northern carriers wanted the traffic to move *north* of Cairo (which is on the Mississippi at the southern tip of Illinois) and thereafter east over Official territory lines, thus eliminating the Southern overhead traffic.

At the time of the incident cited by Georgia, the question of what the division factor should be for the Southern carriers while acting as bridge carriers between the Southwest and Official territory was in dispute and was pending before the Interstate Commerce Commission. So also was the question of what divisions the Southern carriers should receive on through traffic between the South and the North.

In 1939 the Commission decided both controversies. The Commission allowed the Southern carriers a factor of approximately 119 when they were acting as bridge carriers. When they were not acting as bridge carriers, the Commission allowed the Southern carriers on through shipments between Southern and Official territory a factor of

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[5] XI, 3452.

125, in cases where the rates in the South were higher than the rates in the North, and approximately 100 where the rates were approximately equal.[6]

Thus it appears that while the question cited by Georgia did involve routes, the question of routing was only incidental to the basic controversy, which involved divisions.

IV. *Rio Grande Crossings.*

The same thing was true of the next case cited in Proposed Finding 152 (at XIII, 4373-4), which had to do with shipments of wall board and similar products from Official territory producing points to Rio Grande crossings for export to Mexico. In this case six Northern carriers took action independently of the other Northern carriers by stating, according to Burgess[7] "that they individually would not participate in rates via their lines except in connection with routes, Cincinnati and west; and the other lines whose names were not announced did not put that restriction in there."

The question at bottom was one of divisions. Burgess testified:[8]

> "The Eastern lines found that under the divisional formula which applied to the Southwestern lines and the Southern lines when they participated as bridge carriers, that the inflated portions of the through rate would be taken out before there was anything left for the Northern lines and unless the Northern lines got a haul at least from Cincinnati to the East, or the East to Cincinnati, there was not enough revenue to make it compensatory, and it was only for those reasons that these questions . . . arose.
> "There is no semblance of thought of interfering with the flow of traffic and I say again that throughout all the time these questions arose, and to the extent they may continue to arise, there has never been a sugges-

[6] XI, 3471 to 3473.
[7] XIII, 4374.
[8] XIII, 4378.

tion that I have ever heard of that the routes that remained in effect were, in any sense, inadequate or caused any shipper, or traffic, or any place or port, or city, any undue prejudice or unjust discrimination, or resulted in any unreasonable rate, because the measure of the rate is the same regardless of the route over which it applies."

V. *Fertilizer Plant at Blackshear.*

The next incident cited by Georgia in Proposed Finding 152 (at XV, 4976, 4979-80) had to do with shipments from a fertilizer plant at Blackshear, Georgia to Miami, over the Atlantic Coast Line to Jacksonville and the Florida East Coast Railway from there to Miami. Shipment via the Seaboard to Jacksonville was apparently not included in the route. Doss of the Atlantic Coast Line conceded on cross-examination that the failure to include the Seaboard was the result of a "working relationship" between the Atlantic Coast Line Railroad and the Florida East Coast Railroad.[9] He conceded that this working relationship was not based upon the transit arrangement such as figured in the Clewiston case above, but he did not indicate its nature, nor could he state positively that the rate from Blackshear to Miami was not applicable by way of the Seaboard.

VI. *Preferential Traffic Agreement Between the Atlantic Coast Line and the Southern Railway*

Georgia next cited in Proposed Finding 153, a traffic agreement between the Atlantic Coast Line and the Southern Railway under which "each shall regard the other as a preferred connection" (Doss, XV, 4981). The agreement was first made in 1902, at a time when the shipper did not have the right to route traffic. At that time, therefore, the two roads could deliver much more traffic to each other than they can do now.[10] The present agreement, which rep-

[9] XV, 4980.
[10] XV, 5011.

resents a renewal made in 1944 of the old 1902 agreement [11] covers only the traffic which is unrouted by shippers,[12] consisting chiefly of fruit and vegetables from Florida. According to Doss, less than 1% of this traffic is unrouted by shippers, so that the agreement is of only scant importance.[13] The agreement resulted from an earlier traffic arrangement under which the Southern Railway jointly uses the Atlantic Coast Line tracks from Savannah to Jacksonville.[14]

VII. *Alleged Discrimination in Routing Against the Georgia and Florida Railroad*

Proposed Finding 154 states that the Georgia and Florida Railroad is excluded, through routing restrictions, from participation in overhead traffic from Florida to Trunk Line territory. Etheridge of the Seaboard testified that tariffs covering shipments of citrus fruit from Florida to points in northern territory, such as New York City, do not include routing by the Georgia and Florida Railroad.[15]

The Georgia and Florida is a short-line railroad running from Madison, Florida (a small point in the northwestern section of that State, near the Georgia border) northerly to Augusta, Georgia and Greenwood, South Carolina (a junction point in the northwestern part of South Carolina close to the border of Georgia). At Greenwood a connection is made with another branch of the Seaboard which runs in an easterly direction and ultimately connects with the main north-south line of the Seaboard in North Carolina.[16]

While the Georgia and Florida does not participate in overhead traffic from Florida to Trunk Line territory, it

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[11] XV, 4984.
[12] XV, 5008.
[13] XV, 5010.
[14] XV, 5027.
[15] X, 3075.
[16] X, 3076.

does participate in routes to points in Southern territory and to Central Freight Association territory.[17]

Etheridge was asked whether, in view of the fact that there were routes from Florida to Trunk Line territory via the Southern Railway which might take the traffic as far west as Atlanta, he did not regard the non-inclusion of a route by the Georgia and Florida Railroad as discrimination against the latter. He answered in the negative.[18]

Doss of the Atlantic Coast Line was asked:

> "Why is it that the tariff *does* permit routing via the *Southern Railway* which, so far as the Atlantic Coast Line Railroad is concerned, is both circuitous and results in the sacrifice of the long haul by the Atlantic Coast Line Railroad, while, at the same time, those tariffs do *not* provide for moving traffic over the *Georgia and Florida Railroad?*" (Emphasis supplied)

He replied that the "routing in connection with the Southern Railway is in consideration of the terms of this traffic agreement" (referring to the traffic arrangement referred to in case No. 6 above, under which the Southern Railway is permitted to use the Atlantic Coast Line's trackage from Savannah to Jacksonville).[19]

He further testified that it would not be to the interest either of the Atlantic Coast Line Railroad or of its shippers to have a route to the North via the Georgia and Florida Railroad;[20] the route of the Georgia and Florida "would be absolutely an absurd route to the East."[21]

> "Q. More absurd than the Southern's route?
> "A. Yes, yes."

He explained that the Southern Railway makes "substantially the same time" to the North "as the Atlantic

[17] X. 3078.
[18] X. 3078.
[19] XV. 5011.
[20] XV. 5028.
[21] XV. 5029.

Coast Line and the Seaboard Air Line do from Jacksonville."

At page 5032 he explained that the route of the Southern Railway is "very much less in distance" than would be the route via the Georgia and Florida; that "it is physically possible for traffic to move that way, but the operating conditions and other conditions, and the circuity of it, makes it impractical and impossible as a route for Eastern Traffic."[22]

Georgia's Final Brief takes note of the defendants' argument that routing via the Georgia and Florida would be unduly circuitous and replies:

> "However, the Record reflects many instances of routing from Florida ports to the North via Cincinnati."[23]

Proposed Finding 155 states that "on occasions the Northern carriers have forced traffic from Florida ports to move to Trunk Line destinations via Cincinnati in order to obtain the increased revenue resulting from the combination of local rates applicable via Cincinnati." The Proposed Finding cites the cross-examination of Burgess of the Baltimore & Ohio in XIII, 4354 to 4356. Burgess was there discussing the *Gin and Rum* case. In that case, on account of the submarine menace in the last war, gin and rum from the West Indies, which used to go direct by water to the Northern ports, was shipped to Florida ports and thence north by rail.

For a full understanding of the facts in the gin and rum case, it is necessary to consider, in addition to Burgess's testimony, the testimony of Franklin of the Pennsylvania in Volume XI. Franklin stated that the Southern carriers prior to the last war had established very low import rates from the Florida ports to Cincinnati. The shippers who were driven into the Florida ports during the war found that it was cheaper for them to take advantage of the low

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[22] XV, 5033.

[23] P. 105, citing Proposed Finding 155.

import rate from the Florida ports to Cincinnati and then to pay the local rate from Cincinnati to the Eastern destinations, than to ship directly from Florida to the North on the established joint through rates for regular south-north traffic.[24] The shippers therefore quite naturally routed their traffic via Cincinnati.[25]

The Southern lines which serve the Richmond gateway, wishing to carry the new-found freight via Richmond to the North, asked the Northern carriers to reduce the joint through rate via Richmond to the level of the low combination rate through Cincinnati. The Northern carriers at first declined to do this but ultimately yielded.[26]

Proposed Finding 155 is therefore not sustained by the evidence. It implies that affirmative action had been taken on occasions by the Northern carriers to compel traffic from the Florida ports to move north via Cincinnati in order to get the benefit of the longer revenue haul from Cincinnati to the East. However, the facts cited show that the only affirmative action was that which the Southern carriers took before the last war in establishing low import rates from Florida ports to Cincinnati, and that as a result of an unexpected flow of wartime traffic into Florida ports, which had previously gone north by water, it was discovered that the sum of the import rate to Cincinnati plus the local rate east was less than the through rate to the North via Richmond. The Northern carriers therefore cannot be said to have "forced" the traffic to go via Cincinnati. It went via Cincinnati because of the low import rates established by the Southern carriers. In any event, the Northern carriers finally yielded to the request of the Southern carriers to reduce the joint through rate via Richmond to the level of the combination rate via Cincinnati, even though this meant a loss in revenue to the Northern carriers.

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[24] XI. 3339-3340.
[25] XIII. 4340, 4341.
[26] XI. 3342; 4338, 4339.

Still less does Proposed Finding 155 sustain the statement in the text of the Final Brief at p. 105 that "the Record reflects many instances of routing from Florida ports to the North via Cincinnati." Proposed Finding 155 deals only with import rates from Florida ports to Cincinnati, which did not in any way constitute "routing from Florida ports to the North via Cincinnati"—a phrase which connotes established joint through routes from Florida ports to the North via Cincinnati. So far as the record discloses, there were no such joint through routes.

Consequently, Georgia's argument that the Georgia and Florida Railroad should have been included by the Atlantic Coast Line in joint through routes to the North because of the "many instances of routing from Florida ports to the North via Cincinnati" lacks foundation in the record.

The Final Brief next states at page 108 that:

> "The manner in which the power to restrict and influence the routing described above can be used by a group of lines acting in concert to penalize another group of lines is graphically illustrated by the record. For example, the Northern lines acting in concert have denied shippers, as a whole, the benefits of multiple routing by refusing to concur in rates from southern and southwestern points to northern points except via restricted routings specified by the Northern carriers."

This statement cites proposed Finding 160, which in turn cites the cases described below.

VIII. *The Gin and Rum Case.*

This case has already been summarized above under VII. It does not support the statement in the Final Brief quoted above. There was in that case no routing by one group of railroads against another.

IX. *Alcoholic Liquors and Other Shipments from Gulf Ports.*

Finding 160 next cites the Record at XIII, 4354-8, involving the cross-examination of Burgess of the Baltimore &

Ohio. The first item in this portion of the Record consisted of the refusal of the Northern carriers to lower the rates on alcoholic liquors from Gulf ports to Boston, New York, Philadelphia and Baltimore to the level of the existing Cincinnati combination rate. Commenting upon this refusal, Burgess testified that:[27]

> "The point about these equalizations is just this:
>
> "Whensoever they come up and regardless of what they involve by way of traffic, they were special, unusual, exceptional, and unprecedented movements flowing contrary to the prior course of commerce, and our lines had no reason in the world not to want to handle that traffic; they were anxious to handle it.
>
> "The handling of carload traffic within the South is as important to Northern lines as any other carload of traffic.
>
> "We wanted the traffic.
>
> "But, at the same time, we were justified, I think, in raising a question as to the adequacy of the revenue that we would automatically get when we equalized on the Cincinnati combination . . . when the Cincinnati rate is put in effect by another route, we do automatically fall under a rigid divisional function which worked out in a fashion which, we thought, in many instances was inadequate so far as our revenue was concerned, and there was a natural hesitancy about that . . ."

He then cited the citrus fruits divisions case, *B. & O. R. R. Co.* v. *United States* (1936) 298 U. S. 349, in which the Court said at page 356 that "the prescribing of divisions is a legislative function" entrusted to the Commission; that in prescribing divisions the Commission is not required or authorized by the Interstate Commerce Act "to investigate or determine whether the joint rates are reasonable or confiscatory"; that the determination of divisions "does not depend upon the level of the rates"; that the Commission is simply required to "make divisions that colloquially may be

[27] XIII, 4361-2.

said to be fair"; but that "this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. Congress is without power, directly or through the Commission, to require them to serve the public at rates that are confiscatory."

Burgess denied that the route via Cincinnati, which the Northern carriers preferred to maintain, was unusually circuitous. "There were thousands of routes utilized for the movement of traffic that were much more circuitous than that during the war. The government did not want them closed up. There was nothing unusual in moving traffic from Gulf ports via Cincinnati and, in the case of the Florida ports, as I say, we did withdraw our objection and allow the rates to go in effect via the Virginia gateways from Florida to New York even though it meant taking the short end of the division." [28]

It appeared that other commodities besides alcoholic liquors were involved in the wartime equalization questions which arose out of the heavy new traffic from the Gulf ports to Eastern destinations.[29] Burgess asserted that in none of these cases "was there ever any contention" by any shipper or the government "that there was any inadequacy or any insufficiency of routes or that there was better service over one route or another. We were never asked to equalize for the purpose of improving service, by the government or anyone else." [30]

X. *Green Coffee from Texas.*

Burgess was then asked about the concurrence of the Official territory carriers in certain rates proposed by the Southwestern carriers on green coffee from points in Texas, upon condition, however, that the rates be made applicable only via routes through gateways at Cincinnati and

[28] XIII, 4364.
[29] XIII, 4365.
[30] XIII, 4365.

west.[31] Burgess testified that this was another case "where the Eastern lines had their own routes and the concurrence in the routes or roads by gateways east of Cincinnati would have meant not only short hauling the Eastern lines, which they are not obliged to do under the Act except under conditions specified in the Act, and in addition, the revenue question again came into account, because if the traffic were received at the eastern gateways, our lines were of the view that there again the revenue north would be inadequate under the divisional formula that would apply for the service that we would have to perform".[32]

The position of the Northern lines, he contended, did not differ "from the attitude of the Southern lines with respect to traffic growing out of Western Trunk Line territory across the west end of Official territory and down into the South. There the Southern lines, very naturally and properly, would like to haul it as far as they could; they would like to have the traffic turned over to them at St. Louis or Cairo, to get the long haul into the South".[33]

XI. *Rio Grande Crossings.*

The next item involved rates on wall board, etc., from Official territory to Rio Grande crossings for export to Mexico. This case has been covered under IV above.

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[31] XIII, 4366.
[32] XIII, 4367.
[33] XIII, 4369.